



The execution of judgments of the European Court of Human Rights

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The execution of judgments of the European Court of Human Rights

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Introduction

The purpose of judicial proceedings is a practical one: “[a] judgment of the European Court of Human Rights is not an end in itself, but a promise of future change, the starting point of a process which should enable rights and freedoms to be made effective.”¹ The Court has itself had occasion to state that the right of access to a court or tribunal “would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. ... Execution of a judgment given by any court must therefore be regarded as an integral part of the ‘trial’ for the purposes of Article 6”, and the Court infers this right of execution from “the principle of the rule of law”.² What the Court has affirmed in respect of the judgments of domestic courts and tribunals also applies to judgments of the Court itself, since the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the Convention”) is subsidiary to domestic legal systems. Now more than ever, enforcement of judgments is regarded as one of the keys to improving the European human rights system. In the words of the report of the Group of Wise Persons: “the credibility of the human rights protection system depends to a great extent on execution of the Court’s judgments. Full execution of judgments helps to enhance the Court’s prestige and the effectiveness of its action and has the effect of limiting

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1. F. Tulken, “Execution and effects of judgments of the European Court of Human Rights: the role of the judiciary”, in *Dialogue between judges*, Council of Europe, Strasbourg, 2006, p. 12.
 2. ECtHR, *Hornsby v. Greece*, 19 March 1997, §40. ECtHR, Second Section, *Paudicio v. Italy*, 24 May 2007, §53.



the number of applications submitted to it”³ The Committee of Ministers has also made it clear that respecting judgments is one of the conditions of membership of the Council of Europe.⁴

In general international law the spontaneous execution, in good faith, of judgments by international courts should be the corollary of recognition of a court’s jurisdiction. It is for this reason that the former Article 50 (now Article 41) made provision only for a situation in which a state was unable to give effect to a judgment for practical reasons or reasons dictated by its domestic law. It is also for this reason that the wording of the former Article 53 (now Article 46 §1) – “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties” – was taken from Article 94 (1) of the United Nations Charter. Although, in 1950, the initial Foster proposal, which envisaged that the future Court would be able to “prescribe remedies, or require the state concerned to impose criminal or administrative measures against any person responsible for violating, annulling, suspending or amending the impugned decision”⁵ was too ambitious, the system now seems to be moving in that direction. To take the relevant provisions, it is significant that under Article 46 §2 of the Convention⁶ the executive organ of the Council of Europe (the Committee of Ministers) is entrusted with supervising the execution of judgments: once a judgment has been delivered, the state must answer to the Committee for its execution. This clear division of powers between the Court and the Committee of Ministers is fundamental to the European system.

A number of observations are called for at this point.

First, it is interesting that, historically, developments on the extent of the obligation to conform with decisions made at the European level have

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3. CM (2006) 203, 15 November 2006, §25. See also the final resolution in the case of *Stran Greek Refineries and Stratis Andreadis v. Greece* (Final Resolution DH (97) 184).
 4. See the interim resolutions in the cases of *Loizidou v. Turkey* (ResDH (2001) 80), and *Ilaşcu and others v. Moldova and the Russian Federation*.
 5. Foster proposal of the Congress of the European Movement, presented to the Committee of Ministers in July 1949, *Travaux préparatoires*, Vol. 1, p. 42 and pp. 301-303.
 6. Article 46 §2 of the Convention: “The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”



taken place, in parallel and in a similar manner, on the basis of Articles 32 and 50-53 for matters which concerned general and individual non-pecuniary measures and, since 1991, concerning all matters.

Second, as regards the nature of the obligation on the state to comply with judgments of the Court, it has always been interpreted as purely an obligation to produce a specific result: “the Court’s judgment leaves to the state the choice of the means to be used in its domestic legal system to give effect to the obligation under Article 53”.⁷ This principle has one essential consequence: the Court in principle refuses to indicate to the state the measures which need to be taken in order to execute a judgment – a corollary of the subsidiary nature of the Convention in relation to domestic systems and of the division of tasks between the Court and the Committee of Ministers. Moreover, the Court is in no position to make such an assessment, which presupposes a relatively detailed knowledge of the domestic system in question. Nonetheless, the freedom to choose the means has turned out to be relatively limited in practice.⁸ Furthermore, the Court’s lack of power to give directions has come in for more and more criticism (from academic writers and the Parliamentary Assembly of the Council of Europe) as not being conducive to prompt and proper execution of judgments.

Third, in terms of their effects, the Court’s judgments are classified as binding on the parties, i.e. every judgment is binding and final; the “sole object” of a judgment’s being final “is to make the Court’s judgments not subject to any appeal to another authority”.⁹ Moreover, and this is the characteristic feature of the European system, the binding effect of the judgment is enhanced owing to the complex nature of the cases handled, which cover liability, compensation and annulment.¹⁰ Thus, “it is inevitable

7. ECtHR, *Belilos v. Switzerland*, 29 April 1988, Series A no. 132, §78. ECtHR, *Scordino v. Italy* [GC], 29 March 2006, §233.

8. This is the meaning of the Court’s slightly modified wording in ECtHR, *Papamichalopoulos and others v. Greece*, 31 October 1995, Series A no. 330-B, §34: “The Contracting States that are parties to a case are *in principle* free to choose the means whereby they will comply with a judgment in which the Court has found a breach” (emphasis added).

9. ECtHR, *Ringeisen v. Austria*, 22 June 1972 (Article 50), §17, and 23 June 1973, §13.



that the Court's decision will have effects extending beyond the confines of [the] particular case, especially since the violations found stem directly from the contested provisions and not from the individual measures of implementation".¹¹ This enhanced binding effect is apparent from the obligation on the state to adopt general measures in addition to measures for the benefit of the applicant.

Fourth, it is worth noting that the obligation to execute a judgment is binding on a state, which means on all state authorities and not just the executive. This is of fundamental importance in the European context, where heavy demands will be made on the judiciary as a result of the direct effect which judgments of the Strasbourg Court are recognised as having in certain circumstances. This recognition stems from the decision in *Vermeire*, which arose out of a failure to execute the *Marckx* judgment and the refusal of the Belgian courts to compensate for the absence of measures by the legislature. In the *Vermeire* case, the Court did not understand why the Belgian courts were refusing to enforce a rule about which "[t]here was nothing imprecise or incomplete"¹² and added: "The freedom of choice allowed to a state as to the means of fulfilling its obligation under Article 53 cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed, to the extent of compelling the Court to reject in 1991, with respect to a succession which took effect on 22 July 1980, complaints identical to those which it upheld on 13 June 1979."¹³ Thus, provided that the operative part of a European judgment is precise and complete, it is self-executing in the domestic system: the courts must apply the requirements of the European judgment directly and hold that domestic law is non-applicable pending amendment of the legislation. Thus the *Vermeire* judgment must be interpreted above all as condemning the failure to execute a European judgment immediately, as required by Article 46 of the Convention. This

10. J. Verhoeven, "A propos de l'autorité des arrêts de la Cour européenne des Droits de l'Homme et de la responsabilité internationale liée à leur observation", *RCJB*, 1984, pp. 275-295, p. 278.

11. ECtHR, *Marckx v. Belgium*, 13 June 1979, Series A no. 31, §58.

12. ECtHR, *Vermeire v. Belgium*, 29 November 1991, Series A no. 214-C, §25.

13. *Idem*, §26.



decision by the Court must be welcomed, since it means that, notwithstanding any domestic problems which may be experienced in bringing domestic law into line with the Convention, other individuals cannot in the meantime be denied their rights.

Lastly: “The obligation to take measures stemming from Article 46 §1 of the Convention is born without *any other fact than the judgment itself* being necessary. Neither the appearance of the case on the agenda of a DH¹⁴ meeting of the Committee of Ministers, nor the sending by the Secretariat of a letter called ‘initial phase letter’ plays a role in this respect. To wait for either of these before engaging the action necessary for execution will inevitably cause important delays in the execution of the judgment at issue.”¹⁵

Any study of the execution of judgments of the European Court calls for an examination of both the primary rule – determination of the content of the obligation – and the secondary rule – implementation of the sanction represented by execution.¹⁶

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14. The Committee of Ministers meets in special “DH” meetings to carry out its supervisory functions on the Court’s judgments.
 15. GT-DH-PR A (2006) 003, “Avenues for reflection on the effective means at domestic level for the rapid execution of the Court’s judgments: Note from the Department for the Execution of Judgments of the Court”, §1.1.2 (emphasis in original).
 16. Attention is drawn here to just a few important recent legal opinions, which will not be referred to subsequently: G. Cohen-Jonathan, J.-F. Flauss and E. Lambert Abdelgawad (eds), *De l’effectivité des recours internes dans l’application de la CEDH*, Bruylant/Nemesis, Droit et Justice, Vol. 69, 2006; G. Cohen-Jonathan and J.-F. Flauss, *La réforme du système de contrôle contentieux de la CEDH*, Bruylant/Nemesis, Droit et Justice, Vol. 61, 2005; S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects*, Cambridge University Press, 2006; P. Lemmens and W. Vandenhole (eds), *Protocol No. 14 and the Reform of the European Court of Human Rights*, Intersentia, 2005; T. Christou and J. P. Raymond (eds), *European Court of Human Rights. Remedies and Execution of Judgments*, BIICL, 2005. Mention may also be made of the reports on execution of the Court’s judgments in *Revue trimestrielle des droits de l’homme* and the *Annuaire de droit européen*.



Determination of the content of the obligation to execute judgments of the European Court of Human Rights

The obligation to execute judgments arises out of the responsibility assumed by a state which has failed to fulfil its primary obligation under Article 1 of the Convention to secure to everyone within its jurisdiction the rights defined in the Convention.¹⁷ This is in keeping with the scheme of international responsibility. Thus assumption of responsibility entails three obligations: the obligation to put an end to the violation, the obligation to make reparation (to eliminate the past consequences of the act contravening international law) and, finally, the obligation to avoid similar violations (the obligation not to repeat the violation).¹⁸ In the *Scozzari and Giunta* case,¹⁹ the Court reiterated that a judgment finding a breach “imposes on the respondent state a legal obligation not just to pay those concerned the sum awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and

17. The European Court is increasingly referring to Article 1, in parallel with Article 46, to remind states of their obligation to adjust their domestic legislation to the Convention.

18. *Papamichalopoulos and others v. Greece* (Article 50), 31 October 1995, Series A no. 330-B, §34 *et seq.*, where the European Court refers to the judgment in the PCIJ case concerning the factory at Chorzów.

19. *Scozzari and Giunta v. Italy*, 13 July 2000, §249. More recently: *Scordino v. Italy* [GC], 29 March 2006, §233; Fourth Section, *Johansson v. Finland*, 6 September 2007, §64.



to redress so far as possible the effects". These three obligations are equally apparent from the resolutions of the Committee of Ministers adopted with regard to Article 46 §2 under Rule 6 (2).²⁰

The obligation to put an end to a violation, which presupposes a continuing violation, must cover situations of systemic problems. The second obligation, to make reparation in the strict sense, is essential: as in general international law, the principle is that of *restitutio in integrum*. This obligation entails the adoption of individual measures. It is only where *restitutio in integrum* proves to be legally or physically impossible that it will be replaced by compensation. The Court frequently accepts that the finding of a violation in itself constitutes just satisfaction for the applicant.²¹ This obligation to provide redress is effective *ab initio*: the state must eliminate all the consequences of the illegal act and make reparation for it as though no violation had occurred. State practice confirms this position.²²

The obligation to prevent repetition of a violation is fundamental to the European system and entails the requirement that general measures be adopted. This will be the case where the Court has expressly or impliedly called a general legislative provision into question,²³ or when violations of a similar kind cannot be avoided in the future without such legislative amendment. In addition, there are situations in which general legislation by its very existence violates the rights of the individual applicant.²⁴ The obligation in question has immediate consequences on the day on which the judgment is delivered,²⁵ and these are confirmed by the

20. See text reproduced in Appendix, p. 73.

21. For one of many examples, see ECtHR, *Jamil v. France*, judgment of 8 June 1995, Series A no. 317-B, §39.

22. In *Vogt v. Germany*, the civil-service applicant was not only reinstated in her post, but the years during which she had not been in her post were taken into account in calculating her financial benefits and her benefits under her conditions of employment (26 September 1995, A-323 and Resolution DH (97) 12 of 28 January 1997). See also *Schuler-Zgraggen v. Switzerland*, 24 June 1993 (Merits), Series A no. 263, and 31 January 1995 (Article 50), Series A no. 305-A, where the European Court retroactively awarded default interest in addition to retroactive payment of the allowance accepted by the national courts under the head of the pecuniary damage to be made good.

23. For example, ECtHR, *Manoussakis and others v. Greece*, 26 September 1996, §45, where the European Court expressly declared the 1938 law on the Orthodox Church and the practice of religion to be contrary to Article 9 of the Convention.



direct effect of the judgment in the courts (*Vermeire* case-law) and the adoption of transitional measures in order to avoid new findings of violations²⁶ pending definitive legislative reform. It should also be noted that the question of general measures is often raised *ex officio* by the Committee of Ministers, independently of the terms of the judgment.²⁷

The obligations arising out of the Court's judgments thus fall into three broad categories: just satisfaction, individual measures and general measures.

Just satisfaction

Award of just satisfaction by the European Court

Article 41 of the Convention provides as follows:

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Just satisfaction is the only measure that the Court can order a state to take under the terms of the Convention. The resulting judgment therefore has the value of a judgment ordering performance, as opposed to the usual declaratory judgment. The obligation to pay just satisfaction raises few difficulties: it is an obligation that can be clearly and immediately fulfilled.

24. This is the situation in cases concerning, for example, the criminalisation of homosexuality: ECtHR, *Norris v. Ireland*, 26 October 1988, Series A no. 142, §38.

25. For a model of promptness, see *Autronic AG v. Switzerland*, Resolution DH (91) 26 of 18 October 1991: on 21 December 1990 the Government amended an ordinance retroactively to 23 May 1990, in other words, the day following delivery of the judgment. In another case, less than a month after publication of the Court's judgment in *Sørensen and Rasmussen* [GC], 11 January 2006, on freedom of association, the Danish Government tabled a Bill which came into force on 29 April 2006.

26. In the *Procola* case (28 September 1995, A-326), the Luxembourg Government secured the passing of a law one month after delivery of the judgment, pending a definitive reform one year later (Resolution DH (96) 21).

27. This was the case with the problems linked to the length of proceedings in Italy.



The Court's practice has been refined over time: first of all, the Court has assumed the right to specify the currency of payment in order, for example, to avoid the inconvenience of a rapidly depreciating currency; ordinarily, awards are now made in euros. Since the *Moreira de Azevedo v. Portugal* judgment of 28 August 1991 (Series A no. 208-C), the Court has laid down a time-limit for payment by the respondent state (usually three months). However, because of the delay with which certain states have paid the amounts due, the Court has taken a further step: it now makes an order for default interest, thus codifying a practice instituted very early on by the Committee of Ministers. The Committee of Ministers has assumed the power to supervise payment of this default interest. This solution, which has acquired the status of a general principle (that of protecting the value of the sums awarded), has also become established for cases which the Court has struck from its list because a friendly settlement has been reached between the parties and in which no express provision has been made for default interest.

The operative part of a judgment by the Court ordering a state to pay just satisfaction must be enforceable in the domestic legal order. At most, the national authority may satisfy itself that the European Court's judgment actually exists. Thus in Malta, pursuant to section 6 of Act XIV of 19 August 1987, judgments of the European Court are enforceable in exactly the same way as judgments of the Supreme Court: a judgment is executed following an application lodged with the Registry of the Constitutional Court.²⁸

28. Section 6: "(1) Any judgment of the European Court of Human Rights to which a declaration made by the Government of Malta in accordance with Article 46 of the Convention applies, may be enforced by the Constitutional Court in Malta, in the same manner as judgments delivered by that court and enforceable by it, upon an application filed in the Constitutional Court and served on the Attorney General containing a demand that the enforcement of such judgment be ordered."



Priority for award of just satisfaction by national authorities

The latest developments concern the question of how awards at domestic level relate to those claimed in the European Court. Usually, award of compensation at domestic level will divest the applicant of victim status, even if the amount awarded by the Court would have been higher in a particular case.²⁹ The case of *Doğan and others v. Turkey*,³⁰ relating to damage sustained by villagers unable to gain access to their homes for almost 10 years, is noteworthy on several accounts. In this specific case, the Court took account of the victims' wish not to rebuild their lives in their village and held that the best redress was just satisfaction. In particular, it rebutted the government's argument that the applicants should have applied to a domestic compensation commission, on the grounds that the parties had failed to reach a friendly settlement and that the proceedings had already lasted a very long time. It consequently awarded sums ranging between €14 500 and €19 500 to the various applicants.

However, award of just satisfaction on the domestic level is generally preferred. "Apart from the fact that the existence of a domestic remedy is in full keeping with the subsidiarity principle embodied in the Convention, such a remedy is closer and more accessible than an application to the Court; it is faster and is processed in the applicant's own language. It thus offers advantages that need to be taken into consideration."³¹ In the three July 2006 judgments against the Netherlands concerning strip-searches of prisoners,³² given the unusual situation, in which the appli-

29. For one example among many, see admissibility decision in ECtHR, First Section, *Kalajzic v. Croatia*, 28 September 2006, concerning the adequacy of the amount (€1 130) awarded for redress of a compensatory nature available to victims of excessively lengthy proceedings. The European Court took into account the standard of living in the state and the fact that under the national system, compensation would be paid more promptly to the applicant. See also ECtHR, Third Section, *Gardedieu v. France*, 21 June 2007.

30. ECtHR, Third Section, *Doğan and others v. Turkey* (Article 41, just satisfaction), judgment of 13 July 2006. The judgment on the merits (29 June 2004) held that there had been a violation of Articles 8 and 13 of the Convention and Article 1 of Protocol No. 1.

