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THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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I. Introduction

The purpose of judicial proceedings is of a practical order: “the proceedings take place only with a view to arriving at a concrete solution. They are a means and not an end”.¹ The European Court of Human Rights (hereinafter “the European 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 it considers that the right of execution derives from the “principle of the rule of law”.² What the European Court has affirmed in respect of the judgments of domestic courts and tribunals also applies to judgments of the European Court itself, since the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the Convention”) is a system of subsidiary value which merely provides a remedy for defects in the domestic order. The *leitmotiv* is therefore clear: the proper execution of judgments of the European Court is the cornerstone and the most fundamental evidence of the effectiveness of the European mechanism for the protection of human rights.

The concept of “execution” for the purposes of this paper is not as wide as that of “implementation” or “effects” and relates only to the binding force of the judgment *vis-à-vis* the State which is a party to the dispute: the authority of the case-law of the European Court and the effects which its judgments produce other than for the States which are parties to the proceedings will therefore not be examined here.³

1 E. Spitz, *L’acte de juger*, RDP, 2-1995, pp. 289-302, at p. 292.

2 Eur. Court HR, the *Hornsby v. Greece* judgment of 19 March 1997, para. 40.

3 For an analysis of these other aspects, see Part II of my work, *Les effets des arrêts de la Cour européenne des Droits de l’Homme, contribution à une approche pluraliste du droit européen des droits de l’homme*, Bruylant, Brussels, 1999, p. 287 *et seq.* See also the Report of the

In international law generally, the execution of judgments of the international courts has prompted very little attention on the part of academic writers: the execution of a judgment was not regarded as giving rise to problems, since the spontaneous execution of a judgment in good faith should be the corollary of the recognition of the competence of the Court. It is for that reason that the former Article 50 (now Article 41) made provision only for a situation in which a State was for practical reasons, or for reasons dictated by its internal law, unable to give effect to the judgment. It is also for that reason that the wording of the former Article 53 (now Article 41 para. 1), which provides that "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties", was taken from Article 94 (1) of the United Nations Charter. It is very different from 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".⁴ Under the relevant provisions, it is significant that according to Article 46 para. 2 of the Convention,⁵ the executive organ of the Council of Europe (the Committee of Ministers) is entrusted with supervising the execution of judgments: once the judgment has been delivered, the State must answer to the Committee for the execution of the judgment. This clear division of powers between the European Court and the Committee of Ministers is fundamental to the European system.

A number of observations are called for at this point.

First, as regards the nature of the obligation on the State to comply with judgments of the European Court, that obligation has always been interpreted as being 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".⁶

Committee on Legal Affairs and Human Rights, "Execution of judgments of the European Court of Human Rights", by E. Jurgens, Doc. 8808, 12 July 2000, paras. 4-5.

4 Foster Proposal of the Congress of the European Movement, presented to the Committee of Ministers in July 1949, *Travaux préparatoires*, Vol. I, p. 42 and pp. 301-303.

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

6 Eur. Court HR, the *Belilos v. Switzerland* judgment of 29 April 1988, Series A No. 132, para. 78.

This principle has an essential consequence: the European Court refuses to indicate to the State the measures which need to be taken in order to execute the judgment (although such a power to give directions is expressly conferred on, for example, the Inter-American Court of Human Rights), a corollary of the subsidiary nature of the Convention by comparison with the domestic orders, and of the division of tasks between the Court and the Committee of Ministers. The European Court is also badly placed to make such an assessment, which presupposes a relatively detailed knowledge of the domestic order in question. None the less, the freedom to choose the means has proved to be relatively limited in practice.⁷ Furthermore, the absence of an injunctive power on the part of the Court is often criticised (by academic writers and by the Parliamentary Assembly of the Council of Europe) as not being conducive to the proper and rapid execution of the judgment.

Second, as regards the classification of the effects of judgments, it should be noted here that, in a classic sense, judgments of the European Court have binding authority for the parties (*autorité de la chose jugée*), i.e. they are binding and definitive; the "sole object" of their definitive character "is to make the Court's judgments not subject to any appeal to another authority".⁸ However, and this is the characteristic feature of the European system, the *binding nature of the judgment is enhanced* owing to the complex nature of the dispute, which covers liability, compensation and annulment.⁹ Furthermore, although judgments of the European Court are not binding *erga omnes*, their binding authority extends beyond the confines of the particular case: it is in that sense that the formula used by the European Court in the *Marckx* judgment must be interpreted: "Admittedly, it is inevitable that the Court's decision will have effects extending beyond the confines of this particular case, especially since the violations found stem directly from the contested provisions and not from the indi-

7 That is the sense in which it is necessary to understand the lightly revised formula of the European Court in the *Papamichalopoulos and Others v. Greece* judgment of 31 October 1995, Series A No. 330-B, para. 34: "the Contracting States which are parties to a case are *in principle* free to choose the means which they will use in order to comply with a judgment finding a violation" (emphasis added).

8 Eur. Court HR, the *Ringeisen v. Austria* judgments of 22 June 1972 (Article 50), para. 17, and of 23 June 1973, para. 13.

9 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, at p. 278.

vidual measures of implementation ...".¹⁰ This enhanced binding authority is seen, in particular, in the obligation imposed on the State to adopt general measures in addition to measures for the benefit of the applicant.

Third, it is worth noting that the obligation to execute the judgment is binding on the State, which means on all the State authorities, not just the Executive. That is of fundamental importance in the European context, where the judicial authority in particular will be inundated as a result of the direct effect which judgments of the Strasbourg court must be recognised as having, on certain conditions. This recognition stems from the decision in *Vermeire*. Following the finding of a violation in the *Marckx* judgment, where the compatibility of certain provisions of the Belgian code with Articles 8 and 14 of the Convention had been called in question, the Belgian legislature had delayed in amending the relevant legislation, which, accordingly, formed the subject-matter of a fresh application in the *Vermeire* case. The Belgian court took the view that it was for the legislature to execute the *Marckx* judgment, since Articles 8 and 14 were not sufficiently complete to be capable of being directly applied by the courts. The European Court's response was that "[i]t cannot be seen what could have prevented the Brussels Court of Appeal and the Court of Cassation from complying with the findings of the *Marckx* judgment, as the Court of First Instance had done. There was nothing imprecise or incomplete about the rule which prohibited discrimination ... on the grounds of the 'illegitimate' nature of the kinship between her and the deceased".¹¹ The Court stated, in particular, that "[t]he 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".¹² Thus, provided that the operative part of the European judgment is precise and complete, it is self-executing in the internal order: the court must apply the requirements of the European judgment directly and hold that the domestic law is inapplicable pending legislative amendment. Above all, the *Vermeire*

10 Eur. Court HR, the *Marckx v. Belgium* judgment of 13 June 1979, Series A No. 31, para. 58.

11 Eur. Court HR, the *Vermeire v. Belgium* judgment of 29 November 1991, Series A No. 214-C, para. 25.

12 *Idem*, para. 26.

judgment must also be interpreted as condemning the failure to execute the European judgment immediately, as required by Article 46 of the Convention. That decision of the European Court must be saluted, 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 deprived of their rights.

A study of the execution of the judgments of the European Court requires an examination of both the primary rule – namely the determination of the content of the obligation – and the secondary rule – i.e. the implementation of the sanction represented by execution.

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

The obligation to execute judgments stems from the undertaking of responsibility on the part of the State which has failed to fulfil its primary obligation, pursuant to Article 1 of the Convention, to secure to everyone within its jurisdiction the rights defined in the Convention. It thus follows the scheme of international responsibility: thus, the undertaking of responsibility entails three obligations: the obligation to put an end to the violation, the obligation to make reparation (to eliminate the consequences of the act held contrary to international law) and, finally, the obligation to avoid similar violations (the obligation not to repeat the violation). The European Court thus clearly stated in the *Papamichalopoulos* case that “a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach”.¹³ Similarly, in the *Scozzari and Giunta* case,¹⁴ the Court reiterated that a judgment finding a violation “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 to redress so far as possible the effects ...”. The Committee of Ministers has also invoked those principles in a number of recent resolutions adopted pursuant to Article 46 (2), especially in interim resolutions.¹⁵ In particular, in the Rules adopted by the

13 The *Papamichalopoulos and Others v. Greece* judgment (Article 50) of 31 October 1995, Series A No. 330-B, para. 34 et seq., where it refers to the dictum of the Permanent International Court of Justice in the *Chorzow Factory* case.

14 The *Scozzari and Giunta v. Italy* judgment of 13 July 2000, para. 249.

15 Interim Resolution ResDH (2001) 106, Violations of freedom of expression in Turkey: Individual measures, adopted on 23 July 2001: “Stressing the obligation of every State, under Article 46,

Committee of Ministers pursuant to Article 46 (2), as revised on 10 October 2001, Rule 3.b expressly states that

the Committee of Ministers shall examine whether:

- any just satisfaction awarded by the Court has been paid, including as the case may be default interest; and, if required, and taking into account the discretion of the State concerned to choose the means necessary to comply with the judgment, whether
- individual measures 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;
- general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.

The first obligation to put an end to the violation is of limited application in the Convention system, since it presupposes an ongoing violation. The second obligation, to make reparation *stricto sensu* is essential: as in international law in general, the principle is that of *restitutio in integrum*. That 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, which, moreover, the victim often prefers. The European Court frequently accepts that the finding of a violation constitutes in itself just satisfaction for the applicant.¹⁶ That obligation takes effect *ex tunc*: the State must eliminate all the consequences of the illicit act and make reparation for it as though no violation had occurred. The practice adopted by the States confirms that position.¹⁷

paragraph 1, of the Convention, to abide by the judgments of the Court, including the adoption of individual measures putting an end to the violations found and removing as far as possible their effects". And Interim Resolution ResDH (2001) 79 of 26 June 2001 concerning the judgment in the case of *Matthews v. the United Kingdom*: "recalling that the undertaking of the contracting states to abide by the Court's judgments (Article 46, paragraph 1, of the Convention) implies, *inter alia*, an obligation to take general measures in order to prevent effectively new violations of the Convention similar to those found in the Court's judgments".

