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REVISTA IIDH

Edición especial sobre el sistema interamericano de protección de derechos humanos

Número conmemorativo del sesenta aniversario de la Declaración Universal de Derechos Humanos y de la Declaración Americana de los Derechos y Deberes del Hombre

Julio-Diciembre 2007

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INSTITUT INTERAMÉRICAIN DES DROITS DE L'HOMME
INSTITUTO INTERAMERICANO DE DIREITOS HUMANOS
INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS

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Temas en derechos humanos

Effectiveness and fulfillment of the judgements on human rights: the experience of the European System*

*Leo F. Zwaak***

Introduction

Since the entry into force of the European Convention of Human Rights the number of Contracting Parties has almost tripled. As a result of this the number of cases pending before the European Commission and the European Court of Human Rights had grown so enormously, necessitating reform of the supervisory mechanisms. The purpose of these reforms was to enhance the efficiency of the means of protection, to shorten procedures and to maintain the present high quality of human rights protection. To this end, the Committee of Ministers of the Council of Europe adopted Protocol No. 11 to the Convention in May 1994. On 1 November 1998 the European Convention entered into force according to the amendments of the said Protocol.[1]

A new single Court has replaced the two existing supervisory organs, namely the European Commission on Human Rights and the European Court of Human Rights, and performs the functions carried out by these organs. While the underlying purpose of the system remained the same, the Court now had a further role to play in the consolidation of democracy and the rule of law in the wider Europe. The scope of its competence and the breadth of its geographical reach are unprecedented in the history of international law.

The Committee of Ministers of the Council of Europe retained its competence under the former Article 54 (supervision of the judgment of the Court), while its competence under former Article 32 in respect of individual applications has been abolished.

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* Ponencia ofrecida en el marco del XXV Curso Interdisciplinario en Derechos Humanos, 9 al 20 de julio de 2007, San José de Costa Rica.

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1 See in more detail Explanatory Report on Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 155), 1994, Council of Europe Publishing; Yvonne Klerk, "Protocol No. 11 to the European Convention for Human Rights: A Drastic Revision of the Supervisory Mechanism under the ECHR", NQHR, Vol. 14, No. 1 (1996), pp. 35-46; A. Drzemczewski, "A Major Overhaul of the European Convention Control Mechanism: Protocol No. 11", Collected Courses of the Academy of European Law; 1995 The Protection of Human Rights in Europe, The Hague 1997, pp. 125-244.

The events of 1989 and 1990 brought in their train a vast change in the Council of Europe, in that there was a rapid increase in the number of its member States, from 23 at the end of 1989 to 47 in 2007. In its approach to enlargement, the Council of Europe decided that ratification of the Convention shortly after joining the Organization should be a condition for accession thereto. Consequently, the Convention, to which 22 States had previously been party, was ratified in or after 1990 by 19 new member States, most of them being countries of Central and Eastern Europe. For the enforcement machinery this meant that the number of potential applicants, if calculated by reference to the population of the Contracting States, grew from 451 to 772 million.[2] Ratification of the Convention by a new member State entailed the election of a new judge, who had to familiarize him or herself fully with the practices, traditions, perspectives and case-law of the Strasbourg institutions. It may also be observed that, when the reform leading to Protocol No. 11 was first conceived, this substantial and rapid enlargement of the Council of Europe and the impact it would have on the control machinery was not anticipated.

The reform under Protocol No. 11 has, however, proven to be insufficient to cope with the prevailing situation. Since 1998 the number of applications increased from 18,164 to 34,546 in 2002, while at the end of 2003 approximately 65,000 applications were pending before the Court. The problem of the excessive case-load is characterized by two phenomena in particular: i. The number of inadmissible applications, and ii. The number of repetitive cases following a so-called 'pilot judgment'. In 2006 50.500 applications were lodged and 1.634 cases were declared admissible. With respect to the remaining cases, the Court delivered 1.498 judgments in 2006, of which some 60% concerned repetitive cases.[3] 12.860 case were declared inadmissible or struck off the list. While 12.551 applications were disposed of administratively (applications not pursued-files destroyed).

By the end of 2006, there were 89,887 applications pending before the Court, approximately one-quarter (some 23,000) of which had yet to be allocated to the appropriate judicial formation (Committee or Chamber). Some 20 per cent of the cases are directed against Russia. About 12 per cent of the cases concern Romania and a further 10

2 Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG(Court2001)1 27 September 2001, para 15, http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm.

3 Explanatory Report to Protocol No.14, para. 7.

per cent Turkey. The Court's capacity to handle applications has increased noticeably since 1999. In 2006, it handed down 1,560 judgments (an increase by over 40 per cent compared with 2005). The highest number of judgments concerned Turkey (334), Slovenia (190), Ukraine (120), Poland (115), Italy (103), Russia (102), France (96) and Romania (73). These eight States accounted for over 70 per cent of the judgments. In addition, the Court disposed of more than 28,000 other applications, which were either declared inadmissible or struck off for another reason. Applications can also be disposed of administratively, for example, if the applicant fails to follow up on their initial correspondence with the Court. In 2006, some 12,000 applications were disposed of in this way.[4]