31. ECtHR, First Section, *Cocchiarella v. Italy*, 10 November 2004, §26.



cants had commenced national proceedings to obtain just satisfaction for violation of the Convention even before the Court itself had delivered its judgments on the merits, the Court laid down the principle that it could not allow the existence of two parallel sets of proceedings designed to achieve the same result: it made little difference whether such domestic proceedings were already pending at the time when the application was lodged with the Court or whether the application was lodged with the Court first although, under Article 35 §1 of the Convention, the application would be found inadmissible in the former case. To settle this question, the Court considered that it must go back to the principle of subsidiarity under the Convention and, rather surprisingly, inferred from Article 41 that affording just satisfaction to applicants was not central to its role (whereas it is the only power conferred on it by the Convention). According to the Court, Article 46 was of greater importance than Article 41. It also pointed out that the state remained free to grant compensation in addition to awards made at European level. Consequently, the Court decided to defer examination of the case in respect of Article 41 and to take into account any compensation awarded under domestic law before delivering its own judgment.³³ In the *Salah* case a friendly settlement was reached, endorsed by the Court; more surprisingly, in the *Baybasin* case, although civil proceedings were still pending at first instance, the Court struck the case out of its list following domestic payment of costs and expenses, reserving the right, under Article 37 §2 of the Convention, to restore the case to its list of cases.³⁴

While this case-law has the merit of returning to a more literal interpretation of Article 41 – in accordance with the principle of subsidiarity – and of challenging the Court’s growing practice of awarding pecuniary

32. ECtHR, Third Section, judgments of 6 July 2006, *Baybasin v. the Netherlands*, *Salah v. the Netherlands* and *Sylla v. the Netherlands*.

33. For precedents, see ECtHR, First Section, *Tomasic v. Croatia*, judgment of 19 October 2006, concerning violation of Article 6 §1. In respect of Article 41, the Court took account of the amount awarded by the Constitutional Court.

34. ECtHR, Third Section, *Salah v. the Netherlands*, 8 March 2007, which awarded the rather modest sum of €2 500 for all costs, although a violation of Article 3 was at issue. See also ECtHR, Third Section, *Baybasin v. the Netherlands*, 7 June 2007.



compensation, it might exacerbate the differences between amounts awarded for comparable violations.

Are these decisions the harbinger of a more radical change, whereby the Court would systematically relinquish its jurisdiction over just satisfaction to domestic courts? The November 2006 report by the Group of Wise Persons, which was strongly critical on this point, did not hesitate to take the step of proposing that, as a rule, the decision on the amount of compensation should be “referred to the state concerned” (§96), within a time-limit set in accordance with the criteria laid down by the Court. One departure from this rule was recommended: “where such a decision is found to be necessary to ensure effective protection of the victim, and especially where it is a matter of particular urgency” (§96). It would be up to a single judicial body in each state to determine the amount. In addition, the Group of Wise Persons provided for the possibility of a victim applying to the Court “to challenge the national decision by reference to those criteria [the Court’s case-law], or where a state failed to comply with the deadline set for determining the amount of compensation” (§99). The proposals in Lord Woolf’s report did not go this far, providing for the establishment of an “Article 41 Unit” in the Registry that would be responsible for producing guidelines on compensation amounts in order to assist judges or even preparing a “guide as to rates of compensation awarded by the Court”. These proposals were implemented in 2006. But the report, which would have exceeded its remit by suggesting any measures requiring amendment of the Convention, stated that “this [did] not prevent the Court from agreeing with a member state that issues of compensation should be remitted to member states for resolution” and therefore “obtaining such agreement with individual member states”.³⁵

These proposals are undoubtedly in keeping with the Court’s recent tendency to give distinct priority to Article 46 (general or individual non-pecuniary measures) over Article 41 and also the Court’s efforts to determine objective criteria for calculating just satisfaction. This has already

35. *Review of the Working Methods of the European Court of Human Rights*, December 2005, The Right Honourable The Lord Woolf, pp. 40-41.



happened for length-of-proceedings cases under Article 6 §1. In a number of cases concerning Italy, the Court has laid down relatively precise “specific criteria” derived from studies by the Court Registry.³⁶ These criteria make the calculation of just satisfaction more consistent and must be used by domestic authorities as a point of reference.³⁷ It is interesting to note that, in the case of *Paudicio v. Italy*, the Court decided not to make an award for pecuniary damage because proceedings could be instituted at domestic level for this purpose (but were not yet pending).³⁸

Individual non-pecuniary measures

In addition to the reopening of domestic judicial proceedings, many individual non-pecuniary measures may be adopted by the state. The Committee of Ministers recently stressed the pressing need to take such measures “considering the seriousness of the violations found and the time that has elapsed since the European Court’s judgments became final”.³⁹

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36. First Section, *Cocchiarella v. Italy*, 10 November 2004, “2. Criteria specific to non-pecuniary damage: the Court considers that a sum varying between EUR 1 000 and 1 500 per year’s duration of the proceedings (and not per year’s delay) is a base figure for the relevant calculation. The aggregate amount will be increased by EUR 2 000 if the stakes involved in the dispute are considerable, as in cases concerning labour law, civil status and capacity, pensions, or particularly serious proceedings relating to a person’s health or life. The basic award will be reduced in accordance with the number of courts dealing with the case throughout the duration of the proceedings, the conduct of the applicant – particularly the number of months or years due to unjustified adjournments for which the applicant is responsible – what is at stake in the dispute – for example where the financial consequences are of little importance for the applicant – and on the basis of the standard of living in the country concerned. A reduction may also be envisaged where the applicant has been only briefly involved in the proceedings, having taken them over in his or her capacity as heir.”
37. Cf. P. Mahoney, “Thinking a small unthinkable: repatriating reparation from the European Court of Human Rights to the national legal order”, *Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views*, Kehl, 2007, pp. 263-283.
38. ECtHR, Second Section, *Paudicio v. Italy*, 24 May 2007, §59: “The Court notes that the criminal courts have definitively established that the applicant incurred pecuniary damage owing to illegal building by his neighbours” and that, “in accordance with the courts’ decisions, the applicant may institute proceedings in the civil courts to obtain damages”. [Provisional translation]
39. Interim Resolution CM/ResDH (2007) 73 of 6 June 2007 concerning action of the security forces in Northern Ireland (case of *McKerr v. the United Kingdom* and five similar cases).



Reopening of domestic judicial proceedings

The resumption of domestic judicial proceedings, in that (unlike a simple re-examination, as detailed below, p. 24) it affects the principle of *res judicata* at the national level, is undoubtedly the most striking effect which an international judgment can have. The importance of this measure, and the fact that it is the only effective remedy in certain cases, led the Committee of Ministers to adopt a recommendation to states on this point.⁴⁰ However, this measure is not a panacea and the scope for reopening such cases is strictly defined, since this could seriously prejudice the rights of third parties, particularly in civil law. In such cases, compensation for loss of opportunity would be more appropriate than reopening a case, which may endanger the legal certainty of individual situations.⁴¹ In the criminal sphere, the reopening of cases may raise the question of what is to happen to any co-accused (who have not taken their cases to Strasbourg) as well as to the victims, and may cause problems in terms of possible loss of evidence and the period which has elapsed. Furthermore, such a measure would only prolong the already lengthy proceedings between the domestic level and the European level.⁴²

If the Court has found a violation of the procedural safeguards for an individual, if such infringements have affected the choice of sentence at domestic level and if the victim is continuing to serve the sentence, particularly in criminal cases, reopening the proceedings will make it possible to determine, with safeguards for the right of the due process, whether the

40. Recommendation No. 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 (see Appendix, p. 81).

41. For example in the case of *Annoni di Gussola v. France* (14 November 2000); compare with *Bochan v. Ukraine* (3 May 2007). The question of knowing if a state (or its constituent parts) has the right to legal certainty in the same way as a private party remains unresolved. See also the final resolution in the case of *Yvon v. France* (ResDH (2007) 79).

42. In the case of *Saunders*, the Government of the United Kingdom objected to reopening the case, particularly on the grounds of the applicants' age and state of health: *Saunders v. the United Kingdom and I.J.L., G.M.R. and A.K.P. v. the United Kingdom*, Resolution ResDH (2004) 88 of 21 December 2004.



individual is guilty or innocent and to determine the penalty that should have been initially decided upon had there been no violation of the Convention. Indeed, in such circumstances, it is not acceptable merely to pay just satisfaction to an applicant who is still in prison or to release the individuals concerned without a fresh trial, as in the case of *Van Mechelen and others v. the Netherlands*.⁴³ the Netherlands had no rules providing for reopening of the case but was nonetheless required to take account of the Court's judgment. In the *Hulki Güneş v. Turkey* case, where the Court found that there had been a violation of the right to a fair trial and where the victim was serving a life sentence, the Committee of Ministers demanded reopening of the proceedings, without which there would be a "manifest" breach of Article 46.⁴⁴

Thus, pursuant to the Recommendation of the Committee of Ministers of 19 January 2000, two cumulative conditions must be satisfied before such a measure can be deemed necessary: first, the violation – a substantive violation or a violation of procedural safeguards – must be "of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of" and, second, the individual must continue "to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening".

The majority of European states now allow the reopening of domestic judicial proceedings either on the basis of case-law, having regard to the interest of the law in the broader sense of the term, to special circumstances or to new facts or evidence (Czech Republic, Denmark, Finland, Iceland, Spain, Sweden, Ukraine), or by virtue of a *lex specialis* (in at least 26 states, most recently including Belgium⁴⁵). The *lex specialis* mainly applies to criminal cases. In practice, this measure has tended to remain the exception: by December 2000, domestic proceedings had been reo-

43. Judgment of 23 April 1997 and Resolution DH (99)1 24; the release of the applicants, without a fresh trial, sparked a public outcry, thus discrediting the Convention system.

44. Interim Resolution CM/ResDH (2007) 26 of 4 April 2007.



pened in fewer than 15 cases, half of these being criminal.⁴⁶ There have been cases where the reopening of proceedings in criminal cases has resulted in acquittal of the person concerned⁴⁷ and removal of the conviction from the person's criminal record or, more rarely, in the confirmation of the person's guilt and, where relevant, the sentence being upheld.⁴⁸ The question of *reformatio in pejus* is also relevant. It appears that most justice systems exclude the possibility of a stronger sentence or punishment. Sometimes a case is reopened between delivery of the judgment on the merits and the judgment on just satisfaction – the Court having taken the initiative in that regard,⁴⁹ but more frequently the reopening occurs at the stage of supervision of judgments by the Committee of Ministers, which makes the adoption of its final resolution dependent on such a measure where it takes the view that this is the only means of making good the damage sustained by the person concerned.⁵⁰ Thus, a number of cases are at present pending before the Committee of Ministers until such time as

45. Cf. E. Lambert Abdelgawad, "Les procédures de réouverture devant le juge national en cas de 'condamnation' par la Cour européenne", in G. Cohen-Jonathan, J.-F. Flauss and E. Lambert Abdelgawad (eds), *De l'effectivité des recours internes dans l'application de la Convention européenne des droits de l'homme*, Bruylant/Nemesis, Droit et Justice, No. 69, 2006, pp. 197-258. The Belgian law was passed by the Senate on 14 December 2006, and it will be possible to reopen cases pending before the Committee of Ministers with retroactive effect.

46. *Unterpertinger v. Austria*, 24 November 1986; *Piersack v. Belgium*, 1 October 1982 and 26 October 1984; *Jersild v. Denmark*, 23 September 1994; *Barberà, Messegue and Jabardo v. Spain*, 6 December 1988 and 13 June 1994; *Z v. Finland*, 25 February 1997; *Mehemi v. France*, 26 September 1997; *Open Door and Dublin Well Woman Centre v. Ireland*, 29 October 1992; *Welch v. the United Kingdom*, 9 February 1995 and 26 February 1996; *Ekbatani v. Sweden*, 26 May 1988; *Schuler-Zraggen v. Switzerland*, 24 June 1993 and 31 January 1995; *A.P., M.P. and T.P. and E.L., R.L. and J.O.L. v. Switzerland*, 29 August 1997; *Oberschlik v. Austria (No. 2)*, 1 July 1997; and *Windisch v. Austria*, 27 September 1990 and 28 June 1993. For a recent example, see CM/ResDH (2007) 46 of 20 April 2007 in the case of *Mayali v. France*; the Court of Cassation accepted an application for the reopening of criminal proceedings after the Court in Strasbourg found that procedural safeguards had been infringed.

47. *Unterpertinger v. Austria*; *Barberà, Messegue and Jabardo v. Spain*; *Jersild v. Denmark*.

48. *Piersack v. Belgium*, *Ekbatani v. Sweden*.

49. The case of *Barberà, Messegue and Jabardo v. Spain* is a perfect example of this.

50. The case of *Hakkar v. France* is noteworthy in this respect, although it concerned a decision adopted by the Committee of Ministers pursuant to the former Article 32 of the Convention. The Committee of Ministers waited until a law was passed making it possible to review criminal proceedings following a judgment of the European Court and until the retrial of the victim was due to begin.



rules permitting the reopening of proceedings are adopted in Italy and Turkey, since certain cases involving those states demand this form of reparation pursuant to Article 46 of the Convention.

Furthermore, where the violation in question is not an isolated violation of procedural safeguards but a substantive violation, the Committee of Ministers is not content with deciding to reopen the proceedings⁵¹ but takes into consideration the outcome achieved at domestic level before pronouncing the case closed. In the *Hakkar* case, on the other hand, it had to be assumed that procedural safeguards would be respected after reopening of the proceedings; whether the new trial was consistent with the requirements of the Convention was a matter for the Court alone and not for the Committee of Ministers.

This increased supervision by the Committee of Ministers is evidence of its growing consideration over a number of years for what happens to the individual concerned; it has sometimes even ordered states to adopt legislation allowing proceedings to be reopened.⁵² In fact, the Committee of Ministers' practice is changing, coloured by a serious attempt to distinguish carefully the cases to which the various rules apply. Rather than considering the type of violation, the Committee of Ministers seems first and foremost to assess the individual's current situation. Has the victim served his or her sentence? Is he or she still in prison? More generally, has he or she suffered very serious adverse consequences as a result of the violation (aside from the deprivation of liberty, the lack of compensation for a past detention, defamation, a loss of civil or political rights, limitations on exercising professional activities, etc.)? Secondly, the Committee of Ministers takes account of whether the applicant, or the applicant's lawyer, wishes to reopen the proceedings, as this is not always desired. The applicant may not be in favour of this particularly cumbersome and uncertain

51. As in the *Hakkar* case: Resolution ResDH (2001) 4 of 14 February 2001: "Noting with satisfaction that this case ... will be retried very shortly; considering that, since the main violation concerned the fairness of the incriminated proceedings rather than their outcome, it was not necessary to await the outcome of the new trial at domestic level".

52. Interim Resolution ResDH (2005) 85, *Dorigo Paolo v. Italy*, 12 October 2005. CM/ResDH (2005) 93, *Gabbari Moreno v. Spain*, 26 October 2005.



measure of relief. The criterion of a request from the applicant has recently come to exercise a systematic influence on the Court's decisions.⁵³ However, the wishes of the applicant can only be considered in the event of procedural violations.⁵⁴ As for repetitive cases, it appears that some change has occurred. While the Recommendation of 19 January 2000 seemed unpromising in this respect, in Recommendation Rec (2004) 6 of the Committee of Ministers on the improvement of domestic remedies (Appendix, §17), states are asked to envisage, "if this is deemed advisable, the possibility of reopening proceedings similar to those of a pilot case which has established a violation of the Convention, with a view to saving the Court from dealing with these cases and where appropriate to providing speedier redress for the person concerned. The criteria laid out in Recommendation Rec (2000) 2 of the Committee of Ministers might serve as a source of inspiration in this regard." The principle of legal uncertainty could therefore disappear in repetitive cases as well, further to a pilot judgment. The procedure for reopening cases is one of the effective domestic remedies that a state is responsible for introducing in order to relieve the European Court of a multitude of disputes similar to the initial case. There is the further question of whether or not individuals must (instead of may) be released pending the new proceedings. The refusal to release defendants was criticised by the Parliamentary Assembly of the Council of Europe in the case of *Sadak, Zana, Dicle and Dogan v. Turkey*⁵⁵ and also by the Committee of Ministers in an interim resolution.⁵⁶ Relying on the presumption of innocence and the Court's judgment, the Committee of Ministers now considers that, in addition to the reopening of proceedings, the release of applicants is an integral part of the right to

53. For a recent example, see *Duran Sekin v. Turkey*, 2 February 2006, §45: "the most appropriate form of relief would be to ensure that the applicant is granted in due course a retrial by an independent and impartial tribunal, if requested". [Provisional translation]

54. See the cases of *Botten v. Norway* (ResDH (97) 220) and *T and C v. the United Kingdom* (ResDH (2007) 134), in which the Committee of Ministers respected the applicants' opposition to the reopening of their cases.

55. Doc. 10192, "Implementation of decisions of the European Court of Human Rights by Turkey", 1 June 2004, report by Mr Jurgens, §§7-9.

56. ResDH (2004) 31 of 6 April 2004.



reparation “in the absence of any compelling reasons justifying their continued detention pending the outcome of the new trial”.⁵⁷

Similarly, certain texts of the Parliamentary Assembly require adoption of domestic measures to allow reopening of national proceedings.⁵⁸ Thus these developments have at the same time prompted a change in the Court’s “policy” in this field.

The reopening of proceedings has been held by the European Court to be a measure as close to *restitutio in integrum* as possible.⁵⁹ The Court has gradually taken the further step of not simply contenting itself with establishing, after the event, the beneficial effects of the reopening of domestic proceedings, but of recommending this measure prior to the event as offering the most appropriate remedy or an appropriate way of redressing the violation. This is particularly the case in proceedings where the right to an independent and impartial tribunal has been violated.⁶⁰ In the *Öcalan v. Turkey* case, the Grand Chamber clearly endorsed this “general approach”.⁶¹ The same applies to conviction of an applicant after an unfair trial.⁶² The most recent case-law has innovated further, showing a tendency on the Court’s part to compel states to reopen proceedings on certain conditions (option in domestic law, applicant’s request, most effective means of achieving *restitutio in integrum*, respect for procedural safeguards during new proceedings). In the operative part of its *Claes and others v. Belgium* judgment,⁶³ where it found that there had been a viola-

57. ResDH (2004) 31 of 6 April 2004: “Stressing, in this connection, the importance of the presumption of innocence as guaranteed by the Convention; deplors the fact that, notwithstanding the reopening of the impugned proceedings, the applicants continue to serve their original sentences ...; stresses the obligation incumbent on Turkey, under Article 46, paragraph 1, of the Convention, to comply with the Court’s judgment in this case notably through measures to erase the consequences of the violation found for the applicants, including the release of the applicants in the absence of any compelling reasons”.