16 For one of many examples, see Eur. Court HR, the *Jamil v. France* judgment of 8 June 1995, Series A No. 317-B, para. 39.

17 In the *Vogt v. Germany* case, the applicant official 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 (judgment of 26 September 1995, Series A No. 323, and Resolution DH (97) 12 of 28 January 1997). See also the *Schuler-Zraggen v. Switzerland* judgment of 24 June 1993 (Merits), Series A No. 263, and judgment of 31 January 1995 (Article 50), Series A No. 305-A, where the European Court retro-

The obligation to prevent a repetition of the violation has been applied to a significant extent in the European system. This obligation has been affirmed both by the European Court, for example when assessing the conformity of friendly settlements submitted to it with the public interest of the Convention,¹⁸ and by the Committee of Ministers, and is clearly accepted by the States when they inform the Committee of Ministers of the measures which they have taken when the Committee adopts its final resolution; the States ascribe that obligation to Article 46 (formerly Article 53) of the Convention.¹⁹ The obligation to prevent a repetition of the violation may lead to the adoption of general measures: that will be the case where the Court has expressly or impliedly called a general legislative provision into question,²⁰ or when violations of a similar kind cannot be avoided in the future without such a legislative amendment. In addition, there are situations in which “the general legislation has, owing to its very existence, violated the rights of the individual applicant ...”.²¹ The obligation in question produces immediate effects on the day on which the judgment is pronounced.²² Owing to the principle of legal certainty, a judgment does not have retroactive effect unless the State wishes to confer such effect on it; the European Court has thus aligned its case-law with the Court of Justice of the European Communities.²³ That position

actively awarded default interest in addition to the retroactive payment of the allowance accepted by the national courts as the material harm to be made good.

18 See, for example, Eur. Court HR, the *K v. Austria* judgment of 2 June 1993, Series A No. 255-B, para. 13: in accordance with the wishes of the Delegate of the Commission, the Court decided to strike the case out of the list only because the new general measures were compatible with the requirements of the Convention.

19 For one of a number of examples, see the case of *Procola v. Luxembourg*, Resolution DH (96) 19, where the Government explained the legislative reform and stated that “there is no risk of any repetition of the violation found in the present case and that it has, accordingly, fulfilled its obligations under Article 53 of the Convention”.

20 See, for example, Eur. Court HR, the *Manoussakis and Others v. Greece* judgment of 26 September 1996, para. 45, where the Court expressly declared the Law of 1938 on the Orthodox Church and the practice of the religion contrary to Article 9 of the Convention.

21 That is the situation in cases concerning, for example, the criminalisation of homosexuality: Eur. Court HR, the *Norris v. Ireland* judgment of 26 October 1988, Series A No. 142, para. 38.

22 For an exemplary but rather unique example of rapidity, see the *Autronic AG v. Austria* judgment, Resolution DH (91) 26 of 18 October 1991: on 21 December 1990 the Government amended an order with retroactive effect to 23 May 1990, the day following that on which the judgment was pronounced.

23 The *Marckx v. Belgium* judgment of 13 June 1979, Series A No. 31, para. 58.

may also be explained by the principle of the evolutionary interpretation of the rights guaranteed in the Convention. That immediate effect is sanctioned by the direct effect of the judgment: provided that the adaptation of the law to the Convention as interpreted by the European Court requires the intervention of the legislature, the immediate effect should require the adoption of transitional measures in order to avoid new findings of violations²⁴ pending a definitive legislative reform.

The obligations stemming from the judgments of the European Court therefore fall into three broad categories: just satisfaction, individual measures and general measures.

A. Just satisfaction

Article 41 of the Convention provides:

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 European Court can order a State responsible for a violation of the Convention to take. The order to pay just satisfaction confers on a judgment of the Strasbourg Court the value of judgment ordering performance, in contrast to its classic form of declaratory judgment. The obligation to pay just satisfaction raises few difficulties as to its determination: it is an obligation capable of direct and clear performance.

However, there has been a certain evolution in the European Court's practice: first of all, the Court has assumed the right to specify the currency in which the award is to be paid, in order to avoid the inconvenience of a currency which is rapidly depreciating; generally awards are now made with reference to the euro. Since the *Moreira de Azevedo v. Portugal* judgment of 28 August 1991 (Series A No. 208-C), the Court has stated that the respondent State must pay the relevant amount within a certain period (in principle three months). However, owing to the delay with which certain States have paid the amounts due, the Court has taken a

24 In the *Procola* case, cited above, the Luxembourg Government secured the adoption of a law one month after pronouncement of the judgment, pending a definitive reform one year later (Resolution DH (96) 21).

new step: it now makes an order for default interest.²⁵ The Committee of Ministers has assumed the power to supervise payment of default interest. A problem has risen in that regard: what happens where the European Court has struck a judgment from its list because a friendly settlement has been reached between the parties, and has made no express provision for default interest? According to the Directorate General of Human Rights, which was requested by the States to adopt a position on that point, unless the parties have expressly agreed otherwise, default interest is payable when payment is made more than three months after the date on which the judgment becomes final, for the following reasons: the need to protect the value of the sums awarded, which forms the basis of the practice of awarding default interest, is a “general principle” and “should be applied without distinction to the sums awarded by the Court pursuant to Article 41 of the Convention and to those agreed between the State and the applicant in a friendly settlement”; “moreover, the absence of an express provision on default interest in friendly settlements may be explained by the fact that the time of payment is fixed by common agreement between the State concerned and the applicant, often at the proposal of the State concerned”.²⁶

The operative part of a judgment of the European Court ordering a State to pay just satisfaction is enforceable in the domestic legal order:²⁷ unlike a foreign judgment, a judgment of the European Court cannot require a writ of execution. At the most, the national authority against which the judgment is stated to be enforceable may satisfy itself that the judgment of the European Court actually exists. Thus, pursuant to section 6 of Law No. 14 of 19 August 1987, in Malta judgments of the European Court are enforceable in the same way as judgments of the Supreme Court in the internal order: the judgment is applied following an application lodged at the Registry of the Constitutional Court.²⁸

25 J.F. Flauss, *L'octroi d'intérêts moratoires par la Cour européenne des Droits de l'Homme, observations sous l'arrêt Pine Valley Developments Ltd and Others v. Ireland*, RTDH, 16-1993, pp. 580-586.

26 *Ibid.*, paragraphs 6 to 8.

27 G. Ress, Article 54, in *La Convention européenne des Droits de l'Homme, commentaire article par article*, second edition, 1999, pp. 857-869, at p. 857.

28 Section 6: “1. Any judgment of the European Court of Human Rights to which a declaration made by the Government of Malta pursuant to Article 46 of the Convention applies may be implemented by the Constitutional Court of Malta in the same way as judgments delivered by and

B. Individual measures

In addition to the amendment of domestic judicial procedures, many other individual non-pecuniary measures may be adopted by the State.

1. *Reopening of the domestic judicial proceedings*

The resumption of the domestic judicial proceedings is undoubtedly the most spectacular effect which an international judgment can have.²⁹ The importance of that measure, and the fact that it is the only effective remedy in certain cases, lead the Committee of Ministers to adopt a Recommendation to the States on that point.³⁰ However, this measure is not in the nature of a panacea and the scope for reopening such cases is strictly defined. It can be the source of grave harm to the rights of third parties, particularly in civil matters. In criminal matters, the reopening of a case may raise the question of what is to happen to any co-accused (who have not brought the matter before the Strasbourg Court) and to the victims, and may cause problems from the aspect of the loss of evidence and the period which has elapsed. Furthermore, such a measure will inevitably prolong what are already extremely long proceedings between the domestic level and the European level.

When the European Court has found a violation of the procedural guarantees of the individual, that such infringements have had effects on the choice of penalty at domestic level, that the victim is continuing to serve the penalty, particularly in criminal matters, reopening the proceedings will make it possible to determine, with the guarantees of the rights of the defence, whether the individual is guilty or innocent and to fix the penalty which should have been initially decided upon had there been no violation of the Convention. Following the judgment of the European Court, 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

enforceable by that Court, upon application lodged at the Constitutional Court and notified to the Attorney General for an order that the judgment be executed ...”.

29 For more details on this measure, see the author's article *Le réexamen de certaines affaires suite à des arrêts de la Cour européenne des Droits de l'Homme*, RTDH, 2001, pp. 715-742.

30 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 II.

Van Mechelen and Others v. the Netherlands case:³¹ the Netherlands had no rules providing for the re-opening of the case but none the less was required to take account of the judgment of the European Court. Also, 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 guarantees – 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 decision adopted by the Committee for the Re-examination of Criminal Decisions in the *Hakkar* case in France deserves mention: “Although the just satisfaction afforded to A. Hakkar was of such a kind as to put an end to the harmful consequences of the violation of the right to a hearing within a reasonable time, the same does not apply to the violations found of the right to have adequate time and facilities for the preparation of his defence and the right to defend himself through legal assistance of his own choice, since in the present case the violation of these rights, owing to its nature and to its gravity, had harmful consequences for the person convicted which only a re-examination of the case could bring to an end”.³²

Now the majority of European States allow for the re-opening of domestic judicial proceedings: either on the basis of case-law, having regard to the interest of the law *lato sensu* (Austria, Belgium and Spain), special circumstances (Denmark) or new facts (Slovak Republic), or by virtue of a *lex specialis* (in at least 14 States).³³ The *lex specialis* applies almost exclusively to criminal matters but provides a more secure basis than case-law. In practice, this measure has remained the exception: by December 2000 the domestic proceedings had been re-opened in fewer than 15 cases following

31 Judgment of 23 April 1997 and Resolution DH (99) 124; the release of the applicants, without a fresh trial, gave rise to considerable outcry in public opinion, thus casting discredit on the Convention system.

