



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Seminar background paper¹

**Implementation of the judgments of the European Court of Human Rights:
a shared judicial responsibility?**

1. From the point of view of the Court: its role in the implementation of its judgments, powers and limits.
2. From the point of view of national judiciaries: the role of national courts in the implementation of the Court's judgments

I. Introduction

1. The enforcement of final judgments is a critical component of any rule of law system. As the European Court of Human Rights (“the Court”, “the Strasbourg Court”, “the European Court”) has held in relation to national legal systems, the right to bring proceedings would be illusory if a final, binding judicial decision was allowed to remain inoperative². This is equally true of international systems and therefore of the judicial machinery set up by the European Convention on Human Rights (“the Convention”). It has been confirmed by the Committee of Ministers of the Council of Europe (“the Committee of Ministers”) which has recognized that the “speedy and efficient execution of judgments is essential for the credibility and efficacy of the [Convention] as a constitutional instrument of European public order on which the democratic stability of the continent depends”³. However, the judgment of an international court implies a delicate balance between international jurisdiction and national sovereignty. Its enforcement therefore calls for a different type of procedure from that applicable to national proceedings, involving, among other things, dialogue and cooperation. This can also be expressed in terms of a shared responsibility between the different actors, including, for the Convention system, the Court, the Committee of Ministers, the Governments and the national courts.

1. Prepared by the Organising Committee, chaired by Judge Laffranque and composed of Judges Raimondi, Bianku, Nußberger and Sicilianos, assisted by R. Liddell of the Registry. This paper which does not reflect the views of the Court is intended to provide a framework for the rapporteurs and a basis for the seminar discussions.

2. *Hornsby v. Greece*, 19 March 1997, Reports of judgments and decisions 1997-II, § 40 and, among many authorities, *Burdov v. Russia*, no. 59498/00, ECHR 2002-III and *Burdov v. Russia* (no. 2), no. 33509/04, ECHR 2009. See also Opinion No. 13 (2010) of the Consultative Council of European Judges (CCJE) on the role of judges in the enforcement of judicial decision, CCJE(2010)2 Final, 19 November 2010, for instance at § 7.

3. Reply to Parliamentary Assembly Recommendation 1576 (2002), adopted by the Committee of Minister on 26 March 2003 at the 833rd meeting of the Ministers’ Deputies (CM/AS(2013)Rec1576 final).

2. The mechanism for the execution of the Court's judgments is set out in Article 46 of the Convention, which provides first that the Court's judgments are binding on the respondent States⁴ and secondly that their execution is subject to the supervision of the Committee of Ministers⁵. The original text of the Convention made no mention of any role for the Court in the execution phase⁶, but Protocol No. 14 to the Convention⁷ added two elements to the process, namely the possibility for the Committee of Ministers to seek interpretative assistance from the Court to clarify obligations arising from a judgment⁸ and to institute proceedings before the Court to determine whether the respondent State has complied with a judgment⁹. In both cases a majority of two-thirds of the Committee of Ministers is required.

3. The traditional approach to execution was therefore a strict division of labour between the Court, which rendered a judgment that was essentially declaratory, and the Committee of Ministers, which was considered to have exclusive responsibility for monitoring execution¹⁰. The Committee of Ministers' role was one of supervision; the choice of the most appropriate means to implement a judgment fell to the respondent State¹¹. The wish of some of the drafters of the Convention to give the Court cassation powers or even to allow it to strike down national legislation¹² was discarded in favour of a supervisory process under which peer pressure was seen as the most effective way of realising the collective guarantee referred to in the preamble to the Convention. It is commonly accepted that execution entails not only individual measures affording redress to the individual applicant or applicants¹³ but also general measures aimed at eliminating the root causes of any violation found by the Court¹⁴.

4. For the first forty years of the Court's existence, this mechanism functioned, broadly speaking, successfully. While execution was not always rapid¹⁵, there were very few examples of the process failing completely. However, as the effects of the enlargement of

4. Article 46 § 1: "The High Contracting Parties undertake to abide by the final judgment in any case to which they are parties".

5. Article 46 § 2: "The final judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution".

6. Compare with Article 63 § 1 of the American Convention on Human Rights.

7. Protocol No. 14 amending the control system of the Convention entered into force on 1 June 2010.

8. Article 46 § 3.

9. Article 46 §§ 4 and 5. Such proceedings have yet to be instituted. However, following the Court's judgment in *Abuyeva and Others v. the Russian Federation*, no. 27065/05, 02.12.2010, two NGOs, Memorial and EHRAC (European Human Rights Advocacy Centre), submitted an application for the initiation of infringement proceedings under Article 46 in relation to an earlier judgment *Isayeva v. Russia*, no. 27065/05, 24.02.2005.