As a result of the massive increase of individual applications, the effectiveness of the system and thus the credibility and authority of the Court are seriously endangered. In order to cope with this problem, Protocol No. 14 was drafted to amend the control system of the Convention. It was opened for signature on 13 May 2004, but has not entered into force yet. Unlike Protocol No.11, Protocol 14 makes no radical changes to the control system. The changes it does make relate more to the functioning of the system rather than to its structure. Its main purpose is to improve the system, giving the Court the procedural means and flexibility it needs to process all applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination. The amendments concern the following aspects: (a) reinforcement of the Court's filtering capacity in respect of the flux of unmeritorious applications; (b) a new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage; (c) measures for dealing with repetitive cases. Together these elements of the reform seek to reduce the time spent by the Court on clearly inadmissible, repetitive and less important applications, in order to enable the Court to concentrate on those cases that raise important human rights issues. Protocol No. 14 will institute two new procedures regarding the execution phase. The Committee of Ministers will be able to request interpretation of a judgment of the Court. It will also be able to take proceedings in cases where, in its view, the respondent State refuses to comply with a judgment of the Court. In such proceedings, the Court will be asked to determine whether the State has respected its obligation under Article 46 to abide by a final judgment against it.

4 Council of Europe, Survey of Activities 2006, pp. 6-7.

Special situation arising from applications concerning the length of court proceedings in Italy and the applications concerning gross violations in Turkey and Russia

Many applications received in Strasbourg allege that the length of domestic criminal, civil or administrative court proceedings has exceeded the "reasonable time" stipulated in Article 6 para. 1 of the Convention (more than 3.129 of a total of 5.307 applications declared admissible between 1955 and 1999). A particularly high number of such applications have concerned Italy. Thus, of the total of 21.128 applications registered in the period from 1 November 1998 to 31 January 2001, 2.211were directed against Italy; of these, 1.516 related to the length of proceedings. Again, of the 1.085 applications declared admissible in 2000, 486 concerned Italy and, in 428 cases, related to this same issue. In addition, as at July 2001, there were altogether about 10.000 further provisional applications against Italy falling into this category, of which 3.177 files were ready for registration but could not be processed for lack of human resources in the Registry.

Legislation on this matter has very recently been adopted, in the shape of Law No. 89 of 24 March 2001, which provides that anyone who has suffered pecuniary or non-pecuniary damage by reason of violation of the "reasonable time" requirement is entitled to lodge a request for just satisfaction with the Court of Appeal. In the framework of the execution of judgments, the Committee of Ministers is awaiting to assess the impact of a broader range of measures taken by Italy with a view to speeding up court proceedings. The effect of the new Law and those other measures on the case-load of the Strasbourg Court remains to be seen.[5]

Another factor overburdening the workload of the Court is the great number of cases concerning violation of the right to life, torture and inhuman treatment and in some cases even disappearances in Turkey. In 1999 the Court delivered 18 judgments against Turkey in 2000 26 and in 2001 171 of which 57 ended in a friendly settlement. In 2006 the Court decided 320 cases against Turkey. Over the same period almost 1.500 applications against Turkey have been declared admissible. The most of these cases are very time-consuming since on many occasions investigations on the spot are necessary and the Court has to hear a great number of witnesses.[6]

5 Ibidem, para 27.

6 Council of Europe, Survey of Activities, European Court of Human Rights, http://

A new problem area will be the Russian Federation where since 1999 almost 50.000 complaints have been lodged of which 37.500 have been registered and of which almost 21.000 applications have been declared inadmissible or struck of the list. So far 353 applications have been declared admissible and 1.233 applications have been referred to the Government for communication.

Since the new Court commenced its activities, its "productivity" has significantly increased. In 2000 the number of applications disposed of drew closer to, or in two months (March and September) equaled, the number of applications registered, the monthly averages being 643 disposed of and 874 registered and the annual totals being 7.711 disposed of and 10.486 registered. However, it must be remembered that the Court did not have a clean slate in November 1998, having inherited a legacy from the former Court and Commission.

The Court considers that, ideally, a case should be finally disposed of within two years. Since this is very difficult to achieve in the current situation, it has set itself a "target for the handling of applications" of three years.

Roughly 50% of applications are disposed of by the Court within one year of registration, but a considerable number is not terminated within the 3-year target. The latter was true, for example, of about 2.250 of the 19.200 applications pending in September 2001. Some cases are not disposed of until after a period of 4-6 years (for example, about 514 of the 4.719 applications registered in 1997).

Here again, there are differences between the Contracting States. At the end of July 2001, the number of applications per State in which the maximum duration for one of the phases after registration had been exceeded ranged from 1 to 1.459, with 18 States having 100 or more such applications.[7]

According to the Evaluation Group any assessment of the implications of the problem must depend in the first place on a forecast of the number of applications that will be received by the Court in the future. However, it is extremely difficult to make such a forecast with accuracy. It is conceivable that measures taken at national level might have an effect on the Court's workload. On the other hand, recent years have seen no slacking-off in the number of applications and there are

www.echr.coe.int/Eng/InfoNotesAndSurveys.htm.

7 Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG(Court2001)1 27 September 2001, para 31.

few grounds for supposing that this will occur in the next ten years or so. Experience has shown that publicity given to important cases, coupled with increasing knowledge of the Convention machinery on the part of the legal profession and the population in general, has a "snowball" effect. This point is of particular relevance for those States which have ratified the Convention more recently; the flow of applications from them is not yet very great (4.959 out of the 10.486 applications registered in 2000 concerned countries of Central and Eastern Europe) and in some cases has hardly begun. Nor is there any evidence of a significant falling-off of interest from the older Contracting States.[8]

The Council of Europe's Internal Auditor, by taking the number of applications registered for each year and each country over the last ten years and applying statistical methods, estimated, in his report to the Secretary General, that the number of applications registered would be 14.655 in 2002 and 20.720 in 2005. In the five-year period from 2000 (when 10,486 applications were registered) to 2005, there would thus be an overall increase of nearly 100%. The Auditor recognized that his projections were conservative; indeed, it can be seen that they fall below the recorded increase for 2000 and the calculated increase for 2001.