58. See, for example, Recommendation 1684 (2004), Implementation of decisions of the European Court of Human Rights, 23 November 2004, and Resolution 1411 (2004), Implementation of decisions of the European Court of Human Rights, §18.

59. ECtHR, *Piersack v. Belgium* (Article 50), 26 October 1984, §11.

60. *Gençel v. Turkey*, 24 March 2004. Second Section, *Ceylan v. Turkey* (No. 2), 11 October 2005, §38.

61. *Öcalan v. Turkey* [GC], 12 May 2005, §210.

62. *Bracci v. Italy*, 13 October 2005.

63. ECtHR, First Section, 2 June 2005.



tion of the right to a tribunal established by law, the Court gave the state the alternative of reopening the proceedings or paying a predetermined amount in just satisfaction. This alternative may be explained by the fact that it was found to be below the threshold of gravity of the consequences foreseen by a reopening of the case. In its *Lungoci v. Romania* judgment,⁶⁴ concerning a similar violation of the right of access to a court, after noting in the reasons for the decision (§56) that the reopening of proceedings was a possibility, the Court held (operative part, 3.a) that the state should ensure that the proceedings were reopened if the applicant so desired, whilst at the same time requiring the payment of €5 000 for non-pecuniary damage.

In this as in other regards, the European system should set a fundamental example and exercise an influence over, in particular, practice in the inter-American and United Nations systems, and also in the African human rights system.

Other measures

If proceedings are not reopened, re-examination, particularly in administrative cases, may prove sufficient. The choice between re-examination and reopening is not always easy to make and depends on the domestic systems.⁶⁵ This type of measure applies above all to cases involving family law and the law relating to foreign nationals. In criminal law as well, a range of individual measures may offer redress. These may include an agreement not to enforce the domestic measure at issue, including a judgment.⁶⁶ In some states, rectification of criminal records does not require a retrial.⁶⁷ In some countries the legislation also has special provisions, such as the possibility of suspending enforcement of a sentence. Mention should also be made of acts of clemency and reduction of

64. *Lungoci v. Romania*, 26 January 2006.

65. See the cases of *Chevol v. France* (ResDH (2006) 52) and *Lemoine v. France* (ResDH (2007) 78), in which reopening was excluded as a possibility and the outcome was a request made to the authorities for compensation for loss of opportunity.

66. ECtHR, *Muyldermans v. Belgium*, 23 October 91, Resolution DH (96) 18 of 9 February 1996: enforcement of the Audit Court judgment at issue was waived under a subsequent law.



sentences, with procedures varying considerably from one state to another. In the past, pardons have in fact constituted an adequate measure of relief for a number of applicants and in cases where reopening of proceedings is not possible, as in the Belgian cases concerning infringements of the applicants' right to defend themselves through legal assistance of their own choosing at different stages of criminal proceedings.⁶⁸ Another possibility is the unconditional release of the applicant⁶⁹ or, failing that, release on parole.⁷⁰ Following the *Stefanov v. Bulgaria* case, the government promised to adopt a general amnesty; Jehovah's witnesses with criminal convictions for having refused to do their military service on the grounds of conscientious objection would thus be exempted from criminal responsibility and discharged, since they would no longer have committed illegal acts.⁷¹ However, these acts of clemency may entail some awkward consequences. As a measure wholly or partly exempting convicted persons from serving their sentences, a pardon, in most European systems, does not abolish the other effects of a criminal conviction, such as ancillary penalties and entry of the conviction in the criminal record. It does not call into question the individual's criminal guilt. Furthermore, a pardon is often regarded as a sovereign favour; yet, in the case with which

67. Resolution ResDH (2006) 79 of 20 December 2006, on 32 judgments against Turkey in 1999, 2000, 2002, 2004 and 2005 concerning freedom of expression following convictions under former Article 8 of the Law against Terrorism No. 3713, refers to the following individual measures: *ex officio* removal of the convictions from the judicial records and statistics of the Ministry of Justice and automatic lifting of restrictions on applicants' civil and political rights.

68. Cases of *Van Geyseghem* (judgment of 21 January 1999), *Goedhart* (judgment of 20 March 2001), *Stroek L. and C.* (judgment of 20 March 2001) and *Pronk* (judgment of 8 July 2004). The Belgian authorities partially pardoned Mr Stroek and Mr Goedhart, partly erasing the consequences of their convictions, declaring void the international arrest warrants taken out against them; the sentence imposed on Ms Van Geyseghem was time-barred (see CM/Del/OJ/DH (2005) 940vol1 Public, 28 October 2005).

69. ResDH (2006) 53 of 2 November 2006 concerning a judgment against Georgia in 2004 (Grand Chamber): in this case, release occurred the day after the Court's judgment (pursuant to a domestic decision at the same time).

70. ResDH (2006) 56 of 2 November 2006 concerning two Committee of Ministers decisions of 1999 and a judgment against the United Kingdom in 2002 relating to aliens' unlawful detention, lack of compensation, and violation of the right to a fair trial. One of the applicants was released unconditionally, while the other was released on parole.

71. *Stefanov v. Bulgaria* case of 3 May 2001, Resolution ResDH (2004) 32 of 15 June 2004.



we are concerned, the victim is entitled to *restitutio in integrum*. A pardon and reopening of proceedings cannot therefore be deemed equivalent in terms of reparation.⁷²

“Positive” action, which is more noteworthy than that described above since it entails the adoption of new provisions rather than the annulment or repeal of the contested measure, is also less widespread in practice. A positive measure may consist in the reinstatement of an employee who has been unlawfully excluded from the civil service.⁷³ The judgment of the European Court may in itself be recognised in national law as conferring a right to claim compensation where the applicant has been remanded in custody in breach of the Convention.⁷⁴ Cases involving aliens give rise to national reactions that vary considerably as regards the granting of a residence permit following expulsion or removal from the territory that has been held to be incompatible with the Convention.⁷⁵ As regards length of proceedings, when a case is still pending in the domestic courts, the Committee now demands measures to expedite the proceedings.⁷⁶

72. This was clearly accepted by the I.C.J. in the case concerning *Avena and other Mexican Nationals (Mexico v. United States of America)*. Admittedly, in the law of English-speaking countries, the concept of a pardon is broader, encompassing an amnesty, and a pardon may be granted before a conviction has taken place. Moreover, in Italy and Germany in particular, pardon is granted *ex officio*; only certain states such as Belgium, Spain and Switzerland acknowledge a personal right to apply for pardon.

73. ECtHR, *Vogt v. Germany* (Article 50), 2 September 1996, and Resolution DH(97)12.

74. See, for example, Article 1 of the Luxembourg law of 30 December 1981 (Mémorial A, 1981, p. 2660): “Anyone who has been deprived of freedom in circumstances incompatible with Article 5 of the European Convention on Human Rights shall be entitled to compensation.”

75. See, for example, ECtHR, *Lamguindaz v. the United Kingdom*, 23 June 1993, Series A no. 258-C and Resolution DH (93) 55, where the person concerned was given indefinite leave to remain and allowed to make an application for naturalisation. More recently, see CM/ResDH (2007) 35 of 20 April 2007 in the case of *N v. Finland*. The applicant was granted a continuous residence permit, although he had been threatened with expulsion to the Democratic Republic of the Congo. See also CM/ResDH (2007) 38 of 20 April 2007 concerning the judgment in *Aristimuno Mendizabal v. France*, where the Spanish applicant was issued with a ten-year residence permit.

76. Conversely, see ResDH (2006) 28 of 21 June 2006 concerning four judgments against the United Kingdom in 2002 and 2003: “noting that all proceedings had ended at the time the Court rendered its judgments so that no question of their acceleration has been raised”.



General measures

From the outset, states have generally accepted their obligation, under Article 46 of the Convention, to adopt general measures to prevent repetitive cases. These general measures can take various forms. They are not always necessary, as when a violation is an isolated case⁷⁷ relating, for example, to a breach of domestic law or if there is a minimal risk of such cases being brought before the Court in Strasbourg.⁷⁸

Changes in case-law

It is to the courts that a judgment of the European Court is primarily addressed because of the direct effect that it is recognised as having: the relevance of the courts' action lies above all in being able to prevent any repetition of unlawful conduct pending a change in domestic law. Current misgivings about the direct effect of judgments are due not to opposition to the principle but rather to the courts' refusal to accept an interpretation which is too innovative in relation to the domestic law at issue. The courts refuse to endorse too large a change in the law and play for time pending action by Parliament.⁷⁹

In practice, a reversal of precedent has often been enough to prevent further violations, either provisionally, pending reform of domestic law, or

77. See CM/ResDH (2007) 54 of 20 April 2007, *Farbtuhs v. Latvia*, concerning violation of Article 3 (degrading treatment suffered by the applicant due to his prolonged imprisonment despite his advanced age, severe infirmity and poor health). See also CM/ResDH (2007) 81 of 20 June 2007, *Yagtzilar and others v. Greece*, concerning the problem of access to a court, which in this case was held to have been of an exceptional nature.

78. See CM/ResDH (2007) 30 of 20 April 2007 concerning judgments against the Czech Republic with regard to restitution of property confiscated during the communist period and the right of access to the Constitutional Court. "The deadline for lodging restitution requests under this law expired more than 10 years ago, so there are only a very limited number of cases still pending today. The violations found in these cases are isolated and do not call for legislative change."

79. For an illustration, see, for example, the case of *Kroon and others v. the Netherlands* and the arguments of the Supreme Court in the case before the First Chamber, 4 November 1994, BJC, 1994-3, p. 271: on the one hand, domestic law was called into question owing to an interpretation that was "too progressive and creative as regards the positive obligation of the state under Article 8"; on the other hand, "existing religious, ideological or traditional conceptions of the family in each community" were directly challenged.



permanently. Reference may be made to the case of *Borgers v. Belgium*, where the role of the prosecution before the Court of Cassation was challenged under Article 6 of the Convention: pending legislative reform, “the *Cour de Cassation* provisionally introduced a new practice whereby applicants may reply to the opinion of the representative of the prosecutor’s office, and the latter no longer takes part in the deliberations”.⁸⁰ When a state wishes to manage without amending legislation,⁸¹ the Committee of Ministers is increasingly careful to obtain evidence that a reversal of precedent will suffice on its own and demands a period of court practice during which no breaches of the Convention are found. The domestic courts may be encouraged to abandon established case-law by some state authorities, for example by means of a circular.⁸²

Changes to the rules

The rules concerned may take the form of regulations, laws or the Constitution. As regards, for example, action by Parliament, changes have related in particular to procedural safeguards, criminal law and prison regulations. Significant reforms have also been made to the organisation of the courts, especially in Spain, Portugal and Italy, in order to reduce the length of proceedings, and to the administrative courts in the Nordic countries. Mechanisms have been introduced to expedite proceedings.⁸³

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80. Resolution ResDH (2001) 108 of 30 October 1991. This practice has been enshrined in the Belgian Judicial Code since 14 November 2000. See also CM/ResDH (2007) 52 of 20 April 2007, in the case of *Tricard v. France*: although the French Code of Criminal Procedure does not expressly provide for leave to proceed out of time, the Criminal Chamber now accepts that the time for appealing may be extended if “because of a case of *force majeure* or an insuperable obstacle beyond his/her control, the complainant was unable to comply with the time limit”.
81. ECtHR, *Kokkinakis and others v. Greece*, 25 May 1993, Series A no. 260-A and Resolution ResDH (97) 576 of 15 December 1997 concerning the new interpretation of Greek legislation on proselytism. See also Resolution ResDH (2001) 1 of 26 February 2001 in the *News Verlags GmbH and CoKG v. Austria* case concerning copyright.
82. See the departure from existing precedent by the French Court of Cassation following the *Kruslin* and *Huvig* judgments on 24 April 1990 concerning telephone tapping, pursuant to a recommendation of the Ministry of Justice (circular of 27 April 1990, cited in RUDH, 1990, pp. 221-222). More recently, see Final Resolution ResDH (2001) 68 of 26 June 2001 in the case of *Savic v. the Slovak Republic*.
83. See, for example, Law 2915/2001 on acceleration of civil proceedings in Greece, and CM/ResDH (2007) 81 of 20 June 2007 concerning the case of *Yagtzilar and others v. Greece*.



Reforms have taken place in new member states to extend the legal remedies available and abolish powers to set aside final court decisions at any time.⁸⁴ The substantive rights of minority groups (prisoners, the mentally ill, children born out of wedlock, etc.) have also seen significant reforms, as have media regulations in some countries.⁸⁵ Remarkably, the Cypriot law of February 2006, passed in response to the *Aziz* judgment, gives effect to the right to vote and stand for election in parliamentary, municipal and community elections of Cypriot nationals of Turkish origin habitually residing in the Republic of Cyprus, hitherto victims of a discriminatory policy.⁸⁶

States have nonetheless been slow in bringing their domestic law into line with the Convention, above all because the conclusions to be drawn from judgments have not been properly evaluated or because of reluctance that may or may not follow a change in government. In this respect it is essential for the Court's judgments to be clear. The Court sometimes plainly tells a state that legislation must be amended if a judgment is to be enforced.⁸⁷ Much more frequently, states provide information to the Committee of Ministers on the need to adopt general measures, or the Committee will implement this finding of its own accord. Amendments of the Constitution have proved necessary, as the European Court has clearly stated: the Convention "makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member states'

84. For example, CM/ResDH (2007) 94 of 20 June 2007 concerning *Vasilescu v. Romania*. See also CM/ResDH (2007) 90 of 20 June 2007 concerning *Brumarescu* and 30 other cases against Romania (2004 legislative reform whereby it is no longer possible to set aside final court decisions establishing the right to have nationalised property returned).

85. See, for example, the Austrian Parliament's 2005 amendment to the Media Act: CM/ResDH (2007) 76 of 20 June 2007 concerning the case of *A.T. v. Austria*.

86. CM/ResDH (2007) 77 of 20 June 2007.

87. ECtHR, Second Section, *Tan v. Turkey*, 3 July 2007: having found that no compensation should be awarded to the applicant, the Court stated: "The findings of the Court in themselves imply that the violation of the applicant's right as guaranteed by Article 8 of the Convention originates in a problem arising out of Turkish legislation on monitoring of correspondence. Furthermore, the Court has already established the existence of a violation similar to that found in the present case Accordingly, it holds that an appropriate manner of putting an end to the violation found would be to bring the relevant domestic law into line with Article 8 of the Convention." [Provisional translation]



‘jurisdiction’ from scrutiny under the Convention”.⁸⁸ This has been accepted in practice,⁸⁹ although this requirement may give rise to certain difficulties, especially where popular approval by referendum is required.⁹⁰

The case-law of the European Court is thus an important means of achieving some degree of harmonisation of the legislation of different countries. In addition, European case-law should prompt members of parliament to consider at the drafting stage whether their proposed legislation is compatible with the Convention with a view to avoiding subsequent challenges; such a development would parallel that entailed by the establishment in European democracies of Constitutional Courts, which have prompted members of parliament to evaluate the constitutionality of the draft legislation before them. Furthermore, Recommendation Rec (2004) 5 of the Committee of Ministers on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the Convention asks states to “ensure that there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the Convention in the light of the case-law of the Court” and to “ensure the adaptation, as quickly as possible, of laws and administrative practice in order to prevent violations of the Convention”.

Other measures

Other general measures include a method to which the Committee of Ministers has been wedded from the outset, namely the translation of judgments and their dissemination to national authorities,⁹¹ and even the translation of interim resolutions of the Committee of Ministers into the language of the country concerned. Violations of the Convention and of

88. ECtHR, *United Communist Party of Turkey and others v. Turkey*, 30 January 1998, §§29 and 30.

89. For example, the constitutional amendments following the judgment of 27 August 1991 in *Demicoli v. Malta*, Series A no. 210 and Resolution DH (95) 211 of 11 September 1995, and the judgment of 23 October 1995 in *Paloro v. Austria*, Series A no. 329-B, and Resolution DH (96) 150 of 15 May 1996.

90. The problem might have arisen in Ireland: following the *Open Door and Dublin Well Woman v. Ireland* judgment of 29 October 1992, Series A no. 246-A, and Resolution DH (96) 368, the people approved a constitutional amendment.



the case-law of the European Court are the result not so much of disinclination on the part of national authorities to honour their international obligations as of ignorance of European requirements, in particular on the part of administrative authorities. Mention should also be made under this head of general measures of a practical nature, such as the construction of prisons,⁹² the recruitment of judges, and the training of police officers⁹³ and other categories of staff.⁹⁴

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91. For example, Resolution ResDH (2001) 164 of 17 December 2001 in the case of *Coëme and others v. Belgium*, where the government, describing the measures taken in consequence of the judgment, states that “the Court’s judgment in French, as well as a translation in Dutch and in German, had been published on the Internet site of the Belgian Ministry of Justice and sent out to the authorities directly concerned”.
 92. CM/ResDH (2007) 32 of 20 April 2007 in the case of *Alver v. Estonia*, in which a violation of Article 3 was found for inhuman and degrading treatment during detention on remand. The government announced the closure of Tallinn Central Prison, together with a complex programme to build new detention centres or extensively renovate existing ones.
 93. Resolution DH (99) 465 of 15 July 1999 in the case of *Mavronichis v. Cyprus*, where the government states that the number of administrative staff in the courts has been increased, that a new district court is being built in Limassol and that studies are being carried out for the construction of new premises for the Supreme Court in Nicosia.
 94. CM/ResDH (2007) 34 of 20 April 2007 in the case of *K.A. v. Finland* (violation of Article 8 following the authorities’ failure to take adequate measures to reunite the applicants with their children), concerning the training of social workers in child welfare issues.