10. See, for example, *Marckx v. Belgium*, 13 June 1979, Series A No. 31, § 38.

11. *loc. cit.*

12. Pierre-Henri Teitgen, 1st Session of the Consultative Assembly, Collected edition of the "Travaux préparatoires", volume 1, p. 48-49.

13. Rule 6 (2) (b) i of Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

14. Rule 6 (2) (b) ii of the same Rules.

15. Following the *Marckx* case (see note 10 above), amending legislation was not enacted until eight years after the delivery of the judgment. In the case of *Stran Greek Refineries and Stratis Andreadis v. Greece* (9 December 1994, Series A No. 301-B), the (admittedly) substantial just satisfaction awarded was not paid by the Government for over two years.

the Council of Europe began to be felt and following the entry into force of Protocol No. 11¹⁶, new problems emerged for which the traditional mechanism seemed not always sufficiently well-equipped. Deep-seated structural problems and very serious violations of core rights became more frequent. At the same time, in a new political climate, there appeared to be growing reluctance on the part of some States, including among the “old democracies”, to accept rulings by the Court on certain politically sensitive issues. These phenomena led the Court to envisage new solutions and to take a more proactive role.

5. The first seminar theme will focus on the different ways in which this new proactive approach has been expressed, both in relation to individual and general measures and including in situations of structural violation of the Convention, situations of manifest illegality requiring specific individual measures, re-opening of national proceedings following a judgment of the Court and alleged failure of the respondent State to comply with an earlier judgment.

6. The second theme will examine the place of national courts in the execution process. The Court has repeatedly stressed the important role of the national judicial authorities in the Convention system. In view of the Convention’s subsidiary character it is primarily the responsibility of the national authorities, including the courts, to secure the rights and freedoms set out in the Convention. In the context of execution the finding of a violation in Strasbourg may give rise to the need to review case-law and/or practices even where no legislative action is called for. Here the part played by the national courts may depend on the way in which the Convention has been incorporated into national law¹⁷. In some countries courts have acted rapidly to give effect to Strasbourg rulings in their own jurisprudence; some national courts have even anticipated future Strasbourg judgments. In other countries a Strasbourg judgment has triggered a dialogue with the European Court before a solution has been found. In still others resistance to Strasbourg judgments has proved stronger.

7. Given the time constraints the scope of the seminar has to be somewhat limited. This paper will not therefore address in any detail the role of the Committee of Ministers and the respondent Governments¹⁸ except in so far as they interact with the Court and with national courts¹⁹. Nor will it deal with “alternative methods of dispute resolution” in the form of friendly settlements and unilateral declarations and their relevance in the context of execution. Finally the effect of interim measures under Rule 39 of the Rules of Court and their place in the scheme of judgment enforcement under the Convention is likewise not discussed.

16. Protocol No. 11 to the Convention restructuring the control machinery established thereby entered into force on 1 November 1998.

17. While incorporation into national law is not formally an obligation, it is now the case that the Convention has been incorporated into the domestic law of all the member States of the Council of Europe.

18. Including the overarching obligation to perform treaties in good faith as noted in the third paragraph of the preamble to, and Article 26 of, of the Vienna Convention on the Law of Treaties of 23 May 1969. See in this respect *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, ECHR 2009, at § 87.

19. On the general question of execution an important conference is taking place [took place] in Göttingen on 20-21 September 2013: “Judgments of the European Court of Human Rights – Effects and Implementation”.

II. The Court's role in the implementation of its judgments, powers and limits

8. As noted above, the Court has no formal role in the process of execution of judgments except as now provided for in Article 46 of the Convention. In many judgments it remains content to leave the determination of what is required by its finding of a violation to the Committee of Ministers and confines itself to awarding just satisfaction. Indeed in some cases the finding of a violation is considered to be sufficient just satisfaction in itself²⁰. However, increasingly the Court has found it necessary to assist the Committee of Ministers and the respondent Government in the identification of the remedial action required by its judgment.

Pilot judgments as a means to identify general remedial measures

9. Faced with a growing problem of "repetitive" cases deriving from structural violations the Court developed the pilot judgment procedure. The main features of this procedure are well known²¹: the existence of a structural or systemic dysfunction at national level capable of generating a large number of applications to Strasbourg²² and the selection of a representative case making it possible to identify in a pilot judgment the source of the problem, indicate remedial measures and, where appropriate, decide the adjournment of pending cases raising the same issue²³. In specifying the general measure which the respondent State was required to take, the Court was assuming a responsibility hitherto exercised by the Committee of Ministers. However, although the idea first gestated within the Court this initiative was also a response to what was in a sense a plea for help from the Committee of Ministers²⁴. Since then the pilot judgment procedure has been articulated in different forms, including so-called quasi-pilot judgments²⁵, but it is now a well-established feature of the Court's jurisprudence and practice. This is reflected by its incorporation into the Rules of Court²⁶. The new Rule expressly provides that the Court is to identify the type of remedial measure which the respondent State is required to take at the domestic level²⁷. It also states that the Court may direct in the operative provisions of the pilot judgment that