On the basis of the foregoing and particularly the country-by-country analysis, the Evaluation Group considers that there is no ground for disputing that an increase in the number of registered applications of at least the order indicated by the Auditor will occur.

Judgment of the Court[9]

Where the Chamber finds that there has been a violation of the Convention or the Protocols thereto, it gives in the same judgment a ruling on the application of Article 41 of the Convention if that question, after being raised in accordance with Rule 60 of the Rules of the Court, is ready for decision. If the question is not ready for decision, the Chamber reserves it in whole or in part and fixes the further procedure.[10]

According to Article 42 in conjunction with Article 44(2) of the Convention, judgments of Chambers become final (a) when the

8 Ibidem, para 35.

9 See in more detail: *Theory and Practice of the European Convention on Human Rights*, Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (eds), fourth edition, Intersentia (2006), Chapter 2.

10 Rule 75(1) of the Rules of Court.

parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer the case to the Grand Chamber. According to Article 44(1) of the Convention, the judgment of the Grand Chamber is final. Judgments will have to be reasoned (Article 45, paragraph 1). This article does not concern decisions taken by the panel of five judges of the Grand Chamber in accordance with Article 43, nor Committee decisions on admissibility under Article 28.

The judgment will be transmitted to the parties but will not be published until it has become final (Article 44, paragraph 3). According to Article 46, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment is transmitted to the Committee of Ministers, which will supervise its execution.

a. Measures of redress

In several cases the Court noted that it is well established that the principle underlying the provision of just satisfaction for a breach of the Convention is that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements.[11]

The Court has indicated that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision 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. If, on the other hand, national law does not allow –or allows only partial– reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums 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 its domestic

11 See e.g. judgment of 26 October 1984, Piersack, para 12; judgment of 28 May 2002, Kingsley, para. 40.

legal order to put an end to the violation found by the Court and to redress so far as possible the effects.[12] Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed.[13]

b. No jurisdiction to direct a State to take certain measures

Repeatedly the Court declared that it lacked jurisdiction to direct the States to take certain measures, for instance to abolish the violation found by the Court, to repair the costs, etcetera. The Court notes regularly that it is left to the State concerned to choose the means within its domestic legal system to give effect to its obligations under Article 53.[14]

In the Corigliano Case, the Court declared the claim inadmissible to order the State to make certain articles of the Penal Code inapplicable to 'political and social trials'. This 'falls outside the scope of the case brought before the Court', according to the Court.[15] Also the request to publish a summary of the Court's judgment in local newspapers or the removal of any reference to the applicant's conviction in the central criminal records, falls outside the scope of the jurisdiction of the Court.[16]

In the Bozano Case, the applicant had requested the Court to recommend the French Government to approach the Italian authorities through diplomatic channels, with a view to securing either a 'presidential pardon' —leading to his 'rapid release'— or a reopening of the criminal proceedings taken against him in Italy from 1971 to 1976. The Government argued that the Court did not have the power to take such a course of action. Furthermore, they maintained that

12 Judgment of 13 July 2000, Scozzari and Giunta, para. 249; judgment of 24 October 2002, Pisano, para. 43; judgment of 8 April 2004, Haase, para. 115.

13 Judgment of 17 February 2004, Meastri, para. 47.

14 Judgment of 20 September 1993, Saïdi, para. 47; judgment of 13 July 1995, Tolstoy Miloslavsky, paras 69-72; judgment of 30 October 1995, Papamichalopoulos, para. 34; judgment of 1 April 1998, Akdiva, para. 62.

15 Judgment of 10 December 1982, Corigliano, para. 51.

16 Judgment of 27 February 1992, Manifattura FL, para. 26; judgment of 23 April 1992, Castells, para. 54.

it would in any case be unconnected with the subject-matter of the dispute, since it would amount to recommending France to intervene in the enforcement of final decisions of the Italian courts. The Court did not go into these arguments. It merely pointed out that Mr Bozano's complaints against Italy were not in issue before it, as the Commission had declared them inadmissible.[17] One cannot escape the impression that the Court did not want to enter into the issue whether or not it had the power to make a recommendation as requested by the applicant. It might be argued that in cases where restitutio in integrum is impossible, as in the present case, the Court had nothing left than to award just satisfaction. However, what Mr. Bozano in addition requested from the Court was only a recommendation and such a recommendation should, in general, not be deemed inappropriate, comparable as it would seem to be with the recommendation of provisional measures, for which there is also no express basis in the Convention.