Supervision of the execution of judgments

According to the Convention, supervision of the execution of judgments is a matter for the Committee of Ministers alone. As the Committee of Ministers is composed of one representative of each State Party, and having regard to the principle that the Convention system establishes a mechanism of joint responsibility, a state has to justify itself before all the other states (especially where there is excessive delay in executing the judgment) and not merely to respond to requests for information from the Secretariat of the Committee. This arrangement has in reality become much more complex: the European Court has come to play a greater part in the process of supervising execution. However, it is above all the Parliamentary Assembly of the Council of Europe which, of its own motion, has imposed on the Committee of Ministers an increasingly institutionalised right of inspection. It should nonetheless be noted that societal authorities, and more particularly the victim (or the victim's representative), play no part in this arrangement, being absent from the meetings of the Committee of Ministers. The execution of the judgment is therefore outside the control of the applicant (interstate applications are virtually non-existent). It must nevertheless be added that NGOs, national institutions and applicants are able to make documents available to the Committee of Ministers, which may be similar to the actual oral arguments and may provide a starting point for consideration by the Department for the Execution of Judgments.⁹⁵

The author will examine in turn the roles played by the Committee of Ministers, the European Court and the Parliamentary Assembly.

95. Under Rules 9.1 and 9.2 adopted in 2006 by the Committee of Ministers (see Appendix, p. 75). National authorities are also able to appear before the Committee of Ministers at the request of the Permanent Representative.



The Committee of Ministers

The Committee of Ministers plays and continues to play (since the amendment of Protocol No. 11 this has become its sole task) a key role in the execution of judgments. It is the organ which both provides the impetus for and supervises proper execution of European judgments.

The supervision procedure

Rules of general organisation

Under the Rules adopted by the Committee of Ministers for application of Article 46 §2,⁹⁶ supervision of execution of the Court's judgments takes place, in principle, at special human rights meetings, the agendas of which are public. As soon as a judgment is transmitted to the Committee of Ministers it is put on the agenda and the Committee invites the respondent state to inform it of the measures taken in consequence of the judgment. The case is then, in principle, placed on the agenda of the Committee's next meeting, or of a meeting taking place no more than six months later, until a final resolution is adopted. Rule 17 reads:

After having established that the High Contracting Party concerned has taken all the necessary measures to abide by the judgment or that the terms of the friendly settlement have been executed,⁹⁷ the Committee of Ministers shall adopt a resolution concluding that its functions ... have been exercised.⁹⁸

The operating rules of the Committee have changed over the past 10 years or so to ensure that its work in supervising the execution of judgments is more transparent: the agenda and the information provided to

96. Rules as revised on 10 May 2006 (see text reproduced in Appendix, p. 71).

97. For a recent example, see CM/ResDH (2007) 71 in the case of *Erdemli v. Turkey* following deprivation of the right to a fair trial (the applicant not having been assisted by a lawyer during his questioning by the police, the public prosecutor and the magistrate); payment of compensation only was provided for in the friendly settlement. See also CM/ResDH (2007) 72, concerning the *Okatan v. Turkey* judgment (a simple check that just satisfaction had been paid).

98. The resolutions of the Committee of Ministers are published on the Council of Europe's website. The principal resolutions are set out in a document produced for the 50th anniversary of the Convention: Council of Europe, H/Conf (2000) 8, "Control of the execution of judgments and decisions under the European Convention of Human Rights: Application of former Articles 32 and 54 and of Article 46 of the Convention".



the Committee of Ministers by the state concerned, together with the accompanying documents, are made public, as are the agenda and annotated proceedings of each meeting containing information about progress recorded in executing judgments. The deliberations of the Committee of Ministers always remain private, as provided for in Article 21 of the Statute of the Council of Europe.

The rules were amended in 2006, in keeping with the adoption of Protocol No. 14 and to reflect actual practice more effectively and make the Committee's work more transparent. The actual title of the rules has taken account of the fact that supervision now covers execution of friendly settlements.⁹⁹ The rules are divided into four sections: general provisions, supervision of the execution of judgments, supervision of the execution of the terms of friendly settlements, and resolutions. In the first section, the major change is the introduction of Rule 4 on priority treatment of judgments revealing an underlying systemic problem. The second innovation relates to the Committee of Ministers' obligation, under Rule 5, to adopt an annual report on its activities, which "shall be made public and transmitted to the Court and to the Secretary General, the Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe". The second section consists of six rules. Rule 8 on "access to information" adopts the principle that documents provided by a High Contracting Party, the injured party, NGOs or national institutions for the promotion and protection of human rights are in principle made public. Rules 10 and 11 determine when a case arising out of Protocol No. 14 may be referred to the European Court for interpretation of a judgment or for infringement proceedings. In the former case, a referral decision "shall take the form of an interim resolution" and be reasoned; the Committee will be represented before the Court "by its Chair, unless the Committee decides upon another form of representation". As regards infringement proceedings, the decision also takes the form of a reasoned interim resolution, which must be preceded, in principle, by formal notice to the recalci-

99. However, the Committee has always examined the execution of friendly settlements by decisions under the former Article 32.



trant state at least six months beforehand, and the above rules of representation before the Court apply.

The Committee of Ministers receives considerable assistance from its own secretariat and in particular from the Department for the Execution of Judgments, which is responsible for preparing each case file and liaising with the relevant state authorities in respect of each case prior to the Committee's Human Rights meetings as well as advising the Committee, in its role as custodians of the interests of the Convention.

During these meetings, cases are examined by the Committee of Ministers on the following lines: Sections 3.a and 3.b: Supervision of payment of just satisfaction, depending on whether the deadline for payment expired more or less than 6 months previously; Section 3.c: Examination of special payment problems; Section 4: Supervision of individual measures (4.1: Supervision of individual measures only; 4.2: Individual measures and/or general problems; 4.3: Special problems); Section 5: Supervision of general measures already announced (5.1: Legislative and/or regulatory changes; 5.2: Changes of courts' case-law or of administrative practice; 5.3: Publication/dissemination; 5.4: Other measures). It may be noted, by way of example, that at its October 2006 meeting the Committee supervised payment of just satisfaction in 855 cases, adoption of other individual measures in 127 cases or groups of cases and adoption of general measures to prevent further violations in 186 cases or groups of cases. Questions associated with non-payment of just satisfaction thus create a significant backlog for the Committee, even though they are less complex and faster to examine than the other measures.

On 24 November 2006, the Committee of Ministers produced a report on the follow up to the implementation of new working methods¹⁰⁰. Human Rights meetings are devoted principally to substantive discussion of cases considered to be a priority. States' preparation for these meetings

100. CM/Inf/DH (2006) 9 revised 3, 24 November 2006, "Working methods for supervision of the execution of the European Court of Human Rights' judgments. Follow-up to the implementation of the working methods since their introduction in April 2004 and proposals for further improvement".



has been facilitated by a new order of business and preliminary lists of items by country, as well as the inclusion of individualised draft decisions in annotated agendas. The initial phase of the execution of judgments is being improved, with the state being required, once a judgment has been delivered, and no later than six months from that date, to submit an action plan, to be discussed by the Committee at the first or second meeting after the expiry of this six-month deadline. Furthermore, since October 2006, the CDDH Secretariat has been liaising with the Execution Department to discuss preparation of a vade-mecum regarding existing practices. A database (CMIS) has been under development since December 2004.

Supervision of the adoption of all measures needed to comply with the judgment of the European Court

Although the Committee of Ministers' initial practice was relatively timorous, supervision has now become quite rigorous.

The Committee of Ministers ascertains that just satisfaction has been paid, together with any default interest: it requires written proof of payment of the sum to the applicant and may check with the defence that the sum owed by the state has been paid. The Committee of Ministers nevertheless has a fairly flexible position as regards the practice of offsetting under domestic law the sums payable to the victim by the state against the sums which the victim may owe – a position consistent with the liberal interpretation of the European Court itself.¹⁰¹ Although this rule may appear to be the corollary of the principle of subsidiarity, it is nevertheless the author's view that such a set-off should be allowed only when it is the state that is the victim's creditor. Furthermore, even before the Court imposes default interest on the just satisfaction, the Committee of Ministers has required that the sum actually paid by states make full reparation for the harm sustained. That was the position in the case of *Stran Greek Refineries and Stratis Andreadis*.¹⁰² As regards the default interest payable

101. ECtHR, *Alenet de Ribemont v. France* (interpretation of the judgment of 10 February 1995), 7 August 1996.



outside the three-month period, current practice is, at present, lacking transparency,¹⁰³ as in the specific example of cases where individuals have waived their right to interest in view of the small amounts involved.¹⁰⁴ If payment of just satisfaction alone is required under Article 46, the Committee of Ministers expressly states, in principle, that “no other measure was required in the present case to conform to the Court’s judgment.”¹⁰⁵

In addition to payment of just satisfaction, the Committee of Ministers requires the adoption of individual non-pecuniary measures in accordance with the obligation to achieve *restitutio in integrum*. It encourages states to reopen proceedings where possible,¹⁰⁶ to reinstate aliens who have been unlawfully expelled in contravention of Article 8 of the Convention, and to adopt other necessary measures, such as removal of a conviction from the applicant’s criminal record.

The Committee now requires a government to provide evidence that it has adopted all the general measures needed to prevent further violations¹⁰⁷ and has no hesitation in asking a state to take further measures if the situation has not improved.¹⁰⁸ This supervision is also exercised where the parties have reached a friendly settlement and the case before the European Court has accordingly been struck out of the list,¹⁰⁹ and continues to be exercised following the adoption of Protocol No. 11.¹¹⁰ Where a change to legislation appears necessary but the state argues that the

102. The interest rate for compensation was in the region of 6 to 7% of the principal established by the Court. See Resolution DH (97) 184 of 20 March 1997: “stressing Greece’s obligation to safeguard the value of the amounts awarded”, the Committee of Ministers ascertained that the sum paid, “increased in order to provide compensation for the loss of value caused by the delay in payment, [corresponded] to the just satisfaction awarded by the Court”.

103. See, for example, Resolution DH (99) 350 in the case of *Remli v. France* as well as CM/ResDH (2007) 91 of 20 June 2007 concerning *C.C.M.C. v. Romania*: no default interest was due if payment took place within one month of the time-limit set. See also CM/ResDH (2007) 65 of 20 April 2007 concerning the case of *Venot v. France*.

104. For example, Resolution ResDH (2001)1 66 in the case of *De Moucheron and others v. France*.

105. For one of a number of examples, see ECtHR, *Ribeiro Ferreira Ruah No. 1 v. Portugal*, judgment of 16 November 2000 and Resolution ResDH (2001) 104.

106. CM/ResDH (2007) 79 of 20 June 2007 concerning the judgment in *Yvon v. France*, where the Committee considered whether it was necessary to reopen a civil case and concluded that it was not, in the absence of any such demand from the applicant and since the applicant did not appear to have undergone “very serious negative consequences as a result of the violation”.



direct effect of the Convention and of the Court's judgments precludes further violations of a similar kind, the Committee of Ministers now requires proof that this is sufficient: the proof takes the form of convincing court practice for several years following the judgment of the Court. Nevertheless, for reasons of legal certainty, a repeal of non-conventional regulations may prove essential. For example, in the case of *Pauwels v. Belgium*, where a legislative reform was expected, the Committee finally resigned itself, 13 years after the judgment, to adopting a final resolution in the absence of any change to the legislation, relying on existing evidence that the national courts would avoid any comparable new violations.¹¹¹ In such circumstances, dissemination of the judgment, mandatory in all cases, is adequate as a general measure.¹¹²

The adoption of a new legal rule may sometimes come up against major obstacles outside the state's control. For instance, with regard to the 1999 judgment in *Matthews v. the United Kingdom* concerning a breach of

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107. See the wording adopted in resolutions in the late 1990s: "Whereas, during the examination of the case by the Committee of Ministers, the Government ... gave the Committee information about the measures taken to avoid the impending violation as found in the present judgment, this information appears in the appendix to this resolution" (Resolution DH (98) 10 of 18 February 1998, *D v. the United Kingdom*, emphasis added). The present wording is as follows: "Recalling that findings of violations by the Court require, over and above the payment of just satisfaction awarded in the judgment, the adoption by the respondent state, where appropriate, of:
- individual measures to put an end to the violations and erase their consequences so as to achieve as far as possible *restitutio in integrum*; and
 - general measures to prevent similar violations."
108. Resolution DH (97) 336 of 11 July 1997: "Finding that, notwithstanding the adoption of these measures, the number of violations of Article 6, paragraph 1, has not yet decreased; having invited the Government of Italy [at the 585th meeting] to inform the Committee of Ministers of the supplementary measures envisaged in order to remedy this situation ...".
109. Resolution DH (99) 26 of 18 January 1999 in the case of *Sur v. Turkey*.
110. ECtHR, *Freunberger v. Austria*, judgment of 19 December 2000 and Resolution ResDH (2001) 171, which included, under the head of general measures, the repeal of the provisions in the Road Traffic Act which allowed a person to be judged for a second time in respect of facts that had already been the subject of a final judicial decision.
111. See Resolution ResDH (2001) 67 of 26 June 2001 as well as Resolution ResDH (2001) 83 of 23 July 2001 concerning the judgment of 18 December 1996 in *Valsamis v. Greece*: according to the government, "[t]he lack of specific jurisprudence showing this change in the courts' attitude is only due to the very exceptional nature of such complaints". Cf. also Resolution ResDH (2001) 9 of 26 February 2001 concerning the judgment of 25 March 1998 in *Belziuk v. Poland*, and ResDH(2006)55 of 2 November 2006. See also CM/ResDH (2007) 37 of 20 April 2007 concerning the case of *Annoni di Gusola and Deborde and Omer v. France*.



Article 3 of Protocol No. 1 with respect to elections in Gibraltar to the European Parliament, the United Kingdom proposed an amendment to the 1976 European Community Act concerned but was unable to secure unanimous agreement in the Council of the European Union. Consequently, the United Kingdom decided to act unilaterally to enfranchise the Gibraltar electorate by means of United Kingdom domestic legislation: following a law passed in 2003, Gibraltar has been combined with an existing electoral region in England and Wales to form a new electoral region.¹¹³

Given the often lengthy period of time required for adoption of general measures, the Committee has been emphasising, more systematically than in the past, the need to adopt interim measures.¹¹⁴ Dissemination of a judgment and its direct effect in domestic law (the minimum response on the part of a state) are not always enough.¹¹⁵ In Resolution ResDH (2006) 13 of 12 April 2006 concerning actions of police forces in Cyprus, the Committee approved of “the rapid interim measures taken by the Council of Ministers, the Attorney General and the Minister of Justice and Public Order to prevent as far as possible new violations awaiting the entry into force of the comprehensive reforms which had been initiated”.

112. ResDH (2006) 73 of 20 December 2006 concerning a judgment against Liechtenstein in 2005 with regard to the unfairness of certain proceedings before the Administrative Court on account of failure to disclose certain documents to the applicants.

113. ResDH (2006) 57 of 2 November 2006. An interim resolution was adopted in 2001. This provision, whose compatibility with EU law was doubtful, was almost the occasion of an action by the European Commission for non-fulfilment of an obligation.

114. ResDH (2006) 54 of 2 November 2006 concerning a 2004 judgment against Greece.

115. In Resolution ResDH (2006) 2 of 22 February 2006 concerning seven judgments against Austria in 1997, 2000, 2001 and 2002, the Committee deplored the time needed to incorporate the Convention’s requirements in domestic law: with regard to compensation for detention on remand in criminal proceedings, new legislation was introduced in November 2004; according to the appendix (information provided by the government), “In the interim, domestic courts’ compliance with the European Court’s judgments had been ensured by the latter’s wide publication and dissemination and their direct effect in Austrian law.”



Methods of coercion available to the Committee of Ministers

Where the state objects to or delays taking the necessary measures, the Committee of Ministers has two unequal “weapons”: it may adopt interim resolutions or it may threaten to apply Article 8 of the Statute of the Council of Europe.

Adoption of interim resolutions

According to Rule 16 adopted by the Committee of Ministers on the basis of Article 46 §2, “the Committee of Ministers may adopt interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution”.

This practice was introduced with the case of *Ben Yaacoub*¹¹⁶ and has since been repeated, notably in the *Stran Greek Refineries and Stratis Andreadis* case, when Greece disputed the arrangements for payment of just satisfaction. In that case, the Committee of Ministers required the Greek authorities to pay default interest that would guarantee the value of the just satisfaction and was eventually successful.¹¹⁷

Interim resolutions take various forms. The first type of interim resolution consists in taking note that no measures have been adopted and in inviting the state to comply with the judgment;¹¹⁸ this is a simple public, official finding of non-execution. The second type provides the Committee of Ministers with the opportunity to note certain progress and to encourage the state to adopt measures in the future; this allows the Committee to comment directly on possible means of complying with the

116. ECtHR, *Ben Yaacoub v. Belgium*, 27 November 1987, Series A no. 127-A, Interim Resolution DH (88) 13 of 29 September 1988 and Final Resolution DH (92) 58 of 10 November 1992.

117. Interim Resolution DH (96) 251. The Committee of Ministers objected to Greece’s proposal to make five annual payments between 1996 and 2000. Final Resolution DH (97) 184 of 20 March 1997.

118. See, for example, Interim Resolution ResDH (2001) 79 of 26 June 2001 in the case of *Matthews v. the United Kingdom*: “Noting, however, that more than two years after the Court’s judgment, ... no adequate measures have yet been presented with a view to preventing new similar violations in the future; urges the United Kingdom to take the necessary measures to secure the rights ...”.



Court's judgment. This is the most common type of resolution. Mention must be made of the resolution entitled "Action of the security forces in Turkey: measures of a general character" – in which the Committee dissects the measures adopted and their results and makes suggestions as to ways of complying with the judgment¹¹⁹ – and the resolution on action of the security forces in Northern Ireland.¹²⁰ In this way the Committee of Ministers may hope to exert pressure on national parliaments.¹²¹ These types of resolution are also used for interstate cases.¹²² Finally, a third category, used only exceptionally, is designed to threaten a state with more serious measures, owing to the time which has elapsed and the urgency of the situation. The most recent resolution adopted in the case of *Loizidou v. Turkey* comes within this third category.¹²³ In the case of *Ilaşcu and others v. Moldova and the Russian Federation* (Grand Chamber judgment of 8 July 2004),¹²⁴ the fourth Resolution, ResDH (2006) 26 of 10 May 2006, recalls that "the obligation to abide by the judgments of the Court is unconditional and is a requirement for membership of the Council of

119. Resolution DH (99) 434 of 9 June 1999. See also Interim Resolution ResDH (2002) 98 of 10 July 2002, "Action of the security forces in Turkey: progress achieved and outstanding problems".