20. For example *Hanif and Khan v. the United Kingdom*, nos. 52999/08 and 61779/08, § 155, 20.12.2011.

21. See for a comprehensive study "Responding to systemic human rights violations, an analysis of 'pilot judgments' and their impact at national level", Philip Leach, Helen Hardman, Svetlana Stephenson, Brad K. Blitz, Intersentia 2010. For a recent commentary, "The pilot judgment procedure before the European Court of Human Rights as an instrument of dialogue", Janneke Gerrards, published in *Constitutional Conversations in Europe*, Intersentia 2012.

22. The best known examples are excessive length of proceedings and non-execution of final judicial decisions, but problems have also arisen for example in relation to length of pre-trial detention and more generally conditions of detention as well as arrangements for the restitution of nationalised property.

23. See *Broniowski v. Poland* [GC], no. 31443/96, §§ 188-194, ECHR 2004-V.

24. Resolution (Res(2004)3) on judgments revealing an underlying systemic problem, adopted on 12 May 2004, inviting the Court "to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments".

25. For example where the Court notes the existence of a systemic problem without requiring specific remedies in the operative provisions or adjourning similar applications, see *Scordino v. Italy* (no. 1) [GC], no. 36813/97 ECHR 2006-V; *Viaşu v. Romania*, no. 75951/01, §§ 75-83, 9.12.2008.

26. Rule 61 adopted by the Court in February 2011.

27. Rule 61 § 3.

the remedial measures so identified be adopted within a specified time²⁸. This codifies a growing practice on the part of the Court to indicate a time-frame for the adoption of remedial measures²⁹. Here the Court might be said to be straying further into the territory of the Committee of Ministers, since it not only indicates the type of remedial measure required³⁰ but also engages in a form of supervision of the process. While the fixing of time-limits is understandable in certain drawn-out situations and faced with procrastination by the national authorities, it is not without risk. Apart from a possible blurring of the distinction between the respective roles of the Committee of Ministers and the Court, a question arises as to the legal basis for any further procedure, such as requests for extensions of the time-limits³¹. A more cautious approach was taken in a case concerning prison conditions where the Court required the respondent Government to produce within six months, in cooperation with the Committee of Ministers, a binding time-frame within which to make available preventive and compensatory measures³². This sophisticated balancing of the functions of the Court and of the Committee of Ministers reflects the increasingly complementary nature of their respective contributions.

Specific individual measures

10. In some cases the Court considers the individual remedial measure to be self-evident to the point that any real choice is excluded. In these circumstances to leave such a measure to be identified through a lengthy process of dialogue between the Committee of Ministers and the respondent Government runs counter to the principle of effectiveness which guides the Court in much of its work. In addition, in cases such as those involving continuing arbitrary detention any delay in taking appropriate action serves to compound the original violation. Thus in *Assanidze v. Georgia*, the Court, while recalling the traditional elements of the execution process (supervision by the Committee of Ministers, declaratory character of judgments, choice of means for the respondent State), reached the conclusion that the violation found (arbitrary detention) left no real choice as to the measures required to remedy it. The Court therefore directed that the respondent Government had to secure the applicant's release at the earliest possible date³³. In another case where there appeared, in the Court's view, to be no real choice as to the necessary individual measures, the

28. Rule 61 § 4.

29. For example *Burdov v. Russia* (no. 2), see note 2 above, at § 141 and point 6 of the operative provisions; *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, ECHR 2010, at § 115 and point 6 of the operative provisions; *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, at § 241 and point 6 *in fine* of the operative provisions, 12.10.2010.

30. For example, most commonly, the introduction of a remedy at national level for persons affected by the structural violation established. In *Burdov v. Russia* (no. 2), the respondent State was required to set up an effective domestic remedy or combination of such remedies which secured adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments in line with the Convention principles as established in the Court's case-law (point 6 of the operative provisions).

31. Extensions were granted in both *Greens and M.T.* and *Maria Atanasiu and Others*, see note 29.

32. *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, at § 234 and point 7 of the operative provisions, 10.01.2012.

33. *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II, §§ 202-203, point 14 (a) of the operative provisions.

respondent State was directed to secure the applicant's reinstatement in the post of judge of the Supreme Court at the earliest possible date³⁴.