In the Akdivar Case, the applicants claimed, inter alia, compensation under this provision for the losses incurred as a result of the destruction of their houses by the security forces which forced them to abandon their village. They further submitted that the Court should confirm, as a necessary implication of an award of just satisfaction, that the Government should (1) bear the costs of necessary repairs in their village to enable the applicants to continue their way of life there; and (2) remove any obstacle preventing the applicants from returning to their village. The Court held that, if restitutio in integrum is in practice impossible, the respondent States are free to choose the means whereby they will comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard. It falls to the Committee of Ministers acting under Article 54 of the Convention, to supervise compliance in this respect.[18]

In the Papamichalopoulos Case, the Court held that 'the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made [up to then] to remedy the situation complained of, [had] entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions.' The act of the Greek Government which the Court held to be contrary

17 Judgment of 18 December 1986, para. 65.

18 Judgment of 1 April 1998, para. 62; judgment of 24 April 1998, Selçuk and Asker, para. 154; judgment of 24 July 1998, Mentes, para. 423.

to the Convention, was not an expropriation that would have been legitimate but for the failure to pay fair compensation; it was a taking by the State of land belonging to private individuals, which has lasted twenty-eight years, the authorities ignoring the decisions of national courts and their own promises to the applicants to redress the injustice committed in 1967 by the dictatorial regime.[19] Consequently, the Court considered that the return of the land in issue, —as defined in 1983 by the Athens second Expropriation Board— would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1; the award of the existing buildings would then fully compensate them for the consequences of the alleged loss of enjoyment. The Court held that if the respondent State did not make such restitution within six months from the delivery of this judgment, it was to pay the applicants, for damage and loss of enjoyment since the authorities took possession of the land in 1967, the current value of the land, increased by the appreciation brought about by the existence of the buildings, and the construction costs of the latter.[20]

In the Scozzari and Giunta Case, the Court held that a judgment in which the Court finds a breach of the Convention imposes on the respondent State a legal obligation not just to pay those concerned the sums 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.[21]

In the Velikova Case, the applicant claimed 100,000 French francs in compensation for the pain and suffering resulting from the violations of the Convention. She asked for an order of the Court that this amount be paid directly to her in full, free of taxes or of any claim or attachment by the government or by third persons. The applicant also requested the Court to order that there should be no negative consequences for her, such as reduction in social benefits due to her, as a result of the receipt of the above amount. The Court considered that the compensation fixed pursuant to Article 41 and due by virtue of a judgment of the Court should be exempted from attachment. It held, that it would be incongruous to award the applicant an amount in

19 Judgment of 24 June 1993, para. 45.

20 Judgment of 31 October 1995, Papamichalopoulos, paras. 38-40.

21 Judgment of 13 July 2000, para. 249.

compensation for, inter alia, deprivation of life constituting a violation of Article 2, if the State itself were then allowed to attach this amount. The purpose of compensation for non-pecuniary damage would inevitably be frustrated and the Article 41 system perverted, if such a situation were to be deemed satisfactory. However, the Court held that it had no jurisdiction to make an order exempting compensation from attachment. It therefore left this point to the discretion of the Bulgarian authorities.[22]

Where the choice of measures is in practice theoretical, since it is constrained by the nature of the violation, the Court can itself directly require certain steps to be taken. To date, it has made use of this possibility only on two occasions. In the Assanidze Case, the Court ordered the release of the applicant, who was being arbitrarily detained in breach of Article 5 of the Convention. It held that as regards the measures which the Georgian State must take, subject to supervision by the Committee of Ministers, in order to put an end to the violation that had been found, its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed. However, by its very nature, the violation found in the instant case did not leave any real choice as to the measures required to remedy it. In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 5(1) and Article 6(1) of the Convention, the Court considered that the respondent State must secure the applicant's release at the earliest possible date.[23] In the Ilascu Case, the Court considered that any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46(1) of the Convention to abide by the Court's judgment. Regard being had to the grounds on which the respondent States had been found by the Court to be in violation of the Convention, they must take every measure to

22 Judgment of 4 October 2000, para. 99.

23 Judgment of 8 April 2004, paras. 202-203.

put an end to the arbitrary detention of the applicants still detained and to secure their immediate release.[24]

In this respect, it should be noted that the Committee of Ministers in a recent Resolution has considered that the execution of judgments would be facilitated if the existence of a systemic problem is already identified in the judgment of the Court. Therefore, it invited the Court:

> I. as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments;
>
> II. to specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the Court.[25]

c. Scope of the obligations to comply with a judgment

A judgment of the Court does not expressly order the respondent State to take specific measures to rectify the applicant's situation and prevent further violations. Under the Convention, States are free to choose the means whereby they implement individual or general measures.

This is not to say, however, that the payment of just satisfaction is the only obligation that may derive from a judgment of the Court. To execute a judgment finding one or more violations of the Convention the respondent State may, depending on the circumstances, also be required to take certain measures. This may be, firstly, individual measures for the applicant's benefit, so as to end an unlawful situation, if that situation still continues, and to redress its consequence (restitutio in integrum)[26], and secondly, general measures to prevent further violations of a similar nature.[27]

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24 Judgment of 8 July 2004, para. 490.

25 Resolution (2004)3 of 12 May 2004.

26 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: 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, of 19 January 2000.

27 For instance, legislative or regulatory amendments, changes of case law or

This has been stressed by the Court, for example, in the Papamichalopoulos Case. There the Court pointed out that from the obligation under Article 46 of the Convention it follows, inter alia, that a judgment in which the Court finds a breach, imposes on the respondent State a legal obligation not only to pay those concerned the sums 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 taken in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible its effects.[28]

d. The binding force of a judgment

With respect to the binding force and execution of judgments, Protocol No. 14 will amend Article 46 of the Convention. Three new paragraphs will be added to Article 46. The new Article 46, in its paragraph 3, will empower the Committee of Ministers to ask the Court to interpret a final judgment, for the purpose of facilitating the supervision of its execution. The Committee of Ministers' experience of supervising the execution of judgments shows that difficulties are sometimes encountered due to disagreement as to the interpretation of judgments. The Court's reply settles any argument concerning a judgement's exact meaning. The qualified majority vote required on the part of the Committee of Ministers by the last sentence of paragraph 3 shows that the Committee of Ministers should use this possibility sparingly, to avoid over-burdening the Court. The aim of the new paragraph 3 is to enable the Court to give an interpretation of a judgment, not to pronounce on the measures taken by a High Contracting Party to comply with that judgment. No time-limit has been set for making requests for interpretation, since a question of interpretation may arise at any time during the Committee of Ministers' examination of the execution of a judgment.