32 Comm. Réexamen déc. Pén, 30 November 2000, *Hakkar*, JCP, II, 10642, 12 December 2001, No. 50, p. 2304.

33 Austria, Bulgaria, Croatia, France, Germany, Greece, Lithuania, Luxembourg, Malta, Norway, Poland, Slovenia, Switzerland and the United Kingdom.

a judgment of the European Court, half of these being in criminal matters.³⁴ The re-opening of the proceedings in criminal matters has resulted in the acquittal of the person concerned³⁵ and the removal of his conviction from his police record, or more rarely in his conviction, and in some cases the penalty, being upheld.³⁶ Sometimes the case has been re-opened between the time of pronouncement of the judgment on the merits and the judgment on the claim for just satisfaction – the European Court having taken the initiative in that regard³⁷ – more frequently it is adopted at the stage of the 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 that is the only means of ensuring that the harm sustained by the person concerned can be repaired.³⁸ Thus, a number of cases are at present pending before the Committee of Ministers until such time as rules permitting the re-opening of proceedings are adopted in Italy and Turkey, since certain cases involving those States demand such a form of reparation pursuant to Article 46 of the Convention.³⁹

Furthermore, where the violation in question is not an isolated violation of procedural guarantees in the course of the proceedings but a substantive violation, the Committee of Ministers is not satisfied with the decision to

34 *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, *Ekbani 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.

35 Cases of *Unterpertinger v. Austria*, *Barberà, Messegue and Jabardo v. Spain* and *Jersild v. Denmark*.

36 Cases of *Piersack v. Belgium* and *Ekbani v. Sweden*.

37 A perfect example is the case of *Barberà, Messegue and Jabardo v. Spain*.

38 The case of *Hakkar v. France* is noteworthy in that regard, although that case involved a decision adopted by the Committee of Ministers pursuant to the former Article 32 of the Convention. The Committee of Ministers was expecting a law to be enacted permitting review of a criminal trial following a judgment of the European Court and that the re-trial of victim Hakkar would shortly begin.

39 Interim Resolution ResDH (2001) 106 on Violations of freedom of expression in Turkey: Individual measures, 23 July 2001.

re-open the proceedings⁴⁰ but considers the outcome achieved at domestic level before pronouncing the case closed. In the case of *Hertel v. Switzerland* the Committee of Ministers adopted the final resolution only in consideration of the fact that the applicant had submitted a fresh application to the European organs; in that case a violation of Article 10 of the Convention had been found when the applicant had been prohibited from publishing the results of his research into the harmful effects of microwave ovens; the Swiss Federal Court agreed to reconsider his case, but merely extended the scope of the restrictions imposed on Mr Hertel, which did not seem to afford him reparation of the harm suffered under Article 46 of the Convention.⁴¹ In the *Hakkar* situation, on the other hand, it must be presumed that the procedural guarantees were observed following the re-opening of the proceedings; the determination of the compatibility of the new procedure with the requirements of the Convention is a matter for the European Court alone and not for the Committee of Ministers.

This greater supervision by the Committee of Ministers is evidence of what for a number of years has been a growing consideration for the future of the individual. The re-opening of the proceedings has been regarded by the European Court as a measure as close to *restitutio in integrum* as was possible.⁴² In that as in other regards, the European system should set a fundamental example and influence, in particular, the practice in the Inter-American, the United Nations and also the African systems of human rights.

2. Other measures

Other individual measures may be equally varied. First of all, the State concerned may decide not to enforce the national measure at issue, including where it is a judgment,⁴³ or the measure may be annulled: thus,

40 As in the case of *Hakkar*: 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".

41 Eur. Court HR the *Hertel v. Switzerland* judgment of 25 August 1998 and Resolution DH (2000) 122.

42 Eur. Court HR, *Piersack v. Belgium* judgment of 26 October 1984 (Article 50), para. 11.

43 Eur. Court HR, *Muyldermans v. Belgium* judgment of 23 October 1991, Resolution DH (96) 18 of 9 February 1996: the judgment of the Court of Auditors was declared unenforceable by a subsequent law.

following the *Welch* judgment, where the Court had found that there had been a violation of Article 7 in the form of a confiscation order with retro-active effect made after the applicant had been convicted of a drugs offence, the United Kingdom Government declared that “the impugned confiscation order has not been enforced and will not be enforced, thus the applicant is not in danger of being imprisoned for non-payment”.⁴⁴ In criminal matters, a decision to reduce the penalty may be taken at domestic level.⁴⁵ Removal of the conviction from the individual police record is also quite frequently recognised.⁴⁶

The “positive” effects, which are more noteworthy than those described above, since they entail not the annulment or repeal of the contested measure but the adoption of new provisions, are also less widespread in practice. For example, a positive measure may consist in the reinstatement of an employee who has been unlawfully excluded from the civil service.⁴⁷ 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 held in provisional detention in breach of the Convention.⁴⁸ Disputes involving aliens lead to national reactions which vary considerably as regards the grant of a residence permit following expulsion or removal from the territory which has been held to be incompatible with the Con-

44 The Government went on to say that “furthermore, a seizure order made by the High Court on 31 July 1987 preventing the applicant from disposing of his property has been cancelled and the amounts which had been seized and placed in an interest-bearing account have been returned to him, including interest” (Annex to Resolution DH (97) 222 of 15 May 1997). For the annulment of an expulsion order, see Eur. Court HR, *Hatami v. Sweden* judgment of 9 October 1998, Resolution DH (99) 716.

45 See, for example, the Netherlands, Hoge Raad, 1 February 1991, RvdW 1991, 44, where the court relied on Articles 1, 13 and 5 of the Convention when considering the obligation to suspend, cancel or reduce enforcement of the penalty where the European Court finds violations of procedural guarantees.

46 See, for example, Eur. Court HR, *Schwabe v. Austria* judgment of 28 August 1992, Series A No. 242-B, and Resolution DH (94) 23 of 21 March 1994.

47 Eur. Court HR, *Vogt v. Germany* (Article 50) judgment of 2 September 1996 and Resolution DH (97) 12: in addition to the compensation received, “Ms Vogt has also been deemed ... to have reached the fourteenth and final step in the salary grade A13 in November 1996. In addition, the *Land* has recognised the period between 31 October 1989 and 31 January 1991 as a period of pensionable service by her as a civil servant”.

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

vention.⁴⁹ In this sphere individuals are not all treated equally from the aspect of compensation, which may vary according to the State responsible for executing the judgment: this is a corollary of the freedom which the States have to choose the means of complying with a judgment of the European Court.

The author reached the conclusion several years ago that the European system sometimes proves to be rather ineffective in terms of the adoption of individual non-pecuniary measures, so that the individual is in a sense the poor relation of the system.⁵⁰ That conclusion remains true today, although a more strict control by the Committee of Ministers in recent years tends to take greater account of the future of the individual.

C. General measures

The States have been virtually unanimous in accepting the obligation, in certain cases, to adopt general measures in consequence of a judgment of the European Court finding a violation on their part, in addition to any obligation to compensate the victim, and make express reference to it in the information which they provide for the purposes of the adoption of the resolution of the Committee of Ministers.⁵¹ They associate that obligation with Article 46 (formerly Article 53) of the Convention⁵² and with the requirement that they do no repeat the violation. These general measures

49 See, for example, Eur. Court HR the *Lamguindaz v. the United Kingdom* judgment of 23 June 1993, Series A No. 258-C, and Resolution DH (93) 55, where the person concerned was granted an unlimited residence permit and given leave to apply for naturalisation.

50 Effects of the judgments of the European Court of Human Rights, *op. cit.*, pp. 247-248. Mr G. Cohen-Jonathan had given the example of the *B v. France* judgment, which led to a change in case-law, but as the procedure was not re-opened at the time, the applicant had been unable to have his civil status corrected: "It will be agreed that, if it is not an injustice, it is at least a weakness in the system", *50th Anniversary of the European Convention on Human Rights*, RGDIP, 2000-4, pp. 849-872, at p. 861.

51 See, for example, Resolution ResDH (2001) 157 of 17 December 2001 in the *Raiselis v. Lithuania* case, where the Government states: "This legislative amendment clearly prevents new situations similar to that at the basis of the complaints here at issue ...".

52 For one of many examples, see Resolution DH (99) 124 in the *Van Mechelen and Others v. the Netherlands* case: "The Government considers that the information provided above shows that the Netherlands has taken the necessary measures to redress the applicants' situation and to prevent further similar violations to that in the present case. Accordingly, the Netherlands has complied with its obligations under Article 53 of the Convention".

may take the form of an amendment of case-law, an amendment of the applicable regulations or indeed of other measures.

1. Amendments to case-law

It is to the courts that the judgment of the European Court is primarily addressed, owing to the direct effect of such judgments: their interest is above all in being able to avoid any repetition of the unlawful conduct pending a change of domestic law: "... even where the judgments of the Court require a complex and far-reaching reform, the national court may and must – so far as possible – derive the first consequences pending the adoption of a comprehensive law: that is a further 'lesson' from the *Vermeire* judgment".⁵³ Nowadays the direct effect of judgments of the European Court is virtually unanimously accepted in the domestic legal orders.⁵⁴ The only reluctance which remains is due not to opposition to the principle but to circumstantial reasons associated with the courts' refusal to conform with a judgment which is too innovative by comparison with the domestic law at issue. The courts refuse to endorse a development which is too great and play for time pending the intervention of the legislature.⁵⁵

In practice, refusing to apply the national law at issue and/or adopting a new interpretation of the national law often provides an appropriate means of satisfying the immediate obligation not to repeat the violation. In the case of *Modinos v. Cyprus*, where the authorities eventually adopted, in 1998 and 2000, an amendment of the law criminalising homosexual acts which had been challenged in 1993, the Government ensured that the judgments were disseminated to the authorities concerned in order to

53 G. Cohen-Jonathan, *The place of the European Convention on Human Rights in the French legal order*, in *Le Droit Français et la Convention (1974-1992)*, F. Sudre (dir.), ed. N.P. Negel, 1994, p. 10 et seq., at p. 13.

54 In that regard, paragraph 2 of Icelandic Law No. 62 of 19 May 1994 incorporating the Convention in domestic law, which provides that "decisions of the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe are not legally binding in Icelandic law" is problematic.