Re-opening of proceedings

11. Relying on the international law principle of *restitutio in integrum*³⁵, the Court has repeatedly held that the most appropriate form of redress for a violation is to ensure that applicants are, as far as possible, put in the position in which they would have been if there had been no breach of the Convention³⁶. Thus, while the Court has found that the Convention does not give it jurisdiction to direct a State to open a new trial or to quash a conviction,³⁷ it nevertheless insists that the most appropriate means of achieving *restitutio in integrum* in the context of Article 6 is the retrial of the applicant in a way which satisfies the requirements of the Convention, should the applicant so request³⁸. If initially this approach was limited to breaches of Article 6, the possibility of its being extended to other Convention provisions has been recognised³⁹. As a recent example in a different context, following a Strasbourg judgment finding a violation of Article 11 of the Convention, the Russian Supreme Court reopened proceedings and quashed an earlier decision to refuse to register a political party⁴⁰. This approach has been endorsed by the Committee of Ministers which in 2000 encouraged "the Contracting Parties ... to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including re-opening of proceedings, in instances where the Court has found a violation of the Convention ..."⁴¹.

Failed execution

12. In a number of cases the Court has been faced with a claim by the applicant that the respondent Government has failed to execute the judgment delivered in respect of an earlier application. The question then arises as to whether the Court is being asked to re-examine essentially the same facts as in the previous application, in which case the second application will be inadmissible under Article 35 § 2 (b) of the Convention as "substantially the same", or whether there is a new fact or facts which the Court could not have taken into

34. *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 202 and point 9 of the operative provisions, 9.01.2013, but compare *Kudeshkina v. Russia*, no. 29492/05, also involving the dismissal of a judge where the Court found a violation but made no such order for reinstatement. See for further examples of specific measures, among others, *Aleksanyan v. Russia*, no. 46468/06, § 240, 22.12.2008; and *Fatullayev v. Azerbaijan*, no. 40984/07, §§ 176 and 177, 22.04.2010.

35. See *Papamichalopoulos v. Greece*, 31 October 1995, Series A 330-B at § 34.

36. See *Huseyn and Others v. Azerbaijan*, nos. 35485/05, 45553/05, 35680/05 and 36085/05, § 262, 26.07.2011.

37. *Lyons and Others v. the United Kingdom*, (dec.), no. 15227/03, ECHR 2003-IX.

38. See, among others, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; *Krasniki v. Czech Republic*, no. 51277/99, at §§ 93-94, 28.02.2006.

39. For example in respect of Article 10 see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2), no. 32772/02 (Chamber judgment) at § 55.

40. *Republican Party of Russia v. Russia*, no. 12976/07, 12.04.2011; decision of the Supreme Court of 23 January 2012.

41. Recommendation No. R (2000) 2 of the Committee of Ministers to member States on the re-examination or re-opening of certain cases at domestic level following judgments of the European Court of Human Rights (adopted by the Committee of Ministers on 19 January 2000 at its 694th meeting).

consideration in its first judgment⁴². While it does not have jurisdiction to verify whether a Contracting Party has complied with the obligations imposed on it by a judgment, there is nothing to prevent the Court from examining a subsequent application raising a new issue undecided by the Court's previous judgment⁴³.

13. As noted above, the Court lacks jurisdiction to order a State to open a new trial or to quash a conviction. It could not therefore find a State to be in breach of the Convention on account of its failure to take either of these courses of action when faced with the execution of one of its judgments⁴⁴. However, where the issue of re-opening of proceedings gives rise to a "new fact" the Court considers that it does have jurisdiction to examine the issue. The question arose in the case of *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2). Following the Court's first judgment finding a violation of Article 10, the Swiss Federal Court had refused an application to re-open the proceedings. By this stage the Committee of Ministers had already adopted a final resolution closing its supervision of the execution of the judgment⁴⁵. The Swiss Government argued forcefully that for the Court to examine the new application would be to encroach on the Committee of Ministers' function of supervision⁴⁶.

14. The Court responded firstly by recalling that under Article 32 of the Convention its jurisdiction covers "all matters concerning the interpretation and application of the Convention and the Protocols thereto" and that under Article 32 § 2 "[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide". However, it then justified its rejection of the Government's submissions by indicating that the Federal Court's refusal to reopen was based on new grounds. The Court had therefore to deal with relevant new information in the context of a fresh application. It was also noted that, since the Federal Court's refusal occurred after closure of the supervision process by the Committee of Ministers, if the Court were unable to examine it, it would escape all scrutiny under the Convention⁴⁷.