The Court is free to decide on the manner and form in which it wishes to reply to the request. Normally, it would be for the formation of the Court which delivered the original judgment to rule on the question of interpretation. More detailed rules governing this new procedure may be included in the Rules of Court.[29]

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administrative practice or publication of the Court's judgment in the language of the respondent State and its dissemination to the authorities concerned.

28 Judgment of 31 October 1995, para. 34; see also the judgment of 13 July 2000, Scozzari and Giunta v. Italy, para. 249.

29 Explanatory Report to Protocol No. 14, CETS 194, paras. 96-97.

Paragraphs 4 and 5 of Article 46 will empower the Committee of Ministers to bring infringement proceedings in the Court. The Court will sit as a Grand Chamber,[30] having first served the State concerned with notice to comply. The Committee of Ministers' decision to do so requires a qualified majority of two thirds of the representatives entitled to sit on the Committee. This infringement procedure does not aim to reopen the question of violation, already decided in the Court's first judgment. Nor does it provide for payment of a financial penalty by a High Contracting Party found in violation of Article 46, paragraph 1. It is felt that the political pressure exerted by proceedings for non-compliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the state concerned.[31]

In fulfilling its supervisory task the Committee of Ministers invited the Court as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.[32]

In this respect the Court held in the Broniowski Case, that above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause. Such measures should therefore include a scheme which offers to those affected redress for the Convention violation identified in the instant judgment in relation to the present applicant. In this context the Court's concern is to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection. Once such a defect has been identified, it falls to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate, the necessary remedial measures in accordance with the subsidiary character of the Convention, so that the Court does not have to repeat its finding in a lengthy series of comparable cases. The Court held that, with a view to assisting the respondent State in fulfilling its obligations under Article 46, the Court

30 New Article 31(b).

31 Explanatory Report to Protocol No. 14, CETS 194, para. 98.

32 Resolution Res. (2004) 3 of 12 May 2004 on judgments revealing an underlying systemic problem.

has sought to indicate the type of measure that might be taken by the Polish State in order to put an end to the systemic situation identified in the present case. The Court was not in a position to assess whether the December 2003 Act can be treated as an adequate measure in this connection since no practice of its implementation has been established as yet. In any event, this Act does not cover persons who –like Mr. Broniowski– had already received partial compensation, irrespective of the amount of such compensation. Thus, it was clear that for this group of Bug River claimants the Act could not be regarded as a measure capable of putting an end to the systemic situation identified in the present judgment as adversely affecting them. Nevertheless, as regards general measures to be taken, the Court considered that the respondent State must, primarily, either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found, in respect of the applicant, to have been in breach of the Convention, or provide equivalent redress in lieu. As to the former option, the respondent State should, therefore, through appropriate legal and administrative measures, secure the effective and expeditious realisation of the entitlement in question in respect of the remaining Bug River claimants, in accordance with the principles for the protection of property rights laid down in Article 1 of Protocol No. 1, having particular regard to the principles relating to compensation.[33] Since the applicant belonged to a fairly large group of victims of similar violations, the Court on 4 July 2004 for the first time has used the 'leading case' procedure, whereby examination of the many similar cases is being suspended until the required measures have been taken. This procedure is one of the means chosen to reduce the Court's workload.[34]

In the Sejdovic Case, the Court held that the infringement of the applicant's right to a fair trial had originated in a problem resulting from Italian legislation on the question of trial in absentia and had been caused by the wording of the provisions of the CCP relating to the conditions for lodging an application for the lifting of a procedural bar. There was a shortcoming in the Italian legal system which meant that every person convicted in absentia who had not been effectively informed of the proceedings against him could be deprived of a retrial. The Court considered that the shortcomings of domestic law and practice revealed in the present case could lead in the future to a large number of well-founded applications. Italy had

33 Judgment of 12 May 2004, paras. 193-194.

34 Human Rights Information Bulletin, H Inf(2005)1, p. 23.

a duty to remove every legal obstacle that might prevent either the reopening of the time allowed for an appeal or a retrial in the case of every person convicted by default who, not having been effectively informed of the proceedings against him, had not unequivocally waived the right to appear at his trial. Such persons would thus be guaranteed the right to obtain a new ruling on the charges brought against them from a court which had heard them in accordance with the requirements of Article 6 of the Convention. Consequently, Italy should take appropriate measures to make provision for and regulate further proceedings capable of effectively securing the right to the reopening of proceedings, in accordance with the principles of the protection of the rights enshrined in Article 6 of the Convention.[35]

According to the Explanatory Report to Protocol No. 14, the Committee of Ministers should bring infringement proceedings only in exceptional circumstances. None the less, it appeared necessary to give the Committee of Ministers, as the competent organ for supervising execution of the Court's judgments, a wider range of means of pressure to secure execution of judgments. Currently the ultimate measure available to the Committee of Ministers is recourse to Article 8 of the Council of Europe's Statute (suspension of voting rights in the Committee of Ministers, or even expulsion from the Organisation). This is an extreme measure, which would prove counter-productive in most cases; indeed, the High Contracting Party which finds itself in the situation foreseen in paragraph 4 of Article 46 continues to need the discipline of the Council of Europe. The new Article 46, therefore, adds further possibilities of bringing pressure to bear to the existing ones. The procedure's mere existence, and the threat of using it, should act as an effective new incentive to execute the Court's judgments. It is foreseen that the outcome of infringement proceedings will be expressed in a judgment of the Court.