120. Interim resolution CM/ResDH (2007) 73 of 6 June 2007 concerning *McKerr v. the United Kingdom* and five similar cases.

121. Interim Resolution ResDH (2001) 178 of 5 December 2001 "concerning monitoring of prisoners' correspondence in Italy – measures of a general character". See also CM/ResDH (2007) 74 of 6 June 2007 on excessively lengthy proceedings in Greek administrative courts and the lack of an effective domestic remedy, where the Committee urges the Greek authorities to pass two Bills on acceleration of administrative court proceedings and introduction of an effective domestic remedy.

122. See Interim Resolution ResDH (2007) 25 of 4 April 2007 concerning the judgment of 10 May 2001 in the case of *Cyprus v. Turkey*, in which the Committee "welcomes the progress achieved", allowing the Committee to "also close its examination of the violations established in relation to the issues of education and freedom of religion", and "requests Turkey to rapidly take all the additional measures required to ensure the full and complete execution of the judgment".

123. Interim Resolution ResDH (2001) 80 of 26 June 2001: "Stressing that acceptance of the Convention, including the compulsory jurisdiction of the Court and the binding nature of its judgments, has become a requirement for membership of the Organisation; ... declares the Committee's resolve to ensure, with all means available to the Organisation, Turkey's compliance with its obligations under this judgment; calls upon the authorities of the member states to take such action as they deem appropriate to this end." Following this resolution, the 2003 partnership agreement between Turkey and the European Union introduced the requirement for the respect of the the Court's judgments.



Europe”; furthermore, the Committee declares its “resolve to ensure, with all means available to the Organisation, the compliance by the Russian Federation with its obligations under this judgment” and “calls upon the authorities of the member states to take such action as they deem appropriate to this end”. In response to the latter injunction, a statement was made by the Finnish Delegation on behalf of the European Union and with the support of 14 other countries (including candidates for accession), in which they recalled the requirement to execute the judgment, lamented the effect of this failure to execute judgment on the credibility of the Council of Europe and the European Court of Human Rights and called for the most recent interim resolution to be drawn to the attention of the UN and OSCE. The case has been considered at virtually all the meetings of the Ministers’ Deputies (and not just at Human Rights meetings) since 2004 and has also given rise to action by the Parliamentary Assembly and a statement by the Secretary General of the Council of Europe¹²⁵ – all to no avail. The failure to execute the judgment has led to the case being referred to the European Court again.¹²⁶

It will be noted that, in the absence of detailed provisions in the Convention, the Committee of Ministers is quite free when it comes to using the means at its disposal; it can require a state to present a written report on the measures adopted or even an annual report on the progress achieved, for example in 2000 on the length of legal proceedings in Italy. One new development expressly laid down in the resolutions is that the

124. The judgment called upon the respondent states to “to take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release” (operative part, §22) and stated that continuation of their detention “would necessarily entail a serious prolongation of the violation of Article 5 ... and a breach of the respondent states’ obligation under Article 46 §1 of the Convention to abide by the Court’s judgment”.

125. For a history of the measures relating to supervision of execution in this case, see in particular CM/Notes/983/H46-1, 12 December 2006, and CM/Inf/DH (2006) 17 rev21. See also Press Release 766 (2006) of 8 December 2006: “Thirteen years of illegal detention in the middle of Europe”.

126. *Ivantoc, Popa and others v. Moldova and Russia*, No. 23687/05. This is why the Committee of Ministers decided to suspend the examination of this case: see CM/Res DH (2007) 106 of 12 July 2007.



Committee itself is now able to identify cases in which there exists a *systemic or structural problem*. If the European Court does not actually find any systemic failing, the Committee of Ministers can itself identify such a failing in order to put pressure on a state to execute a judgment more quickly.¹²⁷ In the case of such systemic problems, the Committee demands evidence of a notable lessening of the problem in addition to adoption of general measures; such evidence may be provided by national statistics or the number of similar cases brought before the Court.¹²⁸ However, this evolution is part of the prolongation of the Committee's practice which consists of identifying, with the state, the general measures required according to the terms of the judgment.

In order to remedy the shortcomings of interim resolutions, which take a long time to draft and adopt, it is thus suggested, in a document dated November 2006, that faster and more instructive decisions should replace interim resolutions in certain circumstances, and should be followed by press releases. At the same time, any interim resolutions that are adopted should be more detailed and should be translated by the national authorities concerned.¹²⁹ This practice has taken root in the Committee, which ever more frequently endorses information documents prepared by the secretariat of the Department for the Execution of Judgments in cases where it is necessary to help a state clarify the meas-

127. See, for example, Interim Resolution ResDH (2006) 12 of 28 March 2006, *Metropolitan Church of Bessarabia and others v. Moldova* (judgment of 13 December 2001), Interim Resolution ResDH (2006) 1 of 8 February 2006 concerning the supervisory review procedure (*nadzor*) in civil proceedings in the Russian Federation, and CM/ResDH (2007) 74 of 6 June 2007 on excessively lengthy proceedings in Greek administrative courts and the lack of an effective domestic remedy: "Stressing the importance of rapid adoption of such measures in the cases at issue as they reveal structural problems giving rise to a large number of new, similar violations of the Convention".

128. See CM/ResDH (2007) 84 of 20 June 2007 in *Immobiliare Saffi* and 156 other cases against Italy concerning non-execution of court orders to evict tenants. See also Interim Resolution CM/ResDH (2007) 75 of 6 June 2007 in 44 cases against Poland relating to excessively lengthy detention on remand.

129. CM/Inf/DH (2006) 9 revised 3E, 24 November 2006, "Working methods for supervision of the execution of the European Court of Human Rights' judgments: Follow-up to the implementation of the working methods since their introduction in April 2004 and proposals for further improvement", prepared by the Department for the Execution of Judgments of the European Court of Human Rights, III.2 and III.3.



ures required and/or draw up an action plan.¹³⁰ Such memoranda make it possible to go into much greater detail regarding the action to be taken to execute these judgments and to review the measures already taken, their effects and the work still to be done. The purpose is to help a state make headway with executing judgments, which often necessitate wide-ranging measures. These documents help states to improve the creation of overall action plans and may back up adoption of an interim resolution if a state evidences particular delay or negligence. It is also a matter, above all, of making information, which is usually confined to exchanges between the secretariat and the respondent state, public¹³¹ in order to put pressure on the state concerned to expedite adoption of the necessary measures. These documents can also publicise the good practice of states in which similar cases or problems have arisen. The Committee of Ministers may concurrently take the initiative of convening a special seminar with the authorities in order to facilitate execution in certain cases.¹³²

Application of Article 8 of the Statute of the Council of Europe

Exclusion from the Council of Europe is one response theoretically open to European organs where a state categorically refuses to execute a judgment. Under Article 8 of the Statute, “[a]ny member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.” Per-

130. Among the most recent: CM/Inf/DH (2007) 30, 14 June 2007, “Non-enforcement of domestic judicial decisions in Ukraine: general measures to comply with the European Court’s judgments”; CM/Inf/DH (2006) 19 rev3, 4 June 2007, “Non-enforcement of domestic judicial decisions in Russia: general measures to comply with the European Court’s judgments”; and CM/Inf/DH (2006) 32 revised 2, 12 June 2007, “Violations of the ECHR in the Chechen Republic: Russia’s compliance with the European Court’s judgments”.

131. Thus such documents, originally classified as restricted, were declassified at the 976th Human Rights meeting of Ministers’ Deputies (17 and 18 October 2006).

132. See CM/Inf/DH (2006) 45, 1 December 2006: Round table on non-enforcement of court decisions against the state and its entities in the Russian Federation: remaining problems and solutions required – Conclusions of the Round Table of 30 and 31 October 2006.



sistent failure to execute a judgment could be interpreted as a serious violation of the “principles of the rule of law and of the enjoyment ... of human rights and fundamental freedoms” within the meaning of Article 3 of the Statute. In reality, this measure has never been used. The case of *Loizidou v. Turkey* led the Committee of Ministers officially to brandish the threat of exclusion for the first time, although the threat was implausible. This may be seen from the fact that the Committee here had a tendency to resign its role to the states. Although the interim resolution of 26 June 2001 does not make express reference to Article 8 of the Statute of the Council of Europe, it states that the Committee “[d]eclares [its] resolve to ensure, with all means available to the Organisation, Turkey’s compliance with its obligations under [the] judgment.”¹³³ In particular, the Committee of Ministers “[c]alls upon the authorities of the member states to take such action as they deem appropriate to this end,” thus demonstrating the limits of the Committee of Ministers’ authority to secure the execution of a judgment. The Committee of Ministers must therefore show imagination and propose other interim measures. Eissen suggested “that a moral reprimand be imposed, or even that an attachment order be made in respect of any sums which the Treasury of the Council of Europe may owe to the state concerned.”¹³⁴ Before the issuing of a formal request for withdrawal from the Council of Europe, it could be possible to refuse a seat at the Committee of Ministers. Calling for pressure from other international organisations could also have an effect.¹³⁵

The measures introduced by Protocol No. 14 and available to the Court also broaden the spectrum of possible responses.

133. The previous interim resolution in this case, adopted on 24 July 2000 (Resolution DH (2000) 105), states: “Declares that the refusal of Turkey to execute the judgment of the Court demonstrates a manifest disregard for its international obligations, both as a High Contracting Party to the Convention and as a member state of the Council of Europe”.

134. M.-A. Eissen, “La Cour européenne des Droits de l’Homme : de la Convention au règlement”, *AFDI*, 1959, pp. 618-657, p. 637, note 88. The Venice Commission and the Parliamentary Assembly have also supported this idea.

135. This was the case in *Ilaşcu and others v. Moldova and Russia*.



The European Court of Human Rights

The Court has gradually assumed a more important role in the execution of its judgments and is now a major player.

Supervisory methods traditionally employed by the Court

Supervision by the Court is above all preventive in nature: in spite of the declaratory nature of its judgments and the absence of a power to issue directions, the European Court is now clarifying the scope of its judgments more often. It can thus provide very specific details of the shortcomings of national rules.¹³⁶ The principle that it does not prescribe the means of complying with its judgments is thus largely for the sake of form. The first indications of this related to interference with the right to property, where the Court stated that “the best form of redress would in principle be for the state to return the land”.¹³⁷ In the case of *Papamichalopoulos and others v. Greece*, the Court went one step further, since it offered the state an alternative: either make *restitutio in integrum* or pay compensation for the pecuniary damage within six months.¹³⁸ The requirement for property to be returned also becomes more coercive when it is included in the operative part of the judgment.¹³⁹ In more and more cases the Court is also recommending the reopening of domestic legal proceedings when this is the most appropriate form of redress.¹⁴⁰ The most representative cases here are those in which individuals have been tried by courts that have not met the requirements of independence

136. As in the *Kruslin* and *Huvig* cases, where the judgments provided considerable guidance to the national legislature (*Huvig v. France*, 24 April 1990, Series A no. 176-B, §34, and Resolution DH (92) 40 of 15 June 1992).

137. ECtHR, *Hentrich v. France* (Article 50), 3 July 1995, Series A no. 320.

138. ECtHR, *Papamichalopoulos and others v. Greece*, 31 October 1995, Series A no. 330-B, §38.

139. ECtHR, Third Section, *Raicu v. Romania*, judgment of 19 October 2006: the Court ordered the state to return the flat; failing that, it provided for a specific sum to be paid.

140. ECtHR, Third Section, *Abdullah Altun v. Turkey*, judgment of 19 October 2006, §38 (concerning a violation of Article 6 §1); ECtHR, First Section, *Majdallah v. Italy*, judgment of 19 October 2006 (violation of Article 6, §§1 and 3.d); ECtHR, *Zentar v. France*, judgment of 13 April 2006, §35 (violation of Article 6, §§1 and 3.d). See in particular, ECtHR, *Sejdovic v. Italy* [GC], judgment of 1 March 2006, §126 (right of due process). For administrative cases, see ECtHR, Second Section, *Mehmet and Suna Yigit v. Turkey*, 17 July 2007.



and impartiality.¹⁴¹ But the Court has specified that such reopening of proceedings must be requested by the victim and take place in a court that respects the safeguards of Article 6 §1.¹⁴² In all these cases, this is a recommendation, since the Court refuses to order a state to reopen proceedings at the applicant's request, still less to reform its domestic legislation to include the possibility of reopening proceedings.¹⁴³ However, when such reopening is possible under domestic law, the Court has sometimes recommended this measure, including in the operative part of the judgment, in order to put pressure on the state authorities.¹⁴⁴

Such recommendations have now been extended to general measures, and the pilot judgment procedure has opened the way to more widespread use of the Court's power of recommendation (see below).

Furthermore, the European Court has not made sufficient use of the technique of dissociating the judgment on the merits from the judgment making the award; by this means, it can allow the state time to take the measures executing the judgment and, if these prove unsatisfactory, order just satisfaction. Examples of this method in the past have been quite convincing: particular reference may be made to the case of *Schuler-Zraggen v. Switzerland*. Even though, following an appeal on a point of law, the applicant had been awarded a back-dated invalidity pension, the Court held that, having regard to the time which had elapsed, default interest should also be awarded. It therefore ordered the state to pay a sum representing such interest in its Article 50 judgment.¹⁴⁵

141. ECtHR, *Öcalan v. Turkey* [GC], judgment of 12 May 2005, §210.

142. ECtHR, Third Section, *Duran Sekin v. Turkey*, judgment of 2 February 2006, §45.

143. ECtHR, Second Section, *Hostein v. France*, judgment of 18 July 2006, §49: "As for the applicant's request that a review mechanism for civil proceedings be incorporated into domestic law, the Court recalls that this right, as such, is not secured by the Convention." [Provisional translation]

144. ECtHR, Third Section, *Lungoci v. Romania*, judgment of 26 January 2006: "Holds a) that the respondent state shall, if the applicant so desires, ensure that the proceedings are reopened within six months from the date on which the judgment becomes final, under Article 44 §2 of the Convention, and that it shall at the same time pay her the sum of 5 000 (five thousand) euros for non-pecuniary damage, plus any tax that may be chargeable, to be converted into Romanian lei at the rate applicable on the date of payment". [Provisional translation]

145. ECtHR, *Schuler-Zraggen v. Switzerland*, 31 January 1995, Series A no. 305-B. See also, ECtHR, *Pressos Compania Naviera SA and others v. Belgium* (Article 50), 3 July 1997, §§11 and 17, and ECtHR, *Barberà, Messegué and Jabardo v. Spain* (Article 50), 13 June 1994, Series A no. 285-C.



The new “pilot case” procedure

The introduction of the “pilot case” procedure is an extension of the Court’s practice of making recommendations. It only concerns a limited number of cases; in the most complex or serious cases, given that one judgment is not enough to clarify the different facets of the problem and the choice of measures available to redress the situation, the pilot case procedure has not been set in motion.¹⁴⁶ Of the cases for which the Committee of Ministers supervises the adoption of general measures, 95% are not pilot cases. The case of *Broniowski v. Poland* was the first illustration of this method;¹⁴⁷ the Court specified the general measures to be adopted and decided to freeze examination of similar cases pending adoption of a domestic means of redress. In this case, the Grand Chamber held that the question of compensation under Article 41 was not ready for decision, a technique which allowed pressure to be put on the state and any remaining damage not compensated for at domestic level to be better assessed. According to the Grand Chamber judgment of 28 September 2005 endorsing the friendly settlement, this was a logical position consistent with the principle of subsidiarity in the European system and giving the state the option of adopting the requisite individual (pecuniary and/or non-pecuniary) measures at the same time as general measures.¹⁴⁸ However, the Court does not always have the means to assess the effectiveness of domestic measures. In its judgment of 1 March 2006 in *Sejdovic v. Italy*, the Grand Chamber acknowledged a “defect” in the Italian legal system that prevented a retrial of anyone convicted *in absentia*. Having regard to the subsequent reform of the Italian Code of Criminal Procedure, however, it considered it unnecessary to indicate any general measures,

146. For example in the cases concerning serious abuses by security forces in Turkey, Chechnya and Northern Ireland.

147. ECtHR, Grand Chamber, 22 June 2004. See the author’s article, “La Cour européenne au secours du Comité des Ministres pour une meilleure exécution des arrêts ‘pilote’”, *Revue trimestrielle des droits de l’homme* (61/2005), pp. 203-224. See also L. Garlicki, “*Broniowski* and after: on the dual nature of ‘pilot judgments’”, *Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views*, Kehl, 2007, pp. 177-192; V. Zagrebelsky, “Questions autour de *Broniowski*”, *Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views*, Kehl, 2007, pp. 521-535.



on the grounds that it was too early (in the absence of domestic case-law) to assess whether this reform had met the requirements of the Convention.¹⁴⁹ Taking into consideration the very wide terms of the recommendations made by the Court, and the fact that the Court only acts on the basis of one case, the monitoring that it is able to do remains general in nature and should never lead the Committee of Ministers to close a case automatically.¹⁵⁰

The freezing of pending cases, which allows pressure to put on the state but is not without its drawbacks, was not specifically used subsequently.¹⁵¹ It is true that “freezing of similar cases reduces possibility of having a wider picture of the situation and hence of the measures required”.¹⁵² Yet in its judgment of 22 December 2005 in the case of *Xenides-Arestis* the Court’s Third Section made clear, not least in the operative part, the state’s obligation to “introduce a remedy which secures genuinely effective redress for the Convention violations identified in the [...]

148. ECtHR [GC], *Broniowski v. Poland* (friendly settlement), judgment of 28 September 2005, §36: “It cannot be excluded that even before any, or any adequate, general measures have been adopted by the respondent state in execution of a pilot judgment on the merits (Article 46 of the Convention), the Court would be led to give a judgment striking out the ‘pilot’ application on the basis of a friendly settlement (Articles 37 §1(b) and 39) or awarding just satisfaction to the applicant (Article 41). Nonetheless, in view of the systemic or structural character of the shortcoming at the root of the finding of a violation in a pilot judgment, it is evidently desirable for the effective functioning of the Convention system that individual and general redress should go hand in hand. The respondent state has within its power to take the necessary general and individual measures at the same time and to proceed to a friendly settlement with the applicant on the basis of an agreement incorporating both categories of measures, thereby strengthening the subsidiary character of the Convention system of human rights protection and facilitating the performance of the respective tasks of the Court and the Committee of Ministers under Articles 41 and 46 of the Convention.”