15. By contrast in another case the Committee of Ministers had terminated its supervision of the execution of a Court judgment after having had regard to all the materials in the file, including a decision by the competent national court to undertake a full review of the case but to refuse the applicant a new trial. Here no new factual or legal elements had been submitted to the national authorities or the Committee of Ministers that had not been examined and determined by the Strasbourg judgment. The Court could not therefore consider the complaint without encroaching on the powers of the Committee of Ministers under Article 46⁴⁸.

42. See, *Olsson v. Sweden* (no. 2), 27 November 1992, Series A no. 250, § 94.

43. *Mehemi v. France* (no. 2), no. 53470/99, § 43, ECHR 2003-IV.

44. *Lyons and Others v. the United Kingdom*, (dec.), see note 37 above.

45. Resolution ResDH(2003)125.

46. *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2), cited above at note 18. For a criticism of this judgment see Hertig Randall and Ruedin, « Judicial Activism » et exécution des arrêts de la Cour européenne des droits de l'homme, Rev. Trim. dr. h. (82/2010).

47. *Ibid.*, §§ 64-68.

48. *Öcalan v. Turkey* (dec.), no. 5980/07.

16. Another aspect of failed execution may arise in relation to the failure to take effective general measures in good time. In this context the Court has held that, notwithstanding the freedom of choice as to the appropriate means, the adoption of general measures requires the State concerned to prevent, with diligence, further violations similar to those found in the Court's judgments⁴⁹.

Questions on the first theme

17. The Court has increasingly found itself compelled to play a more active part in the execution process in the interests of the effectiveness of the Convention system. At the same time it has continued to stress that it is primarily the function of the Committee of Ministers to oversee the process. However, some questions have arisen as to this approach and as to where the limits lie. Is it still necessary to insist on the declaratory nature of the Court's judgments? It is accepted that, faced with a structural problem, spelling out the appropriate remedial measure may be a precious aid to the execution process. Does this mean that fixing the time-frame for its adoption is also legitimate? In situations of urgency, identifying a specific individual measure may indeed be necessary and desirable. Is this the case where a solution is less urgent? In relation to the re-opening of proceedings and situations of failed execution is there a clear definition of the Court's proper role? To what extent can the Court consider the execution of its judgment in a later case? What new policies or practices could be developed to strengthen the Court's role in the execution process?

III. The role of national courts in the implementation of the Court's judgments

18. As noted in the introduction, under the Convention the Court's judgments are binding on the respondent States. How they affect national courts will initially depend on constitutional arrangements and in particular the way in which the Convention is incorporated into the national legal system⁵⁰. It may also raise questions of the relationship between the executive and the judiciary and therefore of judicial independence. Whether or not national courts are constitutionally bound to follow Strasbourg judgments, it remains essential for those courts to retain full confidence in the international system. If they are not convinced by the Court's reasoning, they will clearly be less enthusiastic about giving effect to Strasbourg judgments. This highlights the importance of having carefully reasoned and persuasive rulings and may also imply a duty for the Court to consider in detail what the practical consequences of its decisions will be at national level.

Direct compliance

19. There are many examples of national courts adapting their case-law following a judgment finding a violation. In 1992 some ten months after the Court's judgment finding a violation of Article 8 of the Convention⁵¹, the French Court of Cassation overturned its

49. *Fabris v. France* [GC], no. 16574/08, § 75, 7.02.2013.

50. See "A Europe of Rights – the impact of the ECHR on national legal systems", Keller and Stone Sweet, Oxford University Press, 2008.

51. *B. v. France*, 25.03.1992, Series A no. 232 C.

settled case-law in recognizing the right of transsexuals to have their civil status rectified to take account of their new gender.

20. The Russian Supreme Court sitting in plenary session has made a number of rulings giving general directives to the lower courts concerning compliance with Strasbourg judgments. Thus in its Resolution no. 5 of 10 October 2003 it confirmed the need for domestic courts to apply principles of international law and in particular to give effect to judgments of the European Court. In its Resolution no. 11 of 14 June 2012 it indicated grounds for refusing extradition with reference to Article 3 of the Convention in terms which accurately reflect the Strasbourg case-law⁵². The Supreme Court has accordingly demonstrated its willingness to secure the implementation of general measures in execution of Strasbourg judgments.

21. The Estonian Supreme Court has recognised the possibility of re-opening of proceedings. The Strasbourg Court had found a violation of Article 7 § 1 of the Convention on the ground that the domestic courts had applied a subsequent amendment to the law retrospectively to behaviour which did not previously constitute a criminal offence⁵³. The Supreme Court *en banc* delivered a judgment re-opening the criminal proceedings and acquitting the applicant⁵⁴.

22. Following a Strasbourg judgment⁵⁵ the Austrian Constitutional Court, noting that it was obliged to secure compliance with the Convention in proceedings before it, annulled an article of the Civil Code which excluded the possibility for a father to obtain judicial review of a decision according sole custody to the mother⁵⁶. The effect of this decision was to set a time-limit for the legislature to amend the law in issue and the amendment entered into force on 1 February 2013.