55 For an illustration, see for example the *Kroon and Others v. the Netherlands* case 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, the calling into question of domestic law results in an interpretation which is "too progressive and creative as regards the positive obligations of the State under Article 8"; on the other hand, "existing religious, ideological or traditional concepts of the family in each community" are directly challenged.

prevent further violations of the Convention.⁵⁶ Reference should also 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 a legislative amendment, “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”.⁵⁷ When established case-law is abandoned it may sometimes be unnecessary for the State to amend the legislation;⁵⁸ in such cases, the Committee of Ministers is increasingly careful to obtain proof of the adequacy of such a single measure and requires a judicial practice over a certain period of time without any violation of the Convention. The domestic courts may be encouraged to abandon established case-law by certain authorities of the State, for example by means of a circular.⁵⁹

2. Normative amendments

These may take the form of amendments of regulations, legislation or the Constitution. As regards, for example, the intervention of the legislature, amendments have related in particular to procedural guarantees, especially in the areas of criminal law and prison regulations. Significant reforms of the organisation of the judiciary have been implemented, especially in Spain, Portugal and Italy, in order to reduce the length of proceedings, and in the Nordic countries in respect of administrative justice in those countries. The substantive rights of minority groups (prisoners, the mentally ill,

56 See Final Resolution ResDH (2001) 152 of 17 December 2001.

57 Resolution ResDH (2001) 108 of 30 October 1991. Since 14 November 2000 this practice has been enshrined in the Judicial Code.

58 Eur. Court HR, *Kokkinakis and Others v. Greece* judgment of 25 May 1993, Series A No. 260-A, and Resolution DH (97) 576 of 15 December 1997, concerning the new interpretation of the Greek legislation on proselytism. Resolution ResDH (2001) 1 of 26 February 2001 in the *News Verlags GmbH and CoKG v. Austria* case: “Given the direct effect given to the European Convention on Human Rights and the Court’s case-law by the Austrian courts ..., the Government considers that these measures are sufficient to ensure for the future an interpretation of Section 78 of the Copyright Act in conformity with this judgment, thus avoiding new violations of the same kind”.

59 By way of example, see the departure from existing precedent by the French Court of Cassation following the *Kruslin* and *Huvig* judgments on 24 April 1990 on telephone tapping, following a recommendation of the Minister of Justice (note 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*.

illegitimate children, etc.) have also been subject to significant reforms. The States have none the less been slow to adopt such amendments, which has led to significant delays pending the adoption of such general measures, owing to the possible opposition of the legislature, or because the consequences to be drawn from the judgment have not been properly evaluated. In that regard, the legibility of the judgments of the European Court is an important criterion from the aspect of their satisfy execution. Amendments of the Constitution have proved necessary following certain judgments, and the European Court has clearly stated that such amendments were required: it has held that the Convention “makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States’ ‘jurisdiction’ from scrutiny under the Convention ...”.⁶⁰ This has been accepted in practice,⁶¹ although this requirement may give rise to certain difficulties where popular approval by referendum is required.⁶²

The case-law of the European Court will thus have played a fundamental role in the harmonisation of national laws. In addition, European case-law should cause members of the parliaments to consider at the drafting stage whether their proposed legislation is compatible with the Convention with a view to avoiding subsequent challenges; this development is parallel to that implied by the establishment in European democracies of Constitutional Courts, which have led members of the parliaments to evaluate the constitutionality of the draft legislation before them. A State such as Greece has thus set up a special service within Parliament in order to facilitate such an *a priori* control of the compatibility of proposed legislation with the Convention.

60 Eur. Court HR, *United Communist party of Turkey and Others v. Turkey* judgment of 30 January 1998, paras. 29 and 30.

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

62 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 the constitutional amendment.

3. *Other measures*

Under the head “general measures” is a device with which the Committee of Ministers has been linked since the beginning, namely the translation and dissemination of the judgment to the national authorities.⁶³ Violations of the Convention and of the case-law of the European Court are the result not so much of disinclination on the part of the national authorities to honour their international obligations as from ignorance, in particular on the part of the administrative authorities, of the European requirements. Mention should also be made under this head of general measures of a practical nature, such as the construction of prisons, the recruitment of judges and the training of police officers.⁶⁴

63 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”.

64 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 the construction of a new District Court in Limassol is under way and that studies are being carried out for the construction of new premises for the Supreme Court in Nicosia.

III. Supervision of the execution of judgments

In this section it is necessary both to examine the supervisory organs and to assess the effectiveness of the supervision and of any remedies which may improve the execution of the judgments of the Court.

A. The supervisory organs

According to the Convention, supervision of the execution of judgments takes place according to a bilateral arrangement between the respondent State and the Committee of Ministers. 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, in reality the State is increasingly required to justify itself before all the 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. In particular, this arrangement, which is bilateral and purely governmental or executive in nature, has in reality become more complex: the European Court, while remaining within the confines of its judicial function, has been able 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 duty right of examination. The arrangement therefore incorporates a more judicial, and especially more parliamentary, dimension, which makes the supervision more transparent and should, above all, help to make the procedure more effective. It will none the less be noted that the societal authorities, and more particularly the victim (or his representative), play no part in the arrangement, although the victim is recognised as having the status of subject of international law. The execution of the judgment is therefore outside the control of the applicant (inter-State applications are virtually non-existent) and remains a matter for the State, which explains in part

one of the weaknesses of the system, which tends to make the individual victim the poor relation of the process.

The author will examine in turn the roles played by the European Court, the Committee of Ministers and the Parliamentary Assembly in supervising the execution of judgments, since that is the chronological order in which those bodies may become involved.

1. The European Court of Human Rights

The European Court is not entirely absent from the supervision of the execution of judgments, but it voluntarily practises a policy of self-limitation.

(a) The supervisory methods 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 has clarified the scope of its judgments in order to facilitate their execution; it may thus provide particularly specific details of the shortcomings of national rules;⁶⁵ the principle that it does not prescribe the means of complying with its judgments thus becomes rather formal. In the case of *Hentrich v. France*, the Court expressly states that “given the violation found of Article 1 of Protocol No. 1, the best form of redress would in principle be for the State to return the land. Failing that, the calculation of pecuniary damage must be based on the current market value of the land”.⁶⁶ In that case, the victim and the Government did not agree on the amount of the pecuniary damage. In the case of *Papamichalopoulos and Others v. Greece*, the Court took a further step, since it offered the State an alternative: either to make *restitutio in integrum* or to pay compensation for the pecuniary damage, within six months.⁶⁷ This was, at the least, a “first serious assault on the doctrine that [the Court]

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

66 Eur. Court HR, the *Hentrich v. France* judgment of 3 July 1995 (Article 50), Series A No. 320.

67 Eur. Court HR, the *Papamichalopoulos and Others v. Greece* judgment of 31 October 1995, Series A No. 330-B, para. 38.

has no power to issue directions to the States in respect of the execution of its judgments".⁶⁸

In the author's view, moreover, the European Court has not made sufficient use of a technique which it has at its disposal, namely to sever the judgment on the merits from the judgment making the award: were it to do so it could leave the State time to take the initial measures to execute the judgment and, where these proved unsatisfactory, order just satisfaction. Nevertheless, the illustrations of this technique have been quite convincing: in the case of *Barberà, Messegue and Jabardo v. Spain*, the Court considered that the measures adopted by the authorities (re-opening of domestic judicial proceedings, release and acquittal of the applicants) could not constitute full satisfaction, as the applicants had been imprisoned on the basis of criminal proceedings which were contrary to the Convention; it therefore awarded them just satisfaction.⁶⁹ In particular, in the case of *Schuler-Zraggen v. Switzerland*, notwithstanding that, following an appeal on a point of law, the applicant had been awarded an invalidity pension, with retroactive effect, 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.⁷⁰ In the case of *Pressos Compania Naviera SA and Others v. Belgium*, the Court clearly examined whether the national measures adopted after the judgment on the merits might secure *restitutio in integrum* for the applicants and found that in the case of one applicant, "the consequences of the violation of the Convention have not been eradicated so that the applicant is entitled to just satisfaction under Article 50".⁷¹

It may prove necessary to make repeated findings of violations in respect of the same impugned general measures in order to persuade the State to adapt its domestic law to the requirements of the Convention. For example, the case of *Van Mechelen and Others v. the Netherlands* is only indirectly the corollary of the delay with which the Netherlands Govern-

68 J.-F. Flauss, "Addendum", JTDE, 1996, p. 48.

69 Eur. Court HR, the *Barberà, Messegue and Jabardo v. Spain* judgment of 13 June 1994 (Article 50), Series A No. 285-C.

70 Eur. Court HR, the *Schuler-Zraggen v. Switzerland* judgment of 31 January 1995, Series A No. 305-B.

71 Eur. Court HR, the *Pressos Compania Naviera SA and Others v. Belgium* judgment (Article 50) of 3 July 1997, paras. 11 and 17.

ment executed the *Kostovski* judgment in regard to the legislation on anonymous witnesses.⁷² However, the European Court is extremely prudent when it comes to referring indirectly even to the satisfactory nature of measures previously adopted with a view to executing its judgments,⁷³ owing to the need to respect the division of powers with the Committee of Ministers.⁷⁴

(b) The refusal to pronounce a judgment finding a violation of Article 46 of the Convention

The European Court has thus far not taken a further step, since it refuses to find a violation on the basis of Article 46 (former Article 53) of the Convention.

There is no doubt that, in accordance with international law in general, a refusal to execute (or the imperfect execution of) a judgment of the European Court constitutes an independent violation of the Convention and engages the international responsibility of the State. It remains to ascertain whether the Court is competent to punish such a violation. According to the terms of the Convention, the European Court was set up in order to “ensure the observance of the commitments undertaken by the High Contracting Parties in the present Convention” (former Article 19). These commitments include the undertaking to “abide by the final judgment of the Court in any case to which [the High Contracting Parties] are parties”. The final nature of the resolution of the Committee of Ministers would not be a ground for declaring such an application inadmissible since the Committee does not undertake a legal examination of the compatibility of the measures adopted with the requirements of Article 46 and since

72 The national courts alone were unable to make good the imperfection in the rules in question: the intervention of the legislature was essential. Eur. Court HR, the *Kostovski v. the Netherlands* judgment of 20 November 1989, Series A No. 166, and Eur. Court HR, the *Van Mechelen and Others v. the Netherlands* judgment of 23 April 1987.