149. ECtHR, Grand Chamber, *Sejdovic v. Italy*, 1 March 2006, §123.

150. This is what happened in the cases of *Broniowski v. Poland* and *Xenides-Arestis v. Turkey*.

151. According to F. Sundberg, “The new approach of ‘freezing’ does, however, create a situation outside the law...”. It “might also, in complex situations, be a hindrance to execution, inasmuch as national authorities might have some difficulty in identifying appropriate measures of execution without more information provided by the Court through its examination of other cases” (“L’effectivité des recours internes suite à des ‘arrêts pilote’”, in G. Cohen-Jonathan, J.F. Flauss and E. Lambert Abdelgawad (eds), *De l’effectivité des recours internes dans l’application de la Convention européenne des Droits de l’Homme*, Bruylant/Nemesis, Droit et Justice, No. 69, 2006, pp. 259-275 and 262-263).

152. CDDH (2007) 011 Addendum 1, Interim Report, 13 April 2007.



judgment in relation to the [...] applicant as well as in respect of all similar applications pending before it, in accordance with the principles for the protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 and in line with its admissibility decision of 14 March 2005". The most surprising aspect of this case is that the Court required this remedy to be "available within three months from the date on which the [...] judgment [was] delivered" and stipulated that "redress should be afforded three months thereafter" (§40). This obligation was confirmed by the fact that the government had to provide the Court with "details of the remedy and its availability" ("within three months from the date on which the judgment [was] delivered") and "to submit information concerning the redress three months thereafter", as ordered in the operative part.¹⁵³ In a recent case where the "pilot case" procedure was not used, the Court, in the operative part of its judgment, nevertheless ordered the state, within three months, either to amend the legislation on transsexuals or, failing that, to pay a sum of money.¹⁵⁴ As regards indication of general measures, in the case of *Hutten-Czapska v. Poland*¹⁵⁵ the Court, whilst remaining fairly vague in its statements (owing to the difficulties inherent in identifying appropriate general measures and the principle that the state is free to choose the means it uses to discharge its obligations), expressly approved "the measures indicated by the Constitutional Court

153. See the press release issued by the Registrar on 12 December 2007 on the resolution of the "Bug River Cases", announcing the striking out of 40 Polish cases from the Court's list of cases following the implementation of an effective compensation scheme. In January 2008 the Court was to examine the possibility of striking out the rest of these cases (about 230 applications).

154. Second Section, *L v. Lithuania*, 11 September 2007, "5. Holds, by 5 votes to 2, that the respondent state, in order to meet the applicant's claim for pecuniary damage, is to adopt the required subsidiary legislation to Article 2.27 of its Civil Code on the gender-reassignment of transsexuals, within three months of the present judgment becoming final, in accordance with Article 44 §2 of the Convention; 6. Holds, by 6 votes to 1, alternatively, that should those legislative measures prove impossible to adopt within three months of the present judgment becoming final, in accordance with Article 44 §2 of the Convention, the respondent state is to pay the applicant EUR 40 000 (forty thousand euros) in respect of pecuniary damage." This case demonstrated the Court's capacity to deal with questions on general measures as part of a decision on just satisfaction.

155. ECtHR, Grand Chamber, 19 June 2006, §239.



in its June 2005 Recommendations, setting out the features of a mechanism balancing the rights of landlords and tenants and criteria for what might be considered a 'basic rent', 'economically justified rent' or 'decent profit'. A systemic problem was also identified and the state ordered to adopt general measures in the judgment's operative part, as had previously happened in the cases of *Broniowski*, *Lukenda* and *Xenides-Arestis*. Occasionally, general measures may be defined more precisely.¹⁵⁶

The Group of Wise Persons, for its part, has also declared itself satisfied with the Court's "pilot judgment" procedure whilst calling for time-limits that are subject to supervision to be laid down (§ 105).¹⁵⁷

This method is useful for compelling states to adopt effective domestic remedies (with retroactive effect, moreover), which the Committee of Ministers was hitherto able to do only through its supervisory role.

The judgments of 10 November 2005 in *Tekin Yildiz v. Turkey* (Third Section) and of 8 June 2006 in *Sürmeli v. Germany* (Grand Chamber) show that this policy is being applied more widely even when there are no large-scale problems that might generate a rash of cases. Admittedly, this is not

156. ECtHR, Fourth Section, *Scordino v. Italy (No. 3) (just satisfaction)*, 6 March 2007, §16. "It considers that the state should, above all, take measures to prevent any cases of illegal occupation of land, whether it has been expropriated without title from the outset or whether expropriation was originally authorised and became without title subsequently. Accordingly, it would be conceivable to authorise expropriation only once it has been established that the expropriation proposal and decisions have been adopted in compliance with the rules prescribed and are accompanied by a budget line able to guarantee prompt and adequate compensation for those concerned (for the principles applicable to compensation for lawful expropriation, see *Scordino v. Italy (No. 1)* [GC], no. 36813/97, §§93-98, ECtHR 2006-). In addition, the respondent state should discourage practices that do not comply with the rules on lawful expropriation by enacting provisions to act as a deterrent and by establishing the liability of those who engage in such practices. In all cases where land has already been expropriated without title and has been transformed in the absence of an expropriation order, the Court considers that the respondent state should eliminate the legal obstacles that systematically prevent, as a matter of principle, the restitution of land. Where restitution of land proves impossible for good reasons in a particular case, the respondent state should ensure payment of a sum corresponding to the value of restitution in kind. The state should also take appropriate steps from a budgetary perspective to award damages, if need be, for losses sustained which would not be covered by restitution in kind or the sum paid in lieu (paragraphs 25-39 below)." [Provisional translation]

157. CM (2006) 203, 15 November 2006.



new in the Court's case-law; we can find examples, even in the relatively distant past, where the Court expressed an opinion on a draft law or more directly helped a state to determine the measures to be adopted. However, what was an exception in the past¹⁵⁸ would today seem to have become part of a more systematic policy.¹⁵⁹

The Court's new policy has not been without its critics, since it is not expressly enshrined in the Convention. In the Grand Chamber case of *Hutten-Czapska v. Poland*, Judge Zagrebelsky, who did not dispute the *erga omnes* effects of the European Court's judgments, was concerned that the "pilot judgment" method might upset the balance between the Court and the Committee of Ministers and make the mistake of shifting the Court on to the political terrain (particularly in the case in question, which involved a general measure that entailed an overhaul of property rights).¹⁶⁰ The Italian Government's position before the Grand Chamber in the *Sejdovic* case is also worth mentioning, as it might well be shared by other countries. By this line of reasoning (§§115-118): "they were not opposed in principle to the Court's giving fairly detailed indications of the general measures to be taken. However, the new practice pursued by the Court ran the risk of nullifying the principle that states were free to choose the means of executing judgments. It also ran counter to the spirit of the Convention and lacked a clear legal basis." According to the Italian Government, this interpretation was confirmed by Protocol No. 14 and a literal reading of the Committee of Ministers resolution.¹⁶¹ The government added that "[i]n any event, if the practice of indicating general measures

158. We should nevertheless note the Court's habitual caution in the *Tekin Yildiz* case, where it stated that its indications concerning general measures were "exceptional" (§91).

159. For a defence of the Court's new policy, see P. Leach, "Beyond the Bug River – A New Dawn for Redress before the European Court of Human Rights?," (2005) *EHRLR* 2, pp. 148-164.

160. Grand Chamber, 19 June 2006. See the answer given by Judge Zupančič in his individual opinion on the same case: "In order to respect the spirit of the Convention, we may take these political hesitations seriously and ask the next question. Is it better for Poland to be condemned in this Court 80 000 times and to pay all the costs and expenses incurred in 80 000 cases, or is it better to say to the country concerned: 'Look, you have a serious problem on your hands and we would prefer you to resolve it at home...! If it helps, these are what we think you should take into account as the minimum standards in resolving this problem...?' Which one of the two solutions is more respectful of national sovereignty?"



were to be continued, it should at least become institutionalised in the Rules of Court or in the questions which the Court put to the parties, so that the parties could submit observations on whether a violation was ‘systemic’.¹⁶¹ Some states have objected to these indications by the Court once they move outside the scope of “pilot case” procedures¹⁶² given that the Court has itself stated, since the *Broniowski* case, that such indication of measures was an exception and related to the existence of large-scale systemic problems. It is essential to underline that this procedure is a tool used by the Court at the service of the Committee of Ministers and states for the better execution of certain cases. It never modifies the obligation of national authorities to adopt general measures following a judgment.

Innovations introduced by Protocol No. 14

Protocol No. 14 has given the Committee of Ministers two new remedies before the Court in Strasbourg. The Court will thus come to the assistance of the Committee of Ministers in the event of problems in interpreting the scope of a judgment or if a state fails to execute it.

161. ECtHR, *Sedjovic v. Italy*, Grand Chamber, 1 March 2006, “In the Government’s submission, this distribution of powers was confirmed by Article 16 of Protocol No. 14, which, in amending Article 46 of the Convention, introduced two new remedies: a request for interpretation and infringement proceedings. According to the explanatory report, the aim of the first of these was ‘to enable the Court to give an interpretation of a judgment, not to pronounce on the measures taken by a High Contracting Party to comply with that judgment’. As regards the second, it was stated that where the Court found a violation, it should refer the case to the Committee of Ministers ‘for consideration of the measures to be taken’. Lastly, in Resolution Res (2004) 3 the Committee of Ministers had invited the Court to identify any underlying systemic problems in its judgments, but not to indicate appropriate solutions as well. The distribution of powers between the Committee of Ministers and the Court as envisaged by the drafters of the Convention had therefore not been altered.”

162. ECtHR, Fourth Section, *Johansson v. Finland*, 6 September 2007, where the Court did not reply to the government but reminded it of its obligation to adapt its domestic law to the requirements of the Convention. See also the partly dissenting opinion of Judge Fura-Sandström in *L v. Lithuania*, Second Section, judgment of 11 September 2007; the judge held that the Court’s order to the state in the operative part of the judgment to amend legislation on transsexuals within three months was groundless in the absence of a systemic problem.



Referral to the Court in the event of a “problem of interpretation” concerning a judgment

According to the new Article 46 §3,¹⁶³ this further referral is calculated to deal with a phenomenon that has been clearly identified by legal opinion and Council of Europe organs: the lack of clarity in a judgment is sometimes detrimental to its prompt and proper execution.

It is worth looking at the background to the preparation of this new provision in order to gain a clearer understanding of its actual scope. For fear of challenging the quality of the judges’ work and the separation of duties between the Committee and the Court, it was simply a question, at first, of the Committee of Ministers’ “informing” the Court of problems,¹⁶⁴ and consequently no amendment to the Convention was required. Furthermore, for fear that the Court might drift towards indicating the means of executing its judgments, considerable reservations on this subject were expressed by the Evaluation Group to the Committee of Ministers on the European Court,¹⁶⁵ by the President of the Court¹⁶⁶ and by the CDDH in its Opinion concerning Recommendation 1477 (2000) of the Parliamentary Assembly on the execution of judgments of the Court, adopted in November 2001. The Venice Commission, in its Opinion No. 209/2002, considered that it might be advisable to encourage the Court to indicate the means of executing its judgments: this procedure would “be preferable over the creation of the power of the Committee of Ministers to ask for formal clarification as suggested by the Parliamentary Assembly” (para. 61).

163. “If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.”

164. See CDDH-GDR (2001) 010, 15 June 2001, Activity Report, Appendix I, Second meeting, April 2001, Item 5. Suggestion A.iii.3 is headed, “Informing the Court of the execution of judgments”: (para. 27) “The aim was not to give the Committee of Ministers authority over the work of the Court, but to inform the Court of the difficulties which could arise with certain of its judgments during the execution stage.”

165. EG Court (2001) 1, 27 September 2001, “Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights”, §49.

166. CDL-AD (2002) 34, 18 December 2002, Opinion No. 209/2002, §6.



It is therefore hardly surprising to find that the final outcome is rather meagre and akin to the traditional interpretation procedure with which we are already familiar. A case can be referred to the Court only by the Committee of Ministers – and not by the applicant or respondent state – with a two thirds majority, which, according to the explanatory report, should result in the Committee of Ministers “us[ing] this possibility sparingly, to avoid overburdening the Court”. No time-limit is set, a fact confirmed by the explanatory report, since the need for interpretation may in fact arise long after the date on which the judgment was delivered. This procedure should thus be confined to fairly isolated cases where the Court has not had an opportunity to clarify its case-law through a subsequent judgment or has not indicated the general measures to be taken in view of its new “policy” since the *Broniowski* case.

Referral to the Court for a state’s failure to execute a judgment

At Strasbourg, infringement proceedings have been recognised only very recently and are subject to a different approach from that taken at EU level. Historically, in the absence of express provisions giving it jurisdiction to this effect, the Court has always refused to find a state in breach of Article 46 of the Convention. While the Court hinted at the problem in *Olsson v. Sweden*,¹⁶⁷ in the case of *Mehemi (No. 2)* it clearly declined jurisdiction.¹⁶⁸ It is true – and this is what explains the different positions of the two European courts – that because cases can be referred to the Strasbourg Court by other individuals on the same grounds as those on which a previous and as yet unexecuted judgment against the same respondent state was delivered, infringement proceedings already exist after a fashion. The difference, however, is that the Court is able to find only that there has been a breach of the primary obligation. Given the most recent developments concerning Article 46, it is pertinent to ask whether the position in the *Mehemi* case (No. 2) is still valid.

167. *Olsson v. Sweden (No. 2)*: “In these circumstances, no separate issue arises under Article 53” (27 November 1992, A-250, §94).

168. Third Section, *Mehemi v. France*, 10 April 2003. Admittedly, its submissions were minimal, since it merely referred to a Commission “precedent”.



Infringement proceedings were eventually introduced by the new Article 46 as reworded by Protocol No. 14, which has not yet entered into force. It is, moreover, considered to be the most striking provision of the reform and the most “important” according to the explanatory report. Under the future Article 46 §4: “If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.” Paragraph 5 adds: “If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.” It is true that the Committee of Ministers has had a fairly limited arsenal when faced with resistance from certain states and that, as stated in the explanatory report to Protocol No. 14, there are no intermediate measures between light weapons (such as interim resolutions) and the heavy artillery of Articles 3 and 8 of the Statute of the Council of Europe, which cannot be used. Might infringement proceedings represent an effective middle course?

As is also the case in the European Union, the procedure is entirely in the hands of a political body, the Committee of Ministers, which is responsible for supervising execution and is therefore best placed to determine whether there is a continuing infringement. The decision will be taken in the form of a reasoned interim resolution, which must in principle be preceded, at least six months beforehand, by a notice to comply served on the recalcitrant state. The Committee will be represented before the Court “by its Chair unless the Committee decides upon another form of representation”.¹⁶⁹ Such proceedings are not open to victims (applicants), who may refer their cases to the Court afresh to establish a continued violation

169. Committee of Ministers, Rule 11, *op. cit.*, May 2006.



of their rights owing to failure to execute a previous judgment in their favour,¹⁷⁰ since it was felt that there would be a considerable risk of abuse on their part. Nor is referral open to the respondent state or any other state, in keeping with the collective guarantee principle, which, in practice, is difficult to operate. Thus the purpose is clearly to support the Committee of Ministers in the event of persistent opposition from a state. The solemnity of the event is marked by the fact that the Court sits as the Grand Chamber. The proceedings culminate in a judgment by the Court, which is intended, as the explanatory report clearly explains (§99), not “to reopen the question of violation, already decided in the Court’s first judgment” but to rule whether the state has taken the measures required by the judgment that found the violation.

Certain problems can be anticipated even before Protocol No. 14 enters into force. How will the Court be able to rule on this matter when it still refuses to consider the consequences of its judgments and holds that it has no means of knowing how a state should set about executing a judgment in a particular case? In all probability, the Court will take the opinion of the Committee of Ministers and endorse it. At EU level, although the Court of Justice of the European Communities has held that the Commission is not obliged to indicate the means to end an infringement, it is undeniable that the latter often does so in practice. The same should apply to the Committee of Ministers, with both organs having to prove that a state has not complied with a judgment. Moreover, what can we expect of infringement proceedings, given that the Court made no secret of its categorical opposition to these during the drafting process? Indeed, the Court holds that such infringement proceedings raise both legal and practical issues:

As regards the legal issues, the status of the procedure is not entirely clear. What would be the procedural rights of the respondent state? What form would the decision finding a violation take? Who would

170. The judgments in *Mehemi (No. 2) v. France* (Third Section, 10 April 2003), *Wynne (No. 2) v. the United Kingdom* (Third Section, 16 October 2003) and *Slimane-Kaïd (No. 2) v. France* (First Section, 27 November 2003) are obvious examples.



represent the Committee of Ministers before the Court? What would be the basis for making a finding of violation? Would this not raise questions of interpretation of the initial judgment? Would this not confuse the existing clear distinction between the political/executive branch of the Council of Europe and its judicial branch?

In practical terms, there might be difficulties in establishing the relevant facts. In the rare cases of refusal to comply as a matter of principle as opposed to undue delays in the legislative process, would it actually make a difference? Would the necessary two-thirds majority be achievable?¹⁷¹

The effects of a judgment finding a failure to comply may also raise problems: either the Court finds such a failure and the case returns (almost exactly as before) to the Committee of Ministers, or else the Court finds that there has been no such failure, and this obliges the Committee of Ministers to close the case. This unqualified consequence may create difficulties, since non-compliance may relate to only one of the three aspects (payment, individual measures and general measures). It would have been preferable to make provision for the Committee of Ministers to continue its supervision whilst taking account of the Court's findings. There is no guarantee that the Court will appreciate the complexity of the Committee's supervision procedure – with regard to length-of-proceedings cases, for example. A sudden interruption of the supervision process may be extremely problematic. The use of this method by the Committee of Ministers is therefore not without its risks.¹⁷²

However, as in the European Union, the preventive effect of such proceedings is undeniable and is their major advantage: specific mention is made of it in the explanatory report moreover.¹⁷³ States are always afraid of such proceedings, especially as referral to the Court must be preceded by formal notice to comply served on the state by the Committee.