23. The Greek Court of Cassation has repeatedly changed its case-law to follow the evolution of the jurisprudence of the Court in the field of expropriation. This process has been articulated in three stages concerning: the modalities of compensation due to the owners of properties expropriated for roadworks⁵⁷, the necessity of an overall assessment of the consequences of an expropriation⁵⁸ and, finally, the award of compensation for the

52. Cited in *Abdulkhakov v. Russia*, no. 14743/11, § 77, 2.10.2012. Other examples are Resolution no. 3 of 24 February 2005 which, among other things, instructed national courts to distinguish between statements and value judgments and recalled the need for public scrutiny of political figures and public officials; Resolution no. 22 of 29 October 2009, referring to the European Court's case-law, clarified a number of important points relating to pre-trial detention.

53. *Veeber v. Estonia* (no. 2), no. 45771/99, ECHR 2003-I.

54. Supreme Court *en banc* judgment of 6 January 2004, 3-1-3-13-03, criminal case against T. Veeber, available in English at <http://www.nc.ee/?id=410>. Subsequently the Estonian legislature followed the practice adopted by the Supreme Court by inserting the possibility of a re-opening of proceedings after a Strasbourg judgment in the procedural codes.

55. *Sporer v. Austria*, no. 35637/03, 3.02.2011.

56. Judgment of the Constitutional Court of 28 June 2012, G114/11.

57. *Tsomtsos and Others v. Greece*, 15.11.1996, Reports of Judgments and Decisions 1996-V, *Katkaridis v. Greece*, 5.11.1996, Reports of Judgments and Decisions 1996-V. Cf. Court of Cassation, Plenary, 8/1999 and Court of Cassation 598/2001.

58. *Azas v. Greece*, no. 50824/99, 19.9.2002, *Efstathiou and Michailidis and Cie Motel Amerika v. Greece*, no. 55794/00, 10.7.2003, *Interoliva A.B.E.E. v. Greece*, no. 58642/00, 10.7.2003, *Konstantopoulos A.E. and*

depreciation of non-expropriated part of land due to the 'nature of the work' (*nature de l'ouvrage*)⁵⁹.

24. The Albanian Supreme Court has ordered that proceedings be reopened in a number of cases⁶⁰ following a finding of violation of Article 6 (criminal limb) in Strasbourg and in one case overturned a conviction⁶¹ despite that fact that neither re-opening of proceedings nor review of conviction is provided for in the Code of Criminal Procedure.

Compliance under pressure

25. Following a number of Strasbourg judgments and the prospect of many more, the Serbian Constitutional Court altered its case-law in respect of the award of compensation to socially-owned companies for the non-enforcement of final judicial decisions to the extent that the European Court recognized that the Constitutional Court now offered an effective remedy at least for certain situations⁶².

Harmonious interpretation

26. The German Federal Constitutional Court considered the effect of Strasbourg judgments following a decision by a Regional Court of Appeal that it was not bound by a judgment of the European Court finding a violation of Article 8. The case concerned the access of a biological father to a child in the care of foster parents. In its judgment the Strasbourg Court had observed that for the State to discharge its legal obligation under Article 46 the applicant should at least be given access to his child⁶³.

27. The biological father lodged a constitutional complaint challenging, among other things "the unsatisfactory enforcement of the European Court's judgment"⁶⁴. In a complex decision the Constitutional Court sought to balance the need to comply with international law obligations against the primacy of the Basic Law. In disavowing the approach taken by the lower court, it found that the Regional Court had not taken sufficient account of the Strasbourg judgment, although it was under an obligation to do so⁶⁵. According to the Constitutional Court, "taking into account" means "taking notice of the Convention provision as interpreted by the European Court and applying it to the case provided the

others v. Greece, no. 58634/00, 10.7.2003, *Biozokat A.E. v. Greece*, no. 61582/00, 9.10.2003, cf. Court of Cassation, Plenary, 10/2004, 11/2004, Court of Cassation 591/2009 and 781/2010.

59. See *Ouzounoglou v. Greece*, no. 32730/03, 24.11.2005, *Athanasiou and others v. Greece*, no. 2531/02, 9.2.2006, cf. Court of Cassation, Plenary, 31/2005 and more recently Court of Cassation 587/2010 with further references.

60. *Caka v. Albania*, no. 44023/02, 8.12.2009, Supreme Court judgment no. 1388/2010, of 07.03.2012; *Laska and Lika v. Albania* (nos. 12315/04 and 17605/04), 20.04.2010, Supreme Court judgment no. 01468/2010, of 07.03.2012. *Berhani v. Albania*, (application no. 847/05), 27.05.2010, Supreme Court judgment no. 01130/2010, of 15.02.2012.