73 Eur. Court HR, the *Radio ABC v. Austria* judgment of 20 October 1997, where it merely noted “with satisfaction that Austria has introduced legislation to ensure the fulfilment of its obligations”. The European Court did not comment on whether the provisions were compatible with Article 10 of the Convention.

74 See also the *Ferrari v. Italy* judgment of 28 July 1999, para. 21, where the Court refers to the large number of cases against Italy involving proceedings exceeding the “reasonable time” requirement in Article 6 and observes that “[s]uch breaches reflect a continuing situation that has not yet been remedied”.

in practice some measures may fail to satisfy the obligation to abide by a judgment.

It is apparent that although the European Court does not refuse to make such a finding, it attempts to postpone the point at which it will have to resolve it; it seems to keep that alternative as a last resort. Although the European Commission of Human Rights did not avoid the issue,⁷⁵ the European Court circumvented it in the judgment in *Olsson II*, where it held that “the facts and circumstances underlying the applicants’ complaint under Article 53 ... are essentially the same as those which were considered above under Article 8, in respect of which no violation was found”. It thus concluded that “no separate issue arises under Article 53”.⁷⁶ In the author’s view, the Court should logically have dealt first with the complaint alleging a violation of Article 53.⁷⁷ None the less, it will be understood that the choice is a strategic one: is it appropriate for the European Court to embark upon such a route? The answer to that question is uncertain; the Convention system is conceived on the principle of the separation of functions between the European Court and the Committee of Ministers; unlike the position under Article 171 of the Community Treaties, the European Court of Human Rights hears applications from any individual: would there not be a risk of abuse on the part of victims attempting this new route? Besides, this new route would only delay the resolution of the dispute for individuals who must be successful at the level of the Committee of Ministers. Furthermore, if the State has failed to comply with a judgment in respect of general measures, an action for failure to act exists *de jure* since other victims may address applications to the European Court

75 European Commission HR, application No. 10243/83 *Times Newspapers Ltd, F. Thomas, R. Giles v. the United Kingdom, P. Knightley and E. Potter v. the United Kingdom*, 6 March 1985, DR 41, p. 123 *et seq.*, where it declares that it is incompetent, since “It cannot ... assume any function in relation to the supervision of the Court’s judgment” and the bill drafted by the Government “seems to have satisfied the Committee of Ministers in exercise of its supervisory functions under Article 54 of the Convention”. Application No. 24469/94 *J.M. Ruiz-Mateos and Others v. Spain*, 2 December 1994, DR 79-B, p. 141, at p. 145 “The Committee of Ministers discharged its function in this respect by the adoption of [the] Resolution ... It follows that the Commission is not competent to deal with this question ...”.

76 Eur. Court HR, the *Olsson v. Sweden* (No. 2) judgment of 27 November 1992, Series A No. 250, para. 94, although the Court previously noted that the Committee of Ministers had adopted a resolution in which it stated that it had fulfilled its functions under (former) Article 54 of the Convention.

77 See the dissenting Opinion of Judge Pettiti, joined by Judges Matscher and Russo.

(the *Vermeire* hypothesis); if the failure on the part of the State relates to individual non-pecuniary reparation, the victim is, admittedly, relatively powerless, but can still obtain a declaration of a continued violation of his rights, as in *Olsson No. 2*. As a general observation, the European system is more effective in terms of general measures than in terms of individual reparation, with the exception of just satisfaction, ordered by the Court.

Such a remedy is therefore of limited usefulness, but may prove symbolic should a State categorically refuse to execute a judgment: as stated above, the Court has not excluded that possibility, but by making such an opening available it could find itself struggling to withstand the burden of a never-ending dispute.

2. The Committee of Ministers

The Committee of Ministers plays and continues to play (since the amendment of Protocol No. 11 it has become its sole task) a fundamental role in the execution. It is the organ which both provides the impetus for and supervises the proper execution of European judgments. What is the scope of its supervision, and what means of coercion are available in the event of opposition by the State?

(a) The supervision of the various obligations involved in the execution of judgments

(i) Rules of general organisation

Under the Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2,⁷⁸ supervision of the execution of judgments of the Court takes place at special human rights meetings the agenda of which is public. As to whether a judgment is included on the agenda, the following rules apply: as soon as a judgment is transmitted to the Committee of Ministers, it is immediately entered 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 included in principle at each meeting of the Committee, and at the latest every six months, until a final resolution is adopted. According to Rule 8,

After having established that the State concerned has taken all the necessary measures to abide by the judgment, the Committee of Ministers shall

78 Rules as revised on 10 January 2001 at the 736th meeting of the Ministers' Deputies. See text reproduced in Appendix I.

adopt a resolution concluding that its functions under Article 46, paragraph 2, of the Convention have been exercised.⁷⁹

The operating rules of the Committee have recently changed with a view to ensuring that its work in supervising the execution of judgments is more transparent: not only are the agenda and the information provided to the Committee of Ministers by the State concerned and the accompanying documents made public, but also since recently the agenda and the annotated proceedings of each meeting containing information about the progress recorded in executing the judgments have been published shortly after the meeting. The deliberations of the Committee of Ministers always remain secret, as provided for in Article 21 of the Statute of the Council of Europe.

The Committee of Ministers receives considerable assistance from its own Secretariat and in particular from the Secretariat of the Human Rights Directorate responsible for preparing each file and for liaising with the relevant State authorities in respect of each case prior to the Committee's Human Rights meetings. The Human Rights Directorate draws up the detailed agenda of the cases to be examined at each meeting, under various heads. A *first head* consists of the final resolutions to be adopted in principle without discussion in cases where execution has been satisfactory and which have already been discussed at previous meetings of the Committee: the cases are placed into groups of "'precedent' cases" (cases which constitute "precedents"); cases concerning problems which have already been resolved (which do not entail any problem relating to the individual situation of the applicant and in respect of which the general problems have already been resolved in other, previous, cases); cases not involving any individual or general measure (where dissemination of the judgment is in itself sufficient to comply with the requirements of the Convention) and cases involving friendly settlements.⁸⁰ A *second head* consists of new cases in respect of which the Ministers' Deputies must carry out an initial examination (in particular of the individual and/or

79 The resolutions of the Committee of Ministers are published on the Council of Europe's website. The principle resolutions are set out in the document drawn up on the occasion of the fiftieth anniversary of the Convention: Council of Europe, H/Conf (2000) 8, "Supervision 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".

80 For a recent example, cf. Resolution DH(2002) 92 of 22 July 2002 concerning the friendly settlements in nineteen cases against Italy.

general measures which be adopted), which will be resumed following the expiry of the period within which the States are required to pay just satisfaction. A *third head* deals with just satisfaction: the Deputies must supervise payment of the just satisfaction awarded by the Court and of any default interest payable. A *fourth head* concerns cases which raise special questions, either because they raise problems connected with the individual situation of the applicant to whom just satisfaction was unable in itself to provide a remedy, or because the measures of execution have not yet been defined or because complex problems have arisen. And a *fifth head* relates to general measures, whether legislative amendments, changes to case-law or administrative practice, the publication of judgments or other measures, such as the recruitment of judges, etc. Where a State refuses to abide by one or more judgments of the Court, the Directorate General of Human Rights may draw up *memoranda* for the Committee for the purpose of taking stock of the individual and/or general measures still to be adopted by the State in order to comply in principle with a number of judgments of the European Court.

It should be noted that a problem in the general task of supervising the execution of judgments of the Court may arise in the near future: this is because of the number of cases pending before the Committee. At present there are more than 2 500 such cases, according to a rather worrying growth curve, based on the figures in the most recent agenda and annotated works.⁸¹ However, since, following the adoption of Protocol No. 11, the Committee no longer exercises its function under the former Article 32 of the Convention, it should be able to devote more time to what is now its sole task of supervising the proper execution of judgments.

(ii) *Supervision of the adoption of all measures needed to abide by the judgment of the European Court*

The Committee of Ministers' initial practice was relatively timid. It then gradually paid attention to the effects of the measures announced and undertaken by the State. The Committee of Ministers was the essential vector of the gradual recognition of the direct effect of European judgments in the domestic legal orders.

81 CM/Del/OJ/TO (2002) 783, 783rd meeting of 19-20 February 2002, available at the Council of Europe's website (<http://www.coe.int/>).

The Committee of Ministers ascertains that the just satisfaction is 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 rather flexible position as regards the practice of compensation according to the rules of domestic law between the sums payable to the victim by the State and the sums which the victim may owe, which is consistent with the liberal interpretation of the European Court itself.⁸² Although this rule may appear to be the corollary of the principle of subsidiarity, in the author's view such a set-off should be accepted only where it is the State that is the victim's creditor. Furthermore, even before the Court imposed default interest on the just satisfaction, the Committee of Ministers had required that the sum actually paid by the States make full reparation for the harm sustained. That was the position in the case of *Stran Greek Refineries and Stratis Andreadis*.⁸³ As regards the default interest payable outside the three-month period, current practice is not widespread⁸⁴ and illustrates in particular cases where individuals have waived payment owing to the small amounts involved.⁸⁵ If only payment of just satisfaction is required under Article 53, the Committee of Ministers expressly states that "no other measure was required in the present case to conform to the Court's judgment".⁸⁶

In addition to payment of just satisfaction, the Committee of Ministers attempts to obtain, at the suggestion of the Secretariat of the Human Rights Directorate, individual non-pecuniary measures by way of reparation, in order to ensure compliance with the obligation to make *restitutio in integrum*: the Committee thus satisfies itself that "the Government of the respondent State accordingly gave the Committee information about

82 Eur. Court HR, *Allenet de Ribemont v. France* (interpretation of the judgment of 10 February 1995), 7 August 1996.

83 The rate of compensation was in the order of 6% to 7% compared with the amount ordered by the Court: Resolution DH (97) 184 of 20 March 1997: "stressing Greece's obligation to safeguard the value of the amounts awarded", it ascertained that the sum paid "corresponds to the just satisfaction awarded by the Court, in compensation for the loss of value caused by the delay in payment ...".