171. CDDH-GDR (2004)001, §§29 and 30.

172. See also, in the same vein, L.-A. Sicilianos, "La 'réforme de la réforme' du système de protection de la Convention européenne des Droits de l'Homme", *AFDI*, 2003, p. 611 *et seq.*, p. 638.

173. Paragraph 100.



Another possible preventive effect, although less certain, might be achieved if the Strasbourg Court were encouraged to indicate more often and more systematically in its judgments that a previous judgment had not been executed by the state concerned, or not in its entirety, or within the prescribed time-limits; this would satisfy a demand by the Venice Commission and the Parliamentary Assembly of the Council of Europe that was not taken into account.¹⁷⁴

The Committee of Ministers is now also supported by the Parliamentary Assembly in its task of supervising the execution of judgments.

The Parliamentary Assembly

This supervision by the Parliamentary Assembly formally dates from the adoption of Order No. 485 (1993), whereby the Assembly instructed its Committee on Legal Affairs and Human Rights to report to it “when problems arise on the situation of human rights in member states including their compliance with judgments by the European Court”, and from the introduction of a monitoring procedure under Order No. 488 (1993), extended by Order No. 508 (1995) to the honouring of commitments within the Council of Europe by all member states.

The involvement of the Parliamentary Assembly in the task of supervising the execution of judgments is the result of a gradual process and currently takes a number of forms. First, members of the Assembly have no hesitation in using written questions to obtain explanations from the Committee of Ministers concerning the failure to execute certain judgments.¹⁷⁵ The Committee of Ministers is consequently required to provide a written answer. For example, following Written Question No. 378 of 10 September 1998 from certain members of the Assembly asking the Committee to explain the length of time necessary for full execution of all the judgments pending for more than three years without any sign of

174. Opinion No. 209/2002, §7.

175. For example, see Written Question No. 402 from Mr Clerfayt (Doc. 9272) regarding Turkey’s non-compliance with judgments concerning violations of Article 5 of the Convention and the Committee’s reply dated 16 January 2002, Doc. 9327 of 21 January 2002.



being executed, the Committee provided three explanations: the extent of the reforms undertaken, the difficulties encountered by member states in implementing certain reforms (such as constitutional amendments) and the need, in certain specific circumstances, to await the outcome of certain other similar cases pending before the organs of the Convention in order to clarify the requirements of the Convention in the relevant area and to provide guidance for proposed reforms.¹⁷⁶ When oral questions are put by members of the Assembly to the Chair of the Ministers' Deputies at each session, the Committee is frequently called upon to provide an explanation concerning judgments which have not yet been executed.

One of the Assembly's four annual sessions now includes an agenda item on the execution of judgments. In addition to the drafting of a report, the discussion leads to adoption of a recommendation and/or a resolution. With the adoption of Resolution 1226 (2000) on execution of judgments of the European Court of Human Rights, the Assembly decided to hold regular debates about the execution of judgments on the basis of a record of execution that it would keep. Its Committee on Legal Affairs and Human Rights decided to use two criteria when compiling this record: first, the time elapsed since the Court's decision (five years for the first record) and, second, the urgency attaching to implementation of certain decisions. The use of this procedure is based on the principle that only national delegations "have the competence to call their governments to account within their own national parliamentary procedure",¹⁷⁷ in an objective manner, for action taken on a judgment. More generally, the Parliamentary Assembly "again calls upon national delegations to monitor the execution of specific Court judgments concerning their governments through their respective parliaments and to take all necessary steps to ensure their speedy and effective execution".¹⁷⁸

176. See recently CM/AS(2007)Quest487-488 final, 23 March 2007, Written Questions by Mr Austin to the Chair of the Committee of Ministers: a. No. 487: "Conditions of detention for Mr Öcalan"; b. No. 488: "Execution of the judgment of the European Court of Human Rights in the *Öcalan* case".

177. Resolution 1268 (2002), "Implementation of decisions of the European Court of Human Rights", 22 January 2002, §10.



The Assembly also envisages, in cases where states prove more reluctant, asking the minister of justice of the state concerned to give an explanation in person to members of the Parliamentary Assembly. This measure was included in Resolution 1226 (2000) on “Execution of judgments of the European Court of Human Rights”; in that Resolution, the Assembly also decided to “adopt recommendations to the Committee of Ministers, and through it to the relevant states, concerning the execution of certain judgments, if it [noticed] abnormal delays”, to hold an “urgent debate”, if necessary, “if the state in question [had] neglected to execute or deliberately refrained from executing the judgment”, to open a monitoring procedure should a member state refuse to implement a decision of the Court, and even to “envisage, if these measures [failed], making use of other possibilities, in particular those provided for in its own Rules of Procedure and/or of a recommendation to the Committee of Ministers to make use of Article 8 of the Statute”.

Finally, the Parliamentary Assembly has secured a promise from the Committee that a regular formal consultation will take place between the Committee’s Rapporteur Group on Human Rights and the Assembly’s Committee on Legal Affairs and Human Rights,¹⁷⁹ so that the different national delegations can question their governments without delay where the latter fail to fulfil their obligation to execute judgments.

The significance of this involvement lies above all in the ability of members of national parliaments to bring subsequent pressure to bear on the national legislature and executive to adopt the necessary measures, and also in their power to make formal recommendations to the national authorities in charge of policy making. Encouraged by official recognition of its role from the Committee itself,¹⁸⁰ the Assembly has even decided to step up its supervision by adopting a more proactive approach, giving priority to examination of cases which concern major structural problems

178. *Idem*, §11.

179. See reply from the Committee of Ministers to Recommendation 1546 (2002) on implementation of decisions of the European Court of Human Rights (Parliamentary Assembly, first part of 2002 session, adopted texts, and CM/Del/Dec (2002) 781/3.1, §14).



and in which unacceptable delays of implementation have arisen. Its sixth report¹⁸¹ selected a number of cases according to the above criteria, namely judgments “which [had] not been fully implemented more than five years after their delivery” and other judgments “raising important implementation issues, whether individual or general”. National delegations from 13 states¹⁸² were asked to provide information and/or take specific action to implement certain judgments, and the rapporteur visited five of them.¹⁸³ In its concluding remarks, the Parliamentary Assembly lamented the low profile of the Committee of Ministers’ activities and hoped that the situation would be improved by the annual reports provided for in the Committee’s Rules adopted on 10 May 2006 and by the annual tripartite meetings that were to be instituted for the Committee of Ministers, the Parliamentary Assembly and the Commissioner for Human Rights “to promote stronger interaction with regard to the execution of judgments”.¹⁸⁴ The Assembly also stated that “member states should improve, and where necessary set up at both governmental and parliamentary levels, procedures to secure immediate and effective implementation of the Court’s judgments”; to this end, they might be able to avail themselves of financial support from the Council of Europe’s Development Bank, as recommended in the 2005 Summit Action Plan and the Declaration of 19 May 2006 by the Committee of Ministers. The Assembly also provided information on the national good practices that states would be encouraged to adopt within their systems. The Parliamentary

180. Resolution 1516 (2006), 2 October 2006, “Implementation of judgments of the European Court of Human Rights”, §4: “In line with ... the Committee of Ministers Declaration of 19 May 2006 indicating that the Parliamentary Assembly will be associated with the drawing up of a recommendation on the efficient domestic capacity for rapid implementation of the Court’s judgments, the Assembly feels duty-bound to further its involvement in the need to resolve the most important problems of compliance with the Court’s judgments.”

181. Document 11020, 18 September 2006, “Implementation of judgments of the European Court of Human Rights”; rapporteur: Mr Erik Jürgens.

182. Belgium, France, Germany, Greece, Italy, Latvia, Moldova, Poland, Romania, Russian Federation, Turkey, Ukraine and the United Kingdom.

183. Italy, Russian Federation, Turkey, Ukraine and the United Kingdom.

184. Declaration of the Committee of Ministers of 19 May 2006 on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels. See Doc. 11020, §92.



Assembly further specified that it “reserve[d] the right to take appropriate action, notably by making use of Rule 8 of its Rules of Procedure (i.e. challenging the credentials of a national delegation), should the state concerned continuously fail to take all the measures required by a judgment of the Court, or should the national parliament fail to exert the necessary pressure on the government to implement judgments of the Court.”¹⁸⁵

The significance of the Parliamentary Assembly’s involvement lies above all in the public nature of its denunciation; it seeks to make members of the Assembly more accountable for the international commitments of their own governments. In the author’s view, this gradual involvement of the Parliamentary Assembly can only be salutary at this stage, especially as it entails close co-ordination with the Committee of Ministers and complements the latter’s role.

185. See also Recommendation 1764 (2006) of 2 October 2006, “Implementation of judgments of the European Court of Human Rights”.



Limits to the effectiveness of European judgments. Outlook for the provisions governing execution of judgments

Problems

It is important not to overestimate the phenomenon of non-compliance with judgments of international courts. As regards the International Court of Justice, the most comprehensive study to date has shown that “in fact, only the judgment delivered in the *Fisheries Jurisdiction* case was never implemented”.¹⁸⁶ Execution would seem to “depend on states’ political interests rather than fear of sanctions”.¹⁸⁷ In the two European systems, failure to comply with judgments has remained a minority phenomenon, which has not necessarily increased in proportion to the Organisation’s enlargement but which is undoubtedly tolerated less because of this new context. A target of 100% efficient and rapid execution is utopian. More than cases of non-compliance, it is cases of late execution that seem to raise difficulties. The Court of Justice of the European Communities has stated that “measures to comply with a judgment must be initiated immediately and must be completed as soon as possible”.¹⁸⁸

186. A. Azar, *L'exécution des décisions de la Cour Internationale de Justice*, Bruylant, Droit International, Brussels, 2003, p. 291.

187. Foreword by G. Guillaume, summarising the argument of A. Azar, *op. cit.*

188. CJEC, 5 November 1986, *Commission v. Italy*, Case 160/85, ECR 1986, p. 3245; CJEC, 7 March 1996, *Commission v. France*, Case 334/94; CJEC, 4 July 2000, *Commission v. Hellenic Republic*, C-387/97, §82.



The assessment is made case by case, in the light of the measures remaining to be taken by the state when the Court's judgment is delivered.¹⁸⁹ Regarding the Council of Europe, the average time between the Court's delivery of a judgment and its actual execution has almost trebled since the late 1990s.¹⁹⁰ Numerous delays have been recorded even for payment of just satisfaction, for which a time-limit of three months is set.¹⁹¹ Delay in executing judgments is reflected in the constant and exponential increase in the Committee of Ministers' workload; while an average of 800 cases were on the agenda of each of its six Human Rights meetings in 2000,¹⁹² today that figure is over 3 000. The number of cases pending shows the same trend; the total is now more than 6 000.¹⁹³ The number of cases for which final resolutions are submitted has risen accordingly.¹⁹⁴ The qualitative challenge is to ensure that general measures are implemented promptly in order to avoid repetitive cases.¹⁹⁵ This is a major challenge, since any delay in adopting general measures results in new applications to the Court.¹⁹⁶

Systematic refusal by a state to execute a judgment is uncommon. According to the Parliamentary Assembly,

189. See Opinion of Advocate General Mischo dated 12 June 2003, Case 278/01, *Commission v. Spain*.

190. According to statistics provided by the Department for the Execution of Judgments of the European Court of Human Rights. Cited in Footnote 7, CLD-AD (2002) 34, 18 December 2002, Venice Commission, Opinion on the implementation of the judgments of the European Court of Human Rights adopted on 13-14 December 2002 (Opinion No. 209/2002).

191. See CM/Del/OJ/DH (2007) 997 Statistics/Statistiques PUBLIC, 11 July 2007, Annotated Agenda: for cases in which there is no confirmation of payment of the capital sum due for over six months, we may note, among the worst offenders, Romania (26 cases), Ukraine (46 cases), France (63 cases), Italy (67 cases) and Slovenia (110 cases).

192. Figures taken from EG Court (2001) 1, 27 September 2001, "Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights".

193. See CM/Del/OJ/DH (2007) 997 Statistics/Statistiques PUBLIC, 11 July 2007, Annotated Agenda: 5 757 cases at the 987th meeting in February 2007, 5 845 at the 992nd meeting in April 2007, and 6 017 at the 997th meeting in June 2007. The total number of new cases has increased commensurately: 147, 225 and 346 for each of the three meetings respectively.

194. See CM/Del/OJ/DH (2007) 997 Statistics/Statistiques PUBLIC, 11 July 2007, Annotated Agenda: 41, 137 and 274 for the first three meetings in 2007.

195. F. Sundberg, "Le contrôle de l'exécution des arrêts de la Cour européenne des Droits de l'Homme", *Mélanges en hommage au Doyen G. Cohen-Jonathan*, Bruylant, Brussels, 2004, p. 1530, para. 47.



The problems of implementation are at least seven-fold: political reasons; reasons to do with the reforms required; practical reasons relating to national legislative procedures; budgetary reasons; reasons to do with public opinion; judgments drafted in a casuistical or unclear manner; reasons relating to interference with obligations deriving from other institutions.¹⁹⁷

The commonest reasons seem to be those relating to the scale of the reforms required and the cumbersome nature of national legislative procedures. Political difficulties are less common, but, when they do arise, constitute formidable obstacles to the execution of judgments: the interstate case of *Cyprus v. Turkey*,¹⁹⁸ still pending before the Committee of Ministers, is a current example. In such situations, intervention by a variety of players in addition to political pressure is often effective. Thus, in the past, intervention by the European Union has encouraged Turkey to meet its obligations under Article 46 of the Convention, which is also a condition of any future accession.¹⁹⁹ Faced with a very weak political process, the judicial approach has allowed the re-establishment of a climate of confi-

196. In 2002 the Court delivered 844 judgments, some 65% of which related to repetitive cases which would not have arisen had the Court's judgments been executed immediately. See figures provided by F. Tulkens, L. Garlicki and S. Piquet in Appendix 4, "Brèves réflexions sur une nouvelle proposition en matière d'exécution des arrêts de la Cour européenne des Droits de l'Homme", in G. Cohen-Jonathan and C. Pettiti, *La réforme de la Cour européenne des Droits de l'Homme*, Bruylant, Droit et Justice, No. 48, 2003.

197. Resolution 1226 (2000), "Execution of judgments of the European Court of Human Rights". For a breakdown of these reasons and illustrations in each case, see report by E. Jürgens on behalf of the Committee on Legal Affairs and Human Rights, 12 July 2000, Doc. 8808, "Execution of judgments of the European Court of Human Rights". See also the reply from the Committee of Ministers to Written Question No. 378 of 10 September 1998 from some members of the Parliamentary Assembly asking the Committee to explain the length of time necessary for full execution of all the judgments pending for more than three years without any sign of being executed; the Committee provided three explanations (set out on page 56 above): the extent of the reforms undertaken, the difficulties encountered by member states in implementing certain reforms (such as constitutional amendments) and the need, in certain specific circumstances, to await the outcome of certain other similar cases pending before the organs of the European Convention on Human Rights in order to clarify the requirements of the Convention in the relevant area and to provide guidance for proposed reforms.

198. European Court of Human Rights, *Cyprus v. Turkey*, 10 May 2001.



dence and the objective paving of the way for what can be legitimately discussed.

Future remedies

Early in 2001 the Committee of Ministers set up a working group to make proposals for means of guaranteeing the continued effectiveness of the system to protect human rights.²⁰⁰ With regard to improving execution of judgments, the specific problem of repetitive cases had to be resolved in the short or medium term. This has now been achieved with Resolution Res (2004) 3 “on judgments revealing an underlying systemic problem” and the “pilot judgment” procedure since the *Broniowski* judgment.

Moreover, when the Committee as a whole does not succeed in arriving at a favourable outcome in a politically sensitive case, the Chair of the Committee may be invited to establish direct contact with the authorities of the state concerned in order to act as a mediator. The Evaluation Group also suggested, in such a case, designating “one of its members as rapporteur to take the lead in pursuing a dialogue with the respondent state.”²⁰¹ However, this does not just mean it would be an ad hoc expert. Only by examining cases in full plenary session, with the assistance of a competent secretariat, can maximum objectivity be attained.

The Parliamentary Assembly of the Council of Europe, which has worked hard to remedy non-compliance with certain judgments,²⁰² eventually managed to have two fundamentally new features incorporated in

199. According to the Committee of Ministers, the beneficial effect of better co-ordination with the European Union and the new Fundamental Rights Agency should be further exploited to ensure proper execution of judgments: CM/AS (2007) Rec1764 final, 30 March 2007, “Implementation of judgments of the European Court of Human Rights, Parliamentary Assembly Recommendation 1764”, §7.

200. The group delivered its report in September 2001: EG Court (2001) 1, 27 September 2001.

201. Evaluation Group report, §53.

202. See Resolution 1226 (2000), “Execution of judgments of the European Court of Human Rights” and Recommendation 1477 (2000), “Execution of judgments of the European Court of Human Rights”; see also Recommendation 1546 (2002), “Implementation of decisions of the European Court of Human Rights”.



Protocol No. 14. It has always encouraged the Court to grant itself the power to give directions, or at least indications, concerning suitable measures for executing a judgment. It has not, however, succeeded in imposing the idea of daily fines, as happens in the European Union.

Alongside the discussions pursued by Ministers' Deputies since 2002, the results of which have yet to be made public, even if the effects were already visible in terms of the treatment of individual cases or new working methods, the question of identifying the possible causes of delay and negligence has been referred to the Steering Committee for Human Rights (CDDH). Among its practical proposals, this committee has suggested preparing a vade-mecum to provide guidance to national authorities on execution of judgments in the form of practical advice and improving the preparation of Human Rights meetings by making the annotated agenda available as soon as possible (six weeks before the meeting), and has drawn attention to the need to share information on execution among all parties concerned and the urgent need for an online global database²⁰³ with relevant and up-to-date information on the execution situation. The Working Group also emphasised the need to identify quickly any situations revealing systemic problems, and the obligation for a state to present an action plan to the Committee (in accordance with the Committee's guidelines, which should set out good practice); the action plan might also mention effective domestic remedies as a means of taking care of repetitive cases. These various proposals have been adopted: the vade-mecum and execution database should come into being early in 2008.