The supervisory task of the Committee of Ministers

As described above, Article 46(1) of the Convention provides that the Contracting Parties 'undertake to abide by the final judgment of the Court in any case to which they are parties.' This undertaking entails precise obligations for respondent States which are found to be in violation of the Convention. On the one hand, they must take measures in favour of the applicants to put an end to these violations and, as far as possible, erase their consequences (restitutio in integrum),

35 Judgment of 10 November 2004, paras. 46-47.

and, on the other hand, they must take the measures needed to prevent new, similar violations. A primary obligation is the payment of just satisfaction (normally a sum of money), which the Court may award the applicant under Article 41 of the Convention and which covers, as the case may be, pecuniary and/or non-pecuniary damage and/or costs and expenses. The payment of such compensation is a strict obligation which is clearly defined in each judgment.

According to Article 46(2) of the Convention, once the Court's final judgment has been transmitted to the Committee of Ministers, the latter invites the respondent State to inform it of the steps taken to pay the amounts awarded by the Court in respect of just satisfaction and, where appropriate, of the individual and general measures taken to abide by the judgment.[36] Once it has received this information, the Committee examines it closely. According to Rule 1(c) of the Rules of the Committee of Ministers for the application of Article 46(2) of the Convention, in case 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(2), that representative shall relinquish the chairmanship during any discussion of that case.

The Directorate General of Human Rights helps the Committee of Ministers to carry out this responsibility under the Convention. In close co-operation with the authorities of the State concerned, it considers what measures need to be taken in order to comply with the Court's judgment. At the Committee of Ministers' request, it supplies opinions and advice based on the experience and practice of the Convention bodies.

In accordance with Rule 3(b), 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. If required, the Committee shall also take into account the discretion of the State concerned to choose the means necessary to comply with the judgment. In all cases it will strive to ascertain 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, and/or, whether general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing

36 See the Rules of the Committee of Ministers for the application of Article 46(2) of the Convention; http://www.coe.int/T/E/Human_rights/execution/. Unless indicated otherwise, in this chapter the Rules refer to this set of Rules.

violations. It is the Committee of Ministers' well-established practice to keep cases on its agenda until the States concerned have taken satisfactory measures, and to continue to require explanations or action.[37] When there is a delay in the execution of a judgment, the Committee of Ministers may adopt an interim resolution assessing the progress towards execution. As a rule, this type of interim resolution contains information about any interim measures taken and indicates a timetable for the reforms designed to resolve the problem or problems raised by the judgment once and for all. If there are obstacles to execution, the Committee will adopt a more strongly worded interim resolution urging the authorities of the respondent State to take the necessary steps in order to ensure that the judgment is complied with. According to Rule 4(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 will 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 applies when this period expires and for each subsequent period. The Committee may bring its full weight to bear in order to induce the State concerned to comply with the Court's judgment. In practice, the Committee of Ministers rarely resorts to political and diplomatic pressure but tends, instead, to function as a forum for constructive dialogue enabling States to work out satisfactory solutions with regard to the execution of judgments. On a number of occasions, however, interim resolutions have been drafted and adopted in order to pressurise States that have refused to afford applicants just satisfaction or to take specific measures in compliance with judgments. Under the Statute of the Council of Europe, tougher political sanctions could be considered such as suspension or termination of membership of the Council of Europe under Article 8 of the Statute, but obviously these are ultima remedia that will be considered in very exceptional circumstances only.

The Committee of Ministers is entitled to consider any communication from the injured party with regard to the payment of the just satisfaction or the taking of individual measures.[38]

37 Rule 4(a) provides that, 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 will be placed on the agenda of each human rights meeting of the Committee of Ministers, unless the Committee decides otherwise.

38 Rule 6(a).

With respect to access to information Rule 5 provides as follows:

> 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 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.

In accordance with Rule 7, the Committee of Ministers may in the course of its supervision of the execution of a judgment adopt interim resolutions 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. There may be situations in which the adverse consequences of the violation suffered by an injured party are not always adequately remedied by the payment of just satisfaction. Depending on the circumstances, the execution of the judgment may also require the respondent State to take individual measures in favour of the applicant, such as the re-opening of unfair proceedings if domestic law allows for such re-opening, the destruction of information gathered in breach of the right to privacy or the revocation of a deportation order issued despite of the risk of inhumane treatment in the country of destination. It may also require general measures –such as an adaptation of legislation, rules and regulations, or of a judicial practice– to prevent new, similar violations.