84 For example, Resolution DH (99) 350 in the case of *Remli v. France*.

85 For example, Resolution ResDH (2001) 166 in the case of *Moucheron and Others v. France*.

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

the individual and general measures taken in consequence of the judgment, with the view to remedying the situation of the applicant".⁸⁷ It encourages the States to resume the proceedings in situations where such revision constitutes *restitutio in integrum*, to reinstate an alien who has been unlawfully expelled from the aspect of Article 8 of the Convention or to adopt other necessary measures, such as removing a conviction from the applicant's police record.

The Committee requires that the Government provide evidence that it has adopted all the general measures susceptible of avoiding further violations⁸⁸ and has no hesitation in asking a State to take new measures when the situation has not improved.⁸⁹ This supervision is also exercised where the parties have reached a friendly settlement and the case before the European Court has therefore been struck out of the list,⁹⁰ and continues to be exercised following the adoption of protocol No. 11.⁹¹ According to a recent practice, the Committee of Ministers expressly states in the body of its resolution that the Government has given it "information about the measures taken to avoid the impending violation as found in the present judgment",⁹² thus emphasising the fact that prevention of a repetition of

87 See, for example, Resolution ResDH (2001) 53 of 26 February 2001 in the case of *Matter v. the Slovak Republic*. See also Interim Resolution DH (99) 529 of 28 July 1999 in the case of *Socialist Party and Others v. Turkey*, where the Committee "instantly invites Turkey to take without delay all the measures necessary to remedy the situation of the former President of the Socialist Party, Mr Perinçek".

88 See the new formula used in resolutions: "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).

89 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 ...".

90 Resolution DH (99) 26 of 18 January 1999 in the case of *Sur v. Turkey*.

91 Eur. Court HR, the *Freunberger v. Austria* judgment of 19 December 2000 and Resolution ResDH (2001) 171, which included, under the head of general measures, the abrogation 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.

92 See, for example, Resolution DH (98) 10 of 18 February 1998 in the case of *D. v. the United Kingdom*, and Resolution DH (99) 24 in the case of *Z. v. Finland*.

the violation is a condition *sine qua non* of the adoption of a final resolution.

Where a legislative amendment appears necessary and the State argues that the direct effect of the Convention and of the Court's judgment precludes new violations of a similar kind, the Committee of Ministers now requires proof that that measure is sufficient: proof takes the form of a convincing judicial practice over several years following the judgment of the Court. For example, in the case of *Pauwels v. Belgium*, where a legislative reform was expected, the Committee finally resigned itself, after 13 years, to adopting a final resolution in the absence of any legislative amendment, relying on the fact that the national courts would avoid any comparable new violations.⁹³ In the case of *Belziuk v. Poland*, the Government provided information about a partial legislative amendment and the adoption of the interpretation of the European Court by the domestic courts: "The change of the domestic practice is evidenced by several judgments of the Supreme Court, notably quashing judgments delivered by regional courts which wrongfully refused to bring the accused to those appeal hearings ... The Supreme Court's case-law shows that it is willing to give direct effect to the jurisprudence of the European Court, thus ensuring that Poland respects its undertakings under the Convention".⁹⁴

(b) The coercive means available to the Committee of Ministers

Where the State is opposed to 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 Statutes of the Council of Europe.

(i) The adoption of interim resolutions

According to Rule 7 adopted by the Committee of Ministers on the basis of Article 46, paragraph 2, as revised on 10 January 2001, "the Committee of Ministers may adopt interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropri-

93 See Resolution ResDH (2001) 67 of 26 June 2001 concerning the judgment in *Pauwels v. Belgium*. See also Resolution ResDH (2001) 83 of 23 July 2001 concerning the judgment of 18 December 1996 in *Valsamis v. Greece*: according to the Government, "The lack of specific jurisprudence showing this change in the courts' attitude is only due to the very exceptional nature of such complaints".

94 Resolution ResDH (2001) 9 of 26 February 2001 concerning the judgment of 25 March 1998 in the case of *Belziuk v. Poland*.

ate, to express concern and/or to make relevant suggestions with respect to the execution".

The Committee of Ministers has taken the initiative of adopting interim resolutions where it considers that the information provided by the Government does not disclose a satisfactory execution of the judgment and that the State ought to be "encouraged". The practice was introduced with the case of *Ben Yaacoub*⁹⁵ and has since been repeated, notably in the *Stran Greek Refineries and Stratis Andreadis* case, where Greece disputed the arrangement for payment of just satisfaction. In that case, the Committee of Ministers required that the Greek authorities pay default interest that would guarantee the value of the just satisfaction and was eventually successful.⁹⁶

Interim resolutions take various forms. A *first type of interim resolution* consists in taking note that no measure has been adopted and in inviting the State to comply with the judgment.⁹⁷ This constitutes a simple public official finding of non-execution. A *second type* provides the Committee of Ministers with the opportunity to note certain progress and to encourage the State to adopt future measures; this allows the Committee to take a position directly on a possible option of complying with the Court's judgment. In addition to the resolution adopted in the case of *Scozzari and Giunta v. Italy*,⁹⁸ mention must also be made of the interim resolution of

95 Eur. Court HR, the *Ben Yaacoub v. Belgium* judgment of 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.

96 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.

97 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 ...".

98 Interim Resolution ResDH (2001) 65 of 29 May 2001: "Noting with the greatest interest that ... the Belgian Government has approached the Italian authorities in order to examine the possibilities or organising, by judicial means, the placement of the children in Belgium, near the mother's place of residence, under the guardianship of the competent youth court; finding that such a proposal could provide the basis for a solution respecting the Court's judgment, Encourages, considering the urgency of the situation, the Belgian and Italian authorities to implement without delay the proposal so as to put an end to the violations found". The resolution ResDH (2001) 151 of 3 October 2001 adopted in the same case does not go further: "The

25 October 2000 entitled “Excessive length of judicial proceedings in Italy, General measures”, in which the Committee of Ministers evaluates in detail the effectiveness of the measures already adopted in order to ensure that there was no repetition of the violation and invites the State to adopt further measures and to present a comprehensive report each year.⁹⁹ It is also appropriate to refer to the resolution entitled “Action of the security forces in Turkey: measures of a general character”, in which the Committee analyses the measures adopted and their results and makes suggestions as to the means of complying with the judgment.¹⁰⁰ Similarly, in the interim resolution adopted in the case of *F.C.B. v. Italy*,¹⁰¹ the Committee observes that “so far, the absence of means to reopen the impugned proceedings has made it impossible fully to rectify the serious and continuing consequences of the violations found” and invites Italy to adopt new legislation in conformity with Recommendation R (2002) 2 of the Committee of Ministers. In this way, the Committee of Ministers may hope to exert pressure on, for example, the national legislature.¹⁰² Finally, a *third category*, used only exceptionally, seeks to threaten the State with more serious measures, owing to the time which has elapsed and to the urgency of the situation. The most recent resolution thus far adopted in the case of *Loizidou v. Turkey* comes within this third category.¹⁰³

It will be noted that the Committee of Ministers is quite free as to the means at its disposal, in the absence of detailed provisions in the Convention. It has all the powers necessary to achieve its function of supervising

Committee of Ministers ... encourages the Italian authorities in particular to reinforce their contacts with the Belgian authorities with a view to organising meetings very quickly between mother and children at a neutral location, pursuant to the decision of the Florence Youth Court.”

99 Interim Resolution DH (2000) 135 of 25 October 2000.

100 Resolution DH (99) 434 of 9 June 1999.

101 Resolution ResDH (2002) 30 of 19 February 2002, “Reopening of judicial proceedings in violation of the European Convention on Human Rights”.

102 Interim Resolution ResDH (2001) 178 of 5 December 2001 “concerning monitoring of prisoners’ correspondence in Italy – measures of a general character”.

103 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”.

judgments and is therefore able to require a State to present a written report on the measures adopted, as in the case involving Italy and the general measures to deal with the excessive length of judicial proceedings. In October 2001 the Committee began to examine the first annual report presented by the Italian authorities, but noted that further information was required before it could embark on a more thorough evaluation of the implementation of those measures. Examination of that question should thus be resumed in 2002, but the problem has not been reduced, since, although a new law has been enacted with a view to compensating the victims of excessively long proceedings, it makes no provision for speeding up the proceedings and, furthermore, its application may well increase the burden of the Courts of Appeal.

It is not inconceivable that the Committee will invent other processes in the future.

(ii) The application of Article 8 of the Statute of the Council of Europe

Exclusion from the Council of Europe may be a possible response by the European organs where a State categorically refuses to execute a judgment. Article 8 of the Statute provides that "Any 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 a 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". Persistent 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, the harsh nature of that measure has rendered it wholly inappropriate and thus far it has not been put into practice. The case of *Loizidou v. Turkey* led the Committee of Ministers to brandish officially the threat of exclusion for the first time, although the threat is implausible. This may be seen from the fact that in that case the Committee seems to cede place in favour of 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 this judgment".¹⁰⁴ 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 power of the Committee of Ministers to secure the execution of a judgment.

The Committee of Ministers must therefore show imagination and propose other interim measures. A. Eissen had 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".¹⁰⁵

Other solutions might perhaps come from the Parliamentary Assembly.

3. *The Parliamentary Assembly*

The Committee of Ministers is now supported by the Parliamentary Assembly of the Council of Europe in its function of supervising the execution of judgments. This examination by the Parliamentary Assembly dates from the adoption of Order No. 485 (1993), whereby the Assembly had instructed its Committee for Legal Matters 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 of Human Rights" and to put in place a "Monitoring" procedure by Order No. 488 (1993), extended by Order No. 508 (1995) to the honouring of commitments entered into 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 is now exercised according to a number of methods.

First, members of the Assembly have no hesitation in using written questions to obtain explanations from the Committee of Ministers concerning

104 The previous interim resolution in that case, adopted on 24 July 2000 (Resolution DH (2000) 105), stated: "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".