61. *Xheraj v. Albania*, (Application no. 37959/02), 29.07.2008, Supreme Court judgment no. 01226/2011 of 07.03.2012.

62. *Marinković v. Serbia* (dec.), no. 5353/11, 29.01.2013.

63. *Görgülü v. Germany*, no. 74969/01, § 64, 26.02.2004.

64. BVerfG 111, 307, BvR 1481/01, 14.10.2004, § 1.

65. *Ibid.*, § 64.

application does not violate prior-ranking law, in particular constitutional law⁶⁶. In effect the Strasbourg judgment was not automatically and directly binding on the German courts because they were also required to consider whether the factual circumstances had evolved and whether there was any conflict with the Basic Law, albeit interpreted in so far as possible as to be consistent with the Convention and the Strasbourg case-law. On the other hand, failure to take due account of the Strasbourg judgment could give rise to a well-founded constitutional complaint on rule of law grounds, as in the case in question. In the result the Constitutional Court attributed considerable weight to European Court's judgments, without going so far as to accord them full binding effect in proceedings before the national courts. In a more recent ruling the Constitutional Court has again confirmed that the Basic Law must be interpreted in way which seeks to accommodate international law ("*völkerrechtsfreundlich*")⁶⁷. In this decision it accepted that judgments of the Strasbourg Court which contain new elements for the interpretation of the Basic Law are equivalent to legally relevant changes which may lead to the final and binding effect of a Constitutional Court decision being overturned.

Dialogue⁶⁸

28. Under the Human Rights Act 1998 the United Kingdom courts are required to "take into account" Strasbourg jurisprudence⁶⁹. Following a Chamber judgment in the case of *Al-Khawaja* in which the European Court found a violation of Article 6 of the Convention on the ground that statements of a witness who had not been called to give evidence during the trial were the sole or at least the decisive basis for the applicant's conviction⁷⁰, the United Kingdom Supreme Court revisited the question in a different case and in doing so examined the effect of the obligation "to take into account" Strasbourg case-law⁷¹. As indicated in the lead judgment, this obligation would normally result in the Supreme Court applying principles that are clearly established by the Strasbourg Court. However, there would be occasions, albeit rare, where there were concerns as to whether the Strasbourg Court had sufficiently understood particular aspects of the domestic process. Where this happened, the Supreme Court could decline to follow the Strasbourg decision, giving reasons for adopting this course. It was expressly suggested that this could give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that was in issue, so as to create the possibility of a "valuable dialogue" between the two courts⁷². The judgment set out a detailed analysis of the Strasbourg case-law to support the finding that the decision in *Al-Khawaja* need not be followed in the case in question. In the meantime the *Al-Khawaja* case had been accepted for referral to the Grand Chamber which gave judgment in December 2011 taking on board at least part of the Supreme Court's reasoning. As the then President of the European Court noted in his concurring opinion, the case afforded "a good

66. *Ibid.*, § 62.

67. BVerfG, 2 BvR 2365/09, 4 May 2011.

68. Attention is drawn to a conference in Oslo (21-22 June 2013): "Transnational Judicial Dialogue; Concept, Method, Extent, Effects". It includes a session devoted to the "Judicial Dialogue of the European Court of Human Rights".

69. Section 2(1) of the Act.

70. *Al-Khawaja and Tahery v. the United Kingdom*, nos. 26766/05 and 22228/06, 20.01.2009.

71. *R v. Horncastle* [2009] UKSC 14.

72. Lord Phillips's judgment, § 11.

example of the judicial dialogue between the national courts and the European Court”⁷³. In any event it shows the potential for a national court to argue on Convention grounds for a different solution from that initially adopted in Strasbourg.

29. The two-way nature of this dialogue is illustrated by the two *Von Hannover* cases and a change in approach by the German courts. Following a first judgment in Strasbourg finding a violation of Article 8 arising out of the publication of photographs of Princess Caroline of Monaco⁷⁴, the Federal Court of Justice⁷⁵ and Constitutional Court⁷⁶ adjusted their position so as to distinguish between photographs which did contribute to public debate and those which simply catered to readers’ curiosity. They nevertheless found that the publication of certain photographs was justified. In its second *Von Hannover* judgment the Strasbourg Court was satisfied that the national courts had explicitly taken account of the Court’s relevant case-law. The Federal Court of Justice had changed its approach following the first *Von Hannover* judgment and the Federal Constitutional Court had not only confirmed that approach, but had also undertaken a detailed analysis of the Court’s case-law. The national courts had thus applied Convention principles and case-law⁷⁷.