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

Finally, Article 17 of the Statute of the Council of Europe provides for still another tool for the Committee in fulfilling its supervisory powers. According to that article the Committee of Ministers may set up advisory or technical committees or commissions if it deems this desirable. The Committee of Ministers might proceed to do so for the purpose of taking evidence and other tasks within the context of its function under the Convention.

a. Just satisfaction

If the Court has decided that the respondent State has to pay just satisfaction under Article 41 of the Convention within three months of

the delivery of its judgment, the Committee of Ministers will examine the case at its meeting following the delivery of that judgment.[39] In a number of cases against Italy concerning violations of the requirement of a reasonable length of proceedings, the Committee had recommended that the Government pay, within a time-limit of three months, just satisfaction to the applicants. The Italian Government disagreed with the proposals of the Committee of Ministers and refused to pay the applicants. The Committee subsequently noted at its next meeting that, although the time-limit had extended, the Government still had not paid the sums it had agreed to pay following the Committee's recommendation. It decided to strongly urge the Government to proceed without delay to pay the specified amount to the applicants. It further decided, if need be, to resume consideration of these cases at each of its forthcoming meetings.[40] In its subsequent session, the Committee of Ministers adopted again resolutions in the Italian cases and now firmly stated that, in accordance with (former) Article 32(2) of the Convention, the Government of Italy was to pay the applicants before a fixed date a certain amount in respect of just satisfaction. The Committee of Ministers invited the Government to inform it of the measures taken in consequence of its decision, having regard to the Government's obligations under (former) Article 32(4) of the Convention to abide by it.[41] Finally, on 17 September 1992, the Committee of Ministers ended the consideration of these cases by declaring, after having taken note of the measures taken by the Italian Government, that it had exercised its functions under (former) Article 32 of the Convention.[42]

In case the respondent State is unable to proof the payment, the case will stay at the agenda of the Committee of Ministers and will be dealt with at every subsequent meeting of the Committee until it is satisfied that the payment has been made in full.

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39 The three month time-limit has become standing practice since the judgment of 28 August 1991, Moreira de Azevedo, under 1 of the operative part of the judgment.

40 Res. DH(91)12 of 6 June 1991, Azzi; Res. DH(91)13 of 6 June 1991, Lo Giacco; Res. DH(91)21 of 27 September 1991, Savoldi; Res. DH(91)22 of 27 September 1991, Van Eesbeeck; Res. DH(91)23 of 27 September 1991, Sallustio; Res. DH 91(24) of 27 September 1991, Minniti.

41 Res. DH(92)3 of 20 February 1992, Lo Giacco; Res. DH92(4) of 20 February 1992, Savoldi; Res. DH(92)5 of 20 February 1992, Van Eesbeeck; Res. DH(92)6 of 20 February 1992, Sallustio; Res. DH(92)7 of 20 February 1992, Minniti.

42 Res. DH(92)45 of 17 September 1992, Azzi; Res. DH(92)46 of 17 September 1992, Lo Giacco, Res. DH(92)47 of 17 September 1992, Savoldi; Res. DH(92)48 of 17 September 1992, Van Eesbeeck; Res. DH(92)49 of 17 September 1992, Sallustio; Res. DH(92)50 of 17 September 1992, Minniti.

It has become practice that, from the expiry of the initial three-month period set for the payment until the final settlement, interest should be payable on the amount at a rate equal to the marginal lending rate of the European Central Bank during the default period.[43]

On the whole, the respondent States are willing to pay the compensation awarded by the Court to the applicant. However, apart from the above-mentioned reasonable-time cases concerning Italy, in a few instances, such as in the Stran Greek Refineries and Stratis Andreas Case and the Loizidiou Case, the Committee of Ministers had to deal with the unwillingness of the respondent State to pay compensation.

After delivery of the judgment of the Court in the Stran Greek Refineries and Stratis Andreas Case,[44] the Greek Government informed the Committee of Ministers that, considering the size of the just satisfaction awarded to the applicants and the economic problems in Greece, it was not able to make immediate full payment. The Committee of Ministers strongly urged the Greek Government to pay the amount corresponding to the value of just satisfaction as of March 1995 and decided, if need be, to resume consideration of the case at each of its forthcoming meetings.[45] Subsequently, in September 1996, the Chairman of the Committee of Ministers wrote to the Minister of Foreign Affairs of Greece underlining the fact that the credibility and effectiveness of the mechanism for the collective enforcement of human rights established under the Convention is based on the respect of the obligations freely entered into by the Contracting Parties and in particular on respect of the decisions of the supervisory bodies. In its Final Resolution of 20 March 1997, the Committee of Ministers was informed that the Greek Government had transferred 30.863.828.50 US Dollar to the applicants, which sum the applicants were entitled to enjoy without any interference whatsoever. The Committee, having satisfied itself that the amount paid, increased in order to provide compensation for the loss of value caused by the delay in payment, corresponded to the just satisfaction awarded by the Court, declared that it had exercised its supervisory function under the Convention.[46]

43 Judgment of 18 June 2002, Önyerildiz, para. 168; judgment of 30 November 2004, Gumusten, para. 34; judgment of 30 November 2004, Klyakhin, para. 134; judgment of 2 December 2004, Yaroslavtsev, para. 42.

44 Judgment of 9 December 1994.

45 Interim Resolution of 15 May 1996, DH (96) 251.

46 Final Resolution of 20 March 1997, DH (97) 184.

In its Interim Resolution concerning the judgment in the Loizidou Case, the Committee of Ministers noted that the Government of Turkey had indicated that the sums awarded by the Court could only be paid to the applicant in the context of a global settlement of all property cases in Cyprus. It concluded that the conditions of payment envisaged by the Government of Turkey could not be considered to be in conformity with the obligations flowing from the Court's judgment. It strongly urged Turkey to review its position and to pay the just satisfaction awarded in this case in accordance with the conditions set out by the Court so as to ensure that Turkey, as a High Contracting Party, met its obligations under the Convention.[47] In its second Interim Resolution, the Committee once more stressed that Turkey had had ample time to fulfill in good faith its obligations in the case concerned. It emphasised that the failure on the part of a High Contracting Party to comply with a judgment of the Court is unprecedented. It declared that the refusal of Turkey to execute the judgment of the Court demonstrated 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. In view of the gravity of the matter, it strongly insisted that Turkey comply fully and without any further delay with the Court's judgment of 28 July 1998.[48] At its subsequent meeting, on 26 June 2001, the Committee declared that it very deeply deplored the fact that Turkey still had not complied with its obligations under the judgment of the Court.[49] At its meeting on 12 November 2003, the Committee urged the Turkish Government to reconsider its position and to pay without any conditions whatsoever the just satisfaction awarded to the applicant by the Court, within one week at the latest. It declared the Committee's resolve to take all adequate measures against Turkey, if the Turkish Government failed once more to pay the just satisfaction to the applicant.[50] On 12 December 2003, the Chairman of the Committee of Ministers announced that the Turkish Government had executed the judgment of 28 July 1998 in the Loizidou Case by paying to the applicant the sum which had been awarded to her by the Court in respect of just satisfaction.[51]