105 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 failure to execute certain judgments.¹⁰⁶ The Committee of Ministers is thus required to provide a written answer. For example, following written question No. 378 of 10 September 1998 from certain members of the Assembly requesting an explanation of the period necessary for the execution in full of all the judgments pending for more than three years without any sign of being executed, the Committee provided three explanations: the extent of the reforms undertaken, the internal difficulties in implementing certain reforms (such as constitutional amendments) and the necessity, in certain specific conditions, to await the resolution of certain other similar cases pending before the Convention organs in order to clarify the requirements of the Convention in the area concerned and to provide guidance for the proposed reforms.

When oral questions are put by members of the Assembly to the President 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. Thus, at the April 1999 session, the President of the Committee of Ministers was questioned about the *Socialist Party and Others v. Turkey* and the *Hakkar v. France* judgments. The members of the Assembly demanded that the Committee adopt a firmer approach and a number of them stated that they would be prepared to make suggestions to the Committee should the problems persist.¹⁰⁷

Henceforth, one of the four annual sessions of the Assembly includes on the agenda a point concerning the execution of judgments. Apart from the adoption of a report, the discussion leads to the adoption of a recommendation and/or a resolution. Since the adoption of Resolution 1226 (2000) on the execution of judgments of the European Court of Human Rights, the Assembly has decided to hold regular discussions of the execution of

106 For the most recent example, see written question No. 402 from Mr Clerfayt (Doc. 9272) concerning Turkey's failure to comply with the judgments concerning violations of Article 5 of the Convention and the Committee's reply of 16 January 2002, Doc. 9327 of 21 January 2002.

107 AS(1999)CR11, cf. the statements of Mr Clerfayt: "(...) I would like to know whether the Committee of Ministers is examining in greater depth how (...) to go about getting refractory states to mend their ways. If the Committee of Ministers does not succeed in finding effective solutions soon, our Assembly will have to look into the problem and make suggestions" (p. 7). Mr Jurgens asked whether the Committee of Ministers would "ask the French and Turkish Justice Ministers to come to Strasbourg for the June Assembly meeting to account for the fact that their countries are not complying with decisions following the mechanisms of the Convention in two specific cases, as a consequence of which Mr Perinçek and Mr Hakkar who should not be are still in jail?"

judgments on the basis of an inventory which it draws up; its Committee for Legal Affairs and Human Rights has decided to use two criteria when drawing up that inventory: first, the period which has elapsed since the Court's decision (five years for the first inventory) and, second, the urgency with which certain decisions must be implemented. Thus, during 2001, it wrote to eight national delegations requesting them to urge their governments to implement the decisions which had not been executed.¹⁰⁸ Five delegations responded to that appeal. The first report taking stock of one year's action was published on 21 December 2001 and debated in the Assembly in January 2002.¹⁰⁹ This made it possible to take stock of some 15 cases. This procedure is based on the principle that only the national delegations "have the competence to call their governments to account within their own national parliamentary procedure",¹¹⁰ according to a non-partisan initiative. 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".¹¹¹

The Assembly also envisages, in cases where the States prove to be more reluctant, to ask the Minister of Justice of the State concerned to explain himself before the members of the Parliamentary Assembly. It was thus proposed to invite the Turkish minister of Justice to attend the June 2002 sitting.¹¹² That measure was included in Resolution 1226 (2000) "Execution of judgments of the European Court of Human Rights"; by 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 notices abnormal delays", to hold an "emergency debate" "if the State in question has neglected to execute or deliberately refrained from executing the judgment", to open a follow-up procedure should a member State refuse to execute a decision of the Court

108 The countries in question were Austria, Belgium, France, Greece, Italy, the Netherlands, Portugal and the United Kingdom.

109 Report by E. Jurgens on behalf of the Committee on Legal Affairs and Human Rights, "Implementation of decisions of the European Court of Human Rights", Doc. 9307.

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

111 *Ibid.*, para. 11.

112 *Ibid.*, para. 7.

and even to “envisage, if these measures fail, making use of other possibilities, in particular those provided for in its own Rules of Procedure and/or of a recommendation to the Council 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 Group of Rapporteurs of the Committee of Ministers on Human Rights and the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly,¹¹³ so that the different national delegations can rapidly question their governments where they fail to fulfil their obligation to execute judgments.

The significance of the involvement of the Parliamentary Assembly lies in particular in the public nature of the denunciation of recalcitrant states; the Assembly thus urges the Ministers’ Deputies, the press, and therefore public opinion, and also the members of the national parliaments of the States concerned, to bring pressure to bear on a State which is reluctant to execute a judgment of the European Court. The Assembly’s involvement seeks to give its members more responsibility in respect of the international commitments of their own governments. Admittedly, it is too early to evaluate the true effectiveness of such measures, the majority of which have been very recent. It is significant that the report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights¹¹⁴ welcomed the trend in the Parliamentary Assembly to follow more closely the question of the execution of judgments by holding regular debates and recommended that the Committee of Ministers “pursue dialogue with the Parliamentary Assembly” on a “special procedure for the handling of repetitive applications”. According to the Evaluation Group, “the supervision process may be facilitated and accelerated as

113 See reply of the Committee of Ministers to Recommendation 1546 (2002) on the implementation of decisions of the European Court of Human Rights (Parliamentary Assembly, Part 1 of the 2002 sitting, Texts adopted; and CM/Del/Dec (2002) 781/3.1, para. 14).

114 EG Court (2001) 1 of 27 September 2001. The Committee of Ministers had established this Evaluation Group in February 2001 to make proposals on the means of guaranteeing the continued effectiveness of the European Court, and in particular on the question of the execution of judgments.

a result of contacts made or questions raised in national Parliaments by members of the Assembly and the resultant publicity".¹¹⁵

In the author's view, this gradual involvement of the Parliamentary Assembly can only be salutary at this stage, especially since it entails close coordination with the Committee of Ministers and complements the latter's role.

B. Failure to execute the judgment and the limits to the effectiveness of European judgments

1. *Precedents*

Examples of reluctance to execute a judgment have been relatively few in number and they must not be extrapolated. Attention must none the less be drawn to them, since they affect the legitimacy of the European system for the protection of human rights and the authority of the European Court.

Non-payment of just satisfaction, or a delay in paying it, is a matter for particular concern: according to the last available annotated agenda¹¹⁶ drawn up by the Human rights Directorate, non-confirmation of payment of the principal concerned, in particular, France (13 cases), Italy (21 cases), Portugal (8 cases), Turkey (47 cases) and the United Kingdom (9 cases). Payment of the principal amount had not been confirmed after more than six months in 12 cases against France, 27 cases against Italy, 9 cases against Poland and 10 cases against Turkey. As regards payment after expiry of the prescribed period and non-confirmation of the default interest payable, there are, regrettably, 270 cases against Italy. Special problems may also arise, for example where the applicant has disappeared or where there is a dispute as to the precise sum paid following exchange rate problems or administrative deductions. Only one State has challenged the rules on payment: this was Greece in the case of *Stran Greek Refineries and Stratis Andreadis*, where the State, pleading economic difficulties, sought in vain to make payment by instalments. The Committee was

¹¹⁵ Report of the Evaluation Group, paragraph 52.

¹¹⁶ Annotated agenda of the 783rd meeting of 19-20 February 2002, CM/Del/OJ/TO (2002) 783.

eventually successful more than two years after delivery of the judgment.¹¹⁷

Apart from cases involving delays in paying just satisfaction or in adopting measures to avoid a repetition of the violation (in particular, delays in adopting legislative arrangements), examples of genuine reluctance on the part of States have been specific and peculiar to certain cases. In the *Hakkar* case, France refused to consider an obligation to re-open the domestic court proceedings as a consequence of a judgment of the Court or a decision of the Committee of Ministers (this opposition came to an end following the legislative amendment of 15 June 2000). In the case of *Socialist Party and Others v. Turkey*, which to date has not yet been resolved, the State refused to cancel the individual criminal penalty imposed on Mr Perinçek (the dissolution of the party had also involved a criminal conviction imposed on its former president).¹¹⁸

The case of *Scozzari and Giunta v. Italy* has also been before the Committee of Ministers for a long time, since Italy refuses, in the name of freedom to choose the means, to adopt the necessary measures.

More seriously, the State concerned may object in principle to executing the judgment. The case of *Loizidou v. Turkey* provides a perfect illustration. The Turkish Government disputes the Court's decision, which is based on Turkey's international responsibility for acts committed in Northern Cyprus, and refuses to consider that the judgment places it under any obligations. Despite the most recent interim resolution, ResDH (2001) 80, of the Committee of Ministers, supported by the Parliamentary Assembly, the member States have taken no further measure, and the case now seems to have reached a complete impasse.

In conclusion, one might support the classification of the Parliamentary Assembly, which, in Resolution 1226 (2000), "Execution of judgments of the European Court of Human Rights", states that

[t]he 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

117 Interim Resolution DH (96) 251 of 15 May 1996 and Final Resolution DH (97) 184 of 20 March 1997.

118 See Interim Resolution DH (99) 245.

opinion; judgments drafted in a casuistical or unclear manner; reasons relating to interference with obligations deriving from other institutions.¹¹⁹

In the author's opinion, the most frequent reasons seem to be those linked with the reforms required and with domestic legislative procedures. The former case may be illustrated, for example, by the cases of torture in Turkey: a legislative reform was not sufficient, and it was also necessary to train the administrative personnel. The latter situation, illustrated by the *Marckx* case, presumes that the national Parliament supports the need for legislative amendments imposed by the judgments of the European Court. However, the most formidable reasons are naturally those of a political nature. It is impossible to know what the outcome of the *Loizidou* case will be, especially since the inter-State case of *Cyprus v. Turkey*¹²⁰ has also been pending before the Committee of Ministers for more than one year.

2. Possible remedies

At the beginning of 2001 the Committee of Ministers set up a "think tank" to make proposals on the means of guaranteeing the continued effectiveness of the system of protection of human rights.¹²¹ As regards the reinforcement of the execution of judgments, a particular problem was to be resolved in the short or medium term: this related to the adoption of general measures with immediate effect, i.e. as soon as the judgment finding a violation is pronounced by the Strasbourg Court. Owing to the delay with which such measures enter into force, a significant number of new judgments may be pending before the European Court, thus obstructing the Committee of Ministers. Thus, in the report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, a number of proposals were made: the Group recommended a special procedure in the event of repeated applications:

on being informed by the Registry of the Court of the existence of the pending applications, the Committee of Ministers would deal with execution of the original judgment by a special procedure allowing for expedited treatment, the pending applications would be "frozen" by the Court for a given period, but subject to regular review, to allow time for the necessary

119 For details of these reasons and illustrations in each case, see Report of E. Jurgens on behalf of the Parliamentary Assembly's Legal Affairs and Human Rights Committee, 12 July 2000, Doc. 8808, "Execution of judgments of the European Court of Human Rights".