Reluctance

30. The French Court of Cassation was noticeably reluctant to follow Strasbourg jurisprudence concerning the admissibility of an appeal on points of law by a person who had absconded. It was not until a law was enacted strengthening the protection of the presumption of innocence seven years after the first judgment that the Court of Cassation changed its position⁷⁸.

31. In the *Markin* Chamber judgment concerning Russia⁷⁹ the Court found a violation of Article 14 read in conjunction with Article 8 arising out of the exclusion of male military personnel from entitlement to parental leave. In the context of Article 46 the Court recommended that the respondent State take measures, under the supervision of the Committee of Ministers, with a view to amending specific legislation and rules⁸⁰. This decision gave rise to overt criticism notably by the President of the Constitutional Court. It is true that the Chamber judgment had expressly indicated that it had found the Constitutional Court’s reasoning unconvincing. The case was subsequently referred to the Grand Chamber which found the same violation, but without criticising the Constitutional Court and without indicating any specific general measure to be taken by way of execution⁸¹. On the strength of that judgment new proceedings are pending before the

73. Sir Nicolas Bratza reiterated this view in his speech at the official opening of the judicial year in January 2012, http://echr.coe.int/Documents/Speech_20120127_Bratza_JY_ENG.pdf.

74. *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI.

75. Judgment of 6 March 2007, no. VI ZR 51/06.

76. Judgment of 26 February 2008, no. 1 BvR 1626/07.

77. *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, ECHR 2012.

78. Law of 15 June 2000, following, among others, the judgments in *Poitrimol v. France*, 23.11.1993, Series A no. 277 A, and *Guérin v. France*, 29.07.1998, Reports of Judgments and Decisions 1998-V.

79. *Konstantin Markin v. Russia*, no. 30078/06, 7.10.2010.

80. *Ibid.*, at § 67.

81. *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012 (extracts).

Russian courts and a question of constitutionality has been submitted to the Constitutional Court.

32. Following the Court's judgment in *Maggio*⁸² finding a breach of Article 6 of the Convention relating to an intervention of the legislature in pending judicial procedures - concerning pension contributions abroad - which retroactively changed the applicable law, the Italian Constitutional Court decided that the Strasbourg judgment was contrary to the Constitution and thus not to be followed by Italian courts⁸³.

Questions on the second theme

33. These examples, which are of course far from being exhaustive, show the real potential for national courts, particularly superior national courts, to play a key role in the execution process, while at the same time engaging in a constructive dialogue with Strasbourg. This calls for efforts on both sides to increase mutual understanding. One aspect of this relationship on which the Court has worked is the translation of its judgments into languages which the national courts will understand⁸⁴. In this context it should be noted that in its opinion on draft Protocol No. 16 to the Convention the Court fully subscribes to the purpose of enabling a dialogue between it and the highest national courts and enhancing interaction between it and the national authorities⁸⁵. There remain however questions: what is the true effect of Strasbourg judgments in national systems? How are national courts to resolve potential conflicts between Strasbourg decisions and national constitutional law? What other means might be used to reinforce the relationship between the European Court and its national counterparts? What can the Court do to make it easier for national courts to contribute to the timely and effective execution of its judgments?

IV. Overall conclusion

34. The three high-level conferences at Interlaken (February 2010), Izmir (April 2011) and Brighton (April 2012) all recognised the fundamental importance of execution for the effectiveness of the Convention system⁸⁶. Measures taken by the respondent States under the supervision of the Committee of Ministers must naturally remain at the heart of the process, but experience has shown that different situations demand different solutions and that all the Convention actors have a contribution to make at the various stages whilst respecting each other's reserved spheres of action. Yet it is clear that the lines have moved; the Court is going further than it has in the past and some national courts are playing a more prominent role. Are these developments sufficient and effective? Are further changes necessary and if so in which direction? These are some of the questions on which it is hoped that the seminar will focus.

82. *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31.05.2011.

83. Decision no. 264/2012.

84. As part of this effort, under a project financed by the Human Rights Trust Fund 1,600 translations were completed in 2012 and these have been, or will be, made available in the Court's HUDOC data base.

85. See Paragraph 4 of the Court's Opinion of 6 May 2013.

86. The declarations can be found on the Court site:

<http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=#n1365510045079> pointer.

35. In reality the Court does not see itself as taking over the function of the Committee of Ministers or part of it, but rather as making a complementary contribution to it where the current mechanism appears no longer well adapted to the wide range of different problems which arise. It seeks to strike a balance between effectiveness or "*effet utile*" and subsidiarity. Execution has to be a shared responsibility involving all the different actors potentially having a role to play. The obligation for all concerned is one of result.