47 Interim Resolution of 6 October 1999, DH (99) 680.
48 Interim Resolution of 24 July 2000, DH (2000) 105.
49 Interim Resolution of 26 June 2002, DH (2001) 80.
50 Interim Resolution of 12 November 2003, DH (2003) 174.
51 Press Release Council of Europe: http://press.coe.int/cp/2003/620a(2003).htm.

b. Individual measures

The need to take individual measures at the domestic level, in addition to the payment of pecuniary compensation if determined by the Court, is considered by the Committee of Ministers where the established breach continues to have negative consequences for the applicant, which cannot be redressed through pecuniary compensation.

The re-opening of proceedings at the domestic level may constitute an important means of redressing the effects of a violation of the Convention, where there were serious shortcomings in the procedure followed by the national court. In fact, the re-opening of domestic proceedings was also within the powers of the Committee of Ministers to suggest during the period before the entry into force of Protocol No. 11, in cases which had not been referred to the Court and where the Committee of Ministers acted under the former Article 32 as the final arbiter.

In the Unterpertinger Case, the applicant claimed that he had been convicted on the basis of a testimony, namely statements made to the police by his former wife and stepdaughter, in respect of which his defence rights had been appreciably restricted. The Court found a violation of Article 6.[52] The Austrian Government informed the Committee of Ministers that the Austrian Supreme Court, on the ground of unlawful refusal to admit supplementary evidence, had quashed the judgment of the Court of Appeal by which the latter had dismissed the applicant's appeal against his conviction by the Innsbruck Regional Court. As a result, the case was referred back to the Innsbruck Court of Appeal for re-examination and decision. That court quashed the applicant's conviction and acquitted him on the ground of lack of evidence. The Committee of Ministers decided, on the basis of the information supplied by the Austrian Government, that it had exercised its supervisory function.[53]

In the Barbará Messegué and Jarbardo Case, the Court found a violation on the ground that the applicants had not received a fair trial.[54] The Spanish Government informed the Committee of Ministers that the Constitutional Court had ordered the re-opening

52 Judgment of 6 December 1988, para. 33.

53 Resolution of 18 January 1989, DH (89) 002.

54 Judgment of 6 December 1988 on the merits, para. 89; judgment of 13 June 1994 on the question of just satisfaction, para. 16.

of the proceedings before the Audiencia Nacional in the applicants' case. That court acquitted the applicants as there was not sufficient evidence against them. The problems of a general nature raised by the Court in its judgment had been resolved by legislative changes and by the development of the case-law of the Constitutional Court and the Supreme Court. The Committee of Ministers agreed and decided that Spain had fulfilled its obligations.[55]

In the Open Door and Dublin Well Women Case, the Court found a violation of Article 10 in that the High Court's injunction that had prohibited the dissemination of information to pregnant women about abortion services in the United Kingdom.[56] The High Court lifted, in so far as Dublin Well Women Centre was concerned, the injunction. Having taken note of the information supplied by the Irish Government, the Committee of Ministers decided that it had exercised it supervisory function.[57]

In the Daktaras Case, the Court held that there were insufficient guarantees to exclude all reasonable doubt as to the impartiality of the composition of the Supreme Court which had examined the applicant's cassation petition.[58] The Government informed the Committee of Ministers that the domestic proceedings had been re-opened on 29 January 2002 by a decision of the Criminal Chamber of the Supreme Court. This reopening was made possible by the application of the new section of the Code of Criminal Procedure called "Re-opening of criminal cases following a judgment of the European Court of Human Rights", which entered into force on 15 October 2001. Following the re-opening of the national proceedings, on 2 April 2002 a plenary session of the Criminal Chamber of the Supreme Court annulled the previous cassation judgment. According to the new judgment, the cassation petition submitted by the President of the Criminal Chamber of the Supreme Court was not taken into account. The cassation petition submitted by Mr Daktaras, as well as that of his legal representative, were rejected.[59]

Sometimes, re-opening of the domestic proceedings is the only form of restitutio in integrum regarding a violation of Article 6 by

55 Resolution of 16 November 1994, DH (94) 84.
56 Judgment of 29 October 1992, para. 80.
57 Resolution of 25 June 1996, DH (96) 368.
58 Judgment of 10 October 2000, para. 38.
59 Resolution of 6 July 2004, DH(2004)43.

previous proceedings. In view of the problem raised in certain cases of the lack of appropriate national legislation, the Committee of Ministers has adopted a recommendation to Member States on the re-examination or re-opening of certain cases at the domestic level following judgments of the Court.[60] In the recommendation, the Committee of Ministers invites the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, restitution in integrum. It further encourages them:

> 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.

In the explanatory memorandum to this