120 Eur. Court HR, the *Cyprus v. Turkey* judgment of 10 May 2001.

121 This group presented its report in September 2001: EG Court (2001) 1 of 27 September 2001.

measures to be taken by the respondent State. This procedure would enable the Committee of Ministers to exert special pressure on the State concerned and could reduce the need for the Court to deliver a series of purely repetitive judgments on the merits.¹²²

This suggestion was taken up by the Committee of Ministers in the “Declaration on the protection of human rights and fundamental freedoms in Europe – Ensuring the long-term effectiveness of the European Court of Human Rights”, adopted on 8 November 2001 at the 109th ministerial session.¹²³ In its report, the Evaluation Group also asked the Committee of Ministers to “utilise every means at its disposal to ensure the expeditious execution of judgments of the Court and recommended that discussions on “possible responses in the event of slowness or negligence in giving effect to a judgment or even non-execution thereof ... should be rapidly initiated and vigorously pursued”, as recommended by the Rome Ministerial Conference”.¹²⁴ When the Committee as a whole does not succeed in arriving at a favourable outcome in a politically sensitive case, the President of the Committee may be invited to establish direct contact with the authorities of the State concerned, but this role of mediation is relatively ineffective. The Evaluation Group also suggest that in such a case the Committee of Ministers should designate “one of its members as rapporteur to take the lead in pursuing a dialogue with the respondent State”.¹²⁵ It therefore remains to await the specific measures which the Committee will be in a position to adopt in the coming months.

More than the Committee of Ministers, it is in particular the Parliamentary Assembly of the Council of Europe that has made a number of specific suggestions as remedies for the failure to execute certain judgments: in Recommendation 1546 (2002) “Implementation of decisions of the European Court of Human Rights”, the Assembly

122 Report of the Evaluation Group, paragraph 51.

123 The Committee of Ministers “instructs the Ministers’ Deputies to pursue urgent consideration of all the recommendations contained in the report concerning b. the use of every means at their disposal to ensure the expeditious and effective execution of judgments of the Court, including those involving issues generating repetitive applications and 11. invites the Ministers’ Deputies to share information with the Parliamentary Assembly on the implementation of this declaration”.

124 Report of the Evaluation Group, paragraph 100 (B.5 and 6).

125 Report of the Evaluation Group, paragraph 53.

reiterates its recommendations to the Committee of Ministers (i) to amend the European Convention on Human Rights so as to give the Committee of Ministers the power to ask the Court for a clarifying interpretation of its judgments where necessary, and to introduce a system of *astreintes* (daily fines for delays in the performance of a legal obligation) to be imposed on states that persistently fail to execute a court judgment.¹²⁶

According to the Assembly, the European Court should “oblige itself to indicate in its judgments to the national authorities concerned how they should execute the judgment so that they can comply with the decisions and take the individual and general measures required” and “more frequently indicate in a judgment whether a previous judgment has not been executed at all, not been completely executed, or not been executed in time by the state concerned”.¹²⁷ Because this last proposal with regard to the Court contradicts the principle that States are free to choose the means of executing judgments, and the principle that tasks are clearly divided between the Court and the Committee of Ministers, it should not be favourably received by those two organs.¹²⁸

The proposal concerning daily fines seems more easily attainable. Without there even being any need to amend the Convention, the European Court could recognise itself as having such power where a State has not executed a judgment following the expiry of a period following formal notice given by the Committee of Ministers for example, such period to be fixed in advance by the Court in its judgment under Article 50.

In addition to these new measures, is it worth recalling that one of the oldest and most effective weapons at the disposal of an executive organ such as the Committee of Ministers is without doubt the effective exercise of the collective responsibility of the States in the face of reluctance on the part of one of them, i.e. the political courage which the members should

126 Both of these proposals had already been made in 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”: “amend the Convention so as to have the power exceptionally for a clarifying interpretation of its judgment in cases where the execution gives rise to reasonable doubts and serious problems regarding the correct mode of implementation”.

127 Resolution 1226 (2000), “Execution of judgments of the European Court of Human Rights”, paragraph 11, B.

128 See the letter of 28 March 2000 from the President of the European Court to the President of the Legal affairs and Human Rights Committee of the Parliamentary Assembly, where opposition to those measures is clearly stated.

show? In cases described by some as politically sensitive it is not the specialist human rights representative who sits but the Ambassador. In regard to human rights, hypocrisy and cowardice on the part of States on the international scene are quite intolerable. In Recommendation 1546 (2002), the Parliamentary Assembly also requested the Committee of Ministers "(iii) to be more firm in carrying out its functions under Article 46 of the Convention", which clearly means that it must "take the measures provided for in Article 8 of the Statute in case of continued refusal".¹²⁹ In his report, "Execution of judgments of the European Court of Human Rights",¹³⁰ the rapporteur, E. Jurgens, states that "[t]here is, of course, the possibility of application of Article 8 in conjunction with Article 3 of the Statute of the Council of Europe concerning suspension and withdrawal of membership, but these are sanctions which should be applied only in cases of persistent refusal despite recourse to all other avenues of persuasion and pressure available to the Council of Europe bodies". The cases of *Loizidou v. Turkey* and *Cyprus v. Turkey* represent a challenge for the Committee of Ministers, albeit one which it has not thus far been able to resolve.

129 Resolution 1226 (2000), "Execution of judgments of the European Court of Human Rights", paragraph 11.A.iv.

130 Doc. 8808 of 12 July 2000, Report on behalf of the Legal Affairs and Human Rights Committee, paragraph 93.

IV. Conclusion

In conclusion, it cannot be overemphasised that the requirements associated with judgments of the European Court are the corollary of the accession of the European States to a system of supranational protection of human rights, which necessarily carries with it a limitation of national sovereignty. It is therefore quite illogical to object that the execution of European judgments infringes 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".¹³¹

Even with some faults (nothing in this world can be perfect), the European Court has beyond question increased the protection fundamental rights in all the European States Parties (if proof is required, it is only necessary to re-read fifty years of case-law). The outcome of the execution of judgments has been broadly positive, so that the rare exceptions are even more unacceptable. None the less, constant vigilance is called for; especially fundamental rights are violated by States, nothing can ever really be taken for granted.

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

V. Appendices

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

(Text approved by the Committee of Ministers on 10 January 2001 at the 736th meeting of the Ministers' Deputies)

Rule 1. General provisions

- a. The Committee of Ministers' supervision of the execution of judgments of the Court will in principle take place at special human rights meetings, the agenda of which is public.
- b. 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 to the examination of cases under Article 46, paragraph 2, of the Convention.
- c. If the chairmanship of the Committee of Ministers is held by the representative of a state which is a party to a case referred to the Committee of Ministers under Article 46, paragraph 2, of the Convention, that representative shall relinquish the chairmanship during any discussion of that case.

Rule 2. Inscription of cases on the agenda

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

Rule 3. Information to the Committee of Ministers on the measures taken in order to abide by the judgment

- a. 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 State concerned to inform it of the measures which the State has taken in consequence of the judgment, having regard to its obligation to abide by it under Article 46, paragraph 1, of the Convention.

- b. When supervising the execution of a judgment by the respondent State, pursuant to Article 46, paragraph 2, of the Convention, the Committee of Ministers shall examine whether:
 - any just satisfaction awarded by the Court has been paid, including as the case may be default interest;
 and, if required, and taking into account the discretion of the State concerned to choose the means necessary to comply with the judgment, whether
 - 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;
 - general measures² have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.

Rule 4. Control intervals

- a. Until the State 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.
- b. If the State 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 5. Access to information

Without prejudice to the confidential nature of Committee of Ministers' deliberations, in accordance with Article 21 of the Statute of the Council of Europe, information provided by the State to the Committee of Ministers in accordance with Article 46 of the Convention and the documents relating thereto shall be accessible to the public, unless the Committee decides otherwise in order to protect legitimate

- 1 For instance, the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit or the re-opening of impugned domestic proceedings (see on this latter point Recommendation No. R (2000) 2 of the Committee of Ministers to the 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.

public or private interests. In deciding such matters, the Committee of Ministers shall take into account reasoned requests by the State or States concerned, as well as the interest of an injured party or a third party not to disclose their identity.

Rule 6. Communications to the Committee of Ministers

- a. The Committee of Ministers shall be entitled to consider any communication from the injured party with regard to the payment of the just satisfaction or the taking of individual measures.
- b. The Secretariat shall bring such communications to the attention of the Committee of Ministers.

Rule 7. Interim resolutions

In the course of its supervision of the execution of a judgment, 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 relevant suggestions with respect to the execution.

Rule 8. Final resolution

After having established that the State concerned has taken all the necessary measures to abide by the judgment, the Committee of Ministers shall adopt a resolution concluding that its functions under Article 46, paragraph 2, of the Convention have been exercised.

II. 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 Rights¹

(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;

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 to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;

1 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.

- 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.

III. References to Council of Europe sources

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Gazette – Committee of Ministers from January 1999-2000.

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 Web site: <http://www.coe.int/>

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<http://www.humanrights.coe.int/>

European Court of Human Rights: <http://www.echr.coe.int/>

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- No. 2 The presentation of an application before the European Commission of Human Rights (1978, out of print)
- No. 3 Outline of the position of the individual applicant before the European Court of Human Rights (1978)
- No. 4 The right to liberty and the rights of persons deprived of their liberty as guaranteed by Article 5 of the European Convention on Human Rights (1981)
- No. 5 Les conditions de la détention et la Convention européenne des Droits de l'Homme (1981) (available in French only)
- No. 6 The impact of European Community law on the implementation of the European Convention on Human Rights (1984)
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