In the event of delay by a state, the report suggested "developing the practice of Committee of Ministers' press releases, press statements and Chairman's declarations". "The CDDH noted that adequate responses

203. Along the lines of HUDOC, according to a French proposal. This proposal arose from the fact that "in a country such as France, which has an extensive civil service, delays and lack of response to Secretariat requests can occur because of the time spent in the many inter-departmental contacts that have to be made in the specialist ministries and the work involved in compiling scant information on the situation of cases, often duplicated from one department to another".



ought also to be developed on a more general level and include information-sharing with other relevant Council of Europe bodies”, which might take place during tripartite meetings of the Chair of the Committee of Ministers, the Chair of the Parliamentary Assembly’s Committee on Legal Affairs and Human Rights and the Human Rights Commissioner after publication of the annual report.²⁰⁴ Indeed, the Commissioner for Human Rights, through his visits to the countries concerned, has been able to play a part in bringing about the necessary adjustments of domestic legislation to the Convention. It was also suggested that a yearly meeting should be held by government agents to examine the specific issue of execution of judgments. All these proposals have been, or are gradually being, implemented. All in all, greater co-ordination among the various Council of Europe players is undoubtedly beneficial and is also supported by the Committee of Ministers.²⁰⁵

Lastly, on 25 October 2006 the Ministers’ Deputies appointed nine experts to participate in the work of the working group on execution of the Court’s judgments set up by the DH-PR (Committee of Experts for the Improvement of Procedures for the Protection of Human Rights), the purpose of which is to come up with additional practical proposals for supervision of execution of judgments in the event of slow or negligent execution. The CDDH also appointed nine experts on the DH-PR to participate in this new forum. Current discussion concerns the drafting of a recommendation on efficient domestic capacity for supervising prompt

204. CDDH (2006) 008, 7 April 2006, Appendix 4, §22.

205. CM/AS (2007) Rec1764 final, 30 March 2007, “Implementation of judgments of the European Court of Human Rights. Parliamentary Assembly Recommendation 1764 (2006)”: “5. The Committee also fully shares the Assembly’s view that better synergies should be developed between various Council of Europe bodies and institutions with a view to more effective implementation of judgments. From this perspective, the Assembly’s enhanced involvement in this area is most welcome. The Committee encourages other bodies of the Council of Europe to mainstream in their respective activities the Convention’s requirements, as set out in the Court’s judgments. An important role should in particular be played in this area by the Council of Europe Commissioner for Human Rights, the Venice Commission and the European Commission for the Efficiency of Justice (CEPEJ). The tripartite meetings between the Committee of Ministers, the Assembly, and the Commissioner for Human Rights may be an appropriate format to address the most important issues arising in the implementation of judgments.”



execution of the Court's judgments. Consideration is being given to how the execution process is monitored at the national level, whether or not there exists a department/official with central co-ordinating responsibility with regard to the execution of the Court's judgments, and the ways and means, if any, of accelerating execution where necessary.²⁰⁶ In particular, the question of the role to be played by national parliaments in monitoring the execution of judgments is being examined, together with the role of national authorities with regard to the translation and dissemination of judgments.²⁰⁷ States were sent a questionnaire, to which most replied.²⁰⁸ A recommendation along these lines should be adopted by early 2008, following adoption of a first draft in March 2007.²⁰⁹

In the name of subsidiarity we should therefore be seeing a broader range of supervisory authorities at both European and national levels. Execution of the Court's judgments, like application of the Convention, will thus become the responsibility of all national authorities.

206. CDDH (2007) 011 Addendum 1, Interim Report, 13 April 2007.

207. See CDDH (2007) 011, 19 April 2007, Report of the 64th meeting.

208. See GT-DH-PR A (2007) 003 of 9 March 2007. See also document DH-PR (2006) 007rev Bil, 27 February 2007, "Information on execution of judgments of the European Court of Human Rights at the national level".

209. GT-DH-PR A (2007) 002, 2 March 2007, CDDH, GT-DH-PR, Group A: "Elements for possible inclusion in the draft recommendation on efficient domestic capacity for rapid execution of the Court's judgments".



Conclusion

In conclusion, it cannot be overemphasised that the requirements associated with execution of judgments of the European Court are the corollary of accession by European states to a system of supranational protection for human rights, which necessarily entails limitation of national sovereignty: in the words of Pierre-Henri Teitgen, “the sovereignty of the states is limited from the aspect of the law, and from that aspect all limits are allowed”.²¹⁰

Although there are some flaws, the outcome of the execution of judgments has been broadly positive, so that the rare exceptions are even more unacceptable. Nonetheless, constant vigilance is called for; particularly where fundamental rights are violated by states, nothing can ever really be taken for granted.

While the European Union has relied mainly on a constraint-based model, on infringement proceedings coupled with daily fines and on a delegation or elite model of accountability to compel states to enforce the judgments of the Court of Justice of the European Communities promptly, the Council of Europe has opted for a very different approach: that of persuasion, co-ordination among the various national and European bodies concerned, and accountability of authorities at different levels, in keeping with the participatory model of accountability.²¹¹ There is reason to believe that this approach is better suited to human rights law. This study has shown that there is also reason to appreciate the essential importance of the practice of the Committee of Ministers and states in the building of a (policy-making and institutional) system of the execution of judgments.

210. P.-H. Teitgen, *Aux sources de la Cour et de la Convention européennes des Droits de l'Homme*, preface by Vincent Berger, *Voix de la cité*, Confluences, October 2000, p. 39.

211. For a comparative study of the two models, see the author's article, “L'exécution des décisions des juridictions européennes (CJCE et CEDH)”, *Annuaire français de Droit international* (2006), pp. 677-724.



Appendices

Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2, of the European Convention on Human Rights

*(Adopted by the Committee of Ministers on 10 May 2006
at the 964th meeting of the Ministers' Deputies)*

I. General provisions

Rule 1

1. The exercise of the powers of the Committee of Ministers under Article 46, paragraphs 2 to 5, and Article 39, paragraph 4, of the European Convention on Human Rights, is governed by the present Rules.
2. Unless otherwise provided in the present Rules, the general rules of procedure of the meetings of the Committee of Ministers and of the Ministers' Deputies shall apply when exercising these powers.

Rule 2

1. The Committee of Ministers' supervision of the execution of judgments and of the terms of friendly settlements shall in principle take place at special human rights meetings, the agenda of which is public.
2. If the chairmanship of the Committee of Ministers is held by the representative of a High Contracting Party which is a party to a case under examination, that representative shall relinquish the chairmanship during any discussion of that case.



Rule 3

When a judgment or a decision is transmitted to the Committee of Ministers in accordance with Article 46, paragraph 2, or Article 39, paragraph 4, of the Convention, the case shall be inscribed on the agenda of the Committee without delay.

Rule 4

1. The Committee of Ministers shall give priority to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem in accordance with Resolution Res (2004) 3 of the Committee of Ministers on judgments revealing an underlying systemic problem.
2. The priority given to cases under the first paragraph of this Rule shall not be to the detriment of the priority to be given to other important cases, notably cases where the violation established has caused grave consequences for the injured party.

Rule 5

The Committee of Ministers shall adopt an annual report on its activities under Article 46, paragraphs 2 to 5, and Article 39, paragraph 4, of the Convention, which shall be made public and transmitted to the Court and to the Secretary General, the Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe.

II. Supervision of the execution of judgments

Rule 6

Information to the Committee of Ministers on the execution of the judgment

1. When, in a judgment transmitted to the Committee of Ministers in accordance with Article 46, paragraph 2, of the Convention, the Court has decided that there has been a violation of the Convention or its protocols and/or has awarded just satisfaction to the injured party under Article 41 of the Convention, the Committee shall invite the High Contracting Party concerned to inform it of the measures which the High Contracting Party has taken or intends to take in conse-



quence of the judgment, having regard to its obligation to abide by it under Article 46, paragraph 1, of the Convention.

2. When supervising the execution of a judgment by the High Contracting Party concerned, pursuant to Article 46, paragraph 2, of the Convention, the Committee of Ministers shall examine:
 - a. whether any just satisfaction awarded by the Court has been paid, including as the case may be, default interest; and
 - b. if required, and taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment, whether:
 - i. individual measures¹ have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;
 - ii. general measures² have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.

Rule 7

Control intervals

1. Until the High Contracting Party concerned has provided information on the payment of the just satisfaction awarded by the Court or concerning possible individual measures, the case shall be placed on the agenda of each human rights meeting of the Committee of Ministers, unless the Committee decides otherwise.

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1. For instance, the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit or the reopening of impugned domestic proceedings (see on this latter point Recommendation Rec (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, adopted on 19 January 2000 at the 694th meeting of the Ministers' Deputies).
 2. For instance, legislative or regulatory amendments, changes of case-law or administrative practice or publication of the Court's judgment in the language of the respondent state and its dissemination to the authorities concerned.



2. If the High Contracting Party concerned informs the Committee of Ministers that it is not yet in a position to inform the Committee that the general measures necessary to ensure compliance with the judgment have been taken, the case shall be placed again on the agenda of a meeting of the Committee of Ministers taking place no more than six months later, unless the Committee decides otherwise; the same rule shall apply when this period expires and for each subsequent period.

Rule 8

Access to information

1. The provisions of this Rule are without prejudice to the confidential nature of the Committee of Ministers' deliberations in accordance with Article 21 of the Statute of the Council of Europe.
2. The following information shall be accessible to the public unless the Committee decides otherwise in order to protect legitimate public or private interests:
 - a. information and documents relating thereto provided by a High Contracting Party to the Committee of Ministers pursuant to Article 46, paragraph 2, of the Convention;
 - b. information and documents relating thereto provided to the Committee of Ministers, in accordance with the present Rules, by the injured party, by non-governmental organisations or by national institutions for the promotion and protection of human rights.
3. In reaching its decision under paragraph 2 of this Rule, the Committee shall take, *inter alia*, into account:
 - a. reasoned requests for confidentiality made, at the time the information is submitted, by the High Contracting Party, by the injured party, by non-governmental organisations or by national institutions for the promotion and protection of human rights submitting the information;
 - b. reasoned requests for confidentiality made by any other High Contracting Party concerned by the information without delay, or at the



latest in time for the Committee's first examination of the information concerned;

- c. the interest of an injured party or a third party not to have their identity, or anything allowing their identification, disclosed.
4. After each meeting of the Committee of Ministers, the annotated agenda presented for the Committee's supervision of execution shall also be accessible to the public and shall be published, together with the decisions taken, unless the Committee decides otherwise. As far as possible, other documents presented to the Committee which are accessible to the public shall be published, unless the Committee decides otherwise.
5. In all cases, where an injured party has been granted anonymity in accordance with Rule 47, paragraph 3 of the Rules of Court; his/her anonymity shall be preserved during the execution process unless he/she expressly requests that anonymity be waived.

Rule 9

Communications to the Committee of Ministers

1. The Committee of Ministers shall consider any communication from the injured party with regard to payment of the just satisfaction or the taking of individual measures.
2. The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention.
3. The Secretariat shall bring, in an appropriate way, any communication received in reference to paragraph 1 of this Rule, to the attention of the Committee of Ministers. It shall do so in respect of any communication received in reference to paragraph 2 of this Rule, together with any observations of the delegation(s) concerned provided that the latter are transmitted to the Secretariat within five working days of having been notified of such communication.



Rule 10

Referral to the Court for interpretation of a judgment

1. When, in accordance with Article 46, paragraph 3, of the Convention, the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.
2. A referral decision may be taken at any time during the Committee of Ministers' supervision of the execution of the judgments.
3. A referral decision shall take the form of an interim resolution. It shall be reasoned and reflect the different views within the Committee of Ministers, in particular that of the High Contracting Party concerned.
4. If need be, the Committee of Ministers shall be represented before the Court by its Chair, unless the Committee decides upon another form of representation. This decision shall be taken by a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee.

Rule 11

Infringement proceedings

1. When, in accordance with Article 46, paragraph 4, of the Convention, the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation.
2. Infringement proceedings should be brought only in exceptional circumstances. They shall not be initiated unless formal notice of the Committee's intention to bring such proceedings has been given to



the High Contracting Party concerned. Such formal notice shall be given ultimately six months before the lodging of proceedings, unless the Committee decides otherwise, and shall take the form of an interim resolution. This resolution shall be adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee.

3. The referral decision of the matter to the Court shall take the form of an interim resolution. It shall be reasoned and concisely reflect the views of the High Contracting Party concerned.
4. The Committee of Ministers shall be represented before the Court by its Chair unless the Committee decides upon another form of representation. This decision shall be taken by a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee.

III. Supervision of the execution of the terms of friendly settlements

Rule 12

Information to the Committee of Ministers on the execution of the terms of the friendly settlement

1. When a decision is transmitted to the Committee of Ministers in accordance with Article 39, paragraph 4, of the Convention, the Committee shall invite the High Contracting Party concerned to inform it on the execution of the terms of the friendly settlement.
2. The Committee of Ministers shall examine whether the terms of the friendly settlement, as set out in the Court's decision, have been executed.

Rule 13

Control intervals

Until the High Contracting Party concerned has provided information on the execution of the terms of the friendly settlement as set out in the decision of the Court, the case shall be placed on the agenda of each



human rights meeting of the Committee of Ministers, or, where appropriate,³ on the agenda of a meeting of the Committee of Ministers taking place no more than six months later, unless the Committee decides otherwise.

Rule 14

Access to information

1. The provisions of this Rule are without prejudice to the confidential nature of the Committee of Ministers' deliberations in accordance with Article 21 of the Statute of the Council of Europe.
2. The following information shall be accessible to the public unless the Committee decides otherwise in order to protect legitimate public or private interests:
 - a. information and documents relating thereto provided by a High Contracting Party to the Committee of Ministers pursuant to Article 39, paragraph 4, of the Convention;
 - b. information and documents relating thereto provided to the Committee of Ministers in accordance with the present Rules by the applicant, by non-governmental organisations or by national institutions for the promotion and protection of human rights.
3. In reaching its decision under paragraph 2 of this Rule, the Committee shall take, *inter alia*, into account:
 - a. reasoned requests for confidentiality made, at the time the information is submitted, by the High Contracting Party, by the applicant, by non-governmental organisations or by national institutions for the promotion and protection of human rights submitting the information;
 - b. reasoned requests for confidentiality made by any other High Contracting Party concerned by the information without delay, or at the latest in time for the Committee's first examination of the information concerned;

3. In particular where the terms of the friendly settlement include undertakings which, by their nature, cannot be fulfilled within a short time span, such as the adoption of new legislation.



- c. the interest of an applicant or a third party not to have their identity, or anything allowing their identification, disclosed.
4. After each meeting of the Committee of Ministers, the annotated agenda presented for the Committee's supervision of execution shall also be accessible to the public and shall be published, together with the decisions taken, unless the Committee decides otherwise. As far as possible, other documents presented to the Committee which are accessible to the public shall be published, unless the Committee decides otherwise.
5. In all cases, where an applicant has been granted anonymity in accordance with Rule 47, paragraph 3 of the Rules of Court; his/her anonymity shall be preserved during the execution process unless he/she expressly requests that anonymity be waived.

Rule 15

Communications to the Committee of Ministers

1. The Committee of Ministers shall consider any communication from the applicant with regard to the execution of the terms of friendly settlements.
2. The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of the terms of friendly settlements.
3. The Secretariat shall bring, in an appropriate way, any communication received in reference to paragraph 1 of this Rule, to the attention of the Committee of Ministers. It shall do so in respect of any communication received in reference to paragraph 2 of this Rule, together with any observations of the delegation(s) concerned provided that the latter are transmitted to the Secretariat within five working days of having been notified of such communication.



IV. Resolutions

Rule 16

Interim resolutions

In the course of its supervision of the execution of a judgment or of the terms of a friendly settlement, the Committee of Ministers may adopt interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution.

Rule 17

Final resolution

After having established that the High Contracting Party concerned has taken all the necessary measures to abide by the judgment or that the terms of the friendly settlement have been executed, the Committee of Ministers shall adopt a resolution concluding that its functions under Article 46, paragraph 2, or Article 39 paragraph 4, of the Convention have been exercised.



Recommendation No. 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 Rights⁴

(Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to bring about a closer union between its members;

Having regard to the Convention for the protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention");

Noting that under Article 46 of the Convention on Human Rights and Fundamental Freedoms ("the Convention") the Contracting Parties have accepted the obligation to abide by the final judgment of the European Court of Human Rights ("the Court") in any case to which they are parties and that the Committee of Ministers shall supervise its execution;

Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum*);

Noting that it is for the competent authorities of the respondent State to decide what measures are most appropriate to achieve *restitutio in integrum*, taking into account the means available under the national legal system;

4. Considering that the quasi-judicial functions of the Committee of Ministers under the former Article 32 of the Convention will cease in the near future, no mention of the Committee of Ministers' decisions is made. It is understood, however, that should certain cases still be under examination when the recommendation is adopted, the principles of this recommendation will also apply to such cases.



Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*;

- I. Invites, in the light of these considerations the Contracting Parties are invited to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;
- II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:
 - (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and
 - (ii) the judgment of the Court leads to the conclusion that
 - (a) the impugned domestic decision is on the merits contrary to the Convention, or
 - (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.



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Note: during the course of 2001, the prefix used to identify human rights resolutions was changed from *DH* to *ResDH*. For simplicity, this book uses *DH* for all resolutions until the end of 2000, and *ResDH* thereafter.



Internet

- Council of Europe's website: <http://www.coe.int/>
- Website of the Directorate General of Human Rights and Legal Affairs: http://www.coe.int/human_rights/
- HUDOC: database of European human rights case-law: <http://hudoc.echr.coe.int/>
- European Court of Human Rights: <http://www.echr.coe.int/>
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These latter measures may take the form, for example, of a change in legislation, recognition of the Court's judgment in national case-law, the appointment of extra judges or magistrates to absorb a backlog of cases, the construction of detention centres suitable for juvenile delinquents, the introduction of training for the police, or other similar steps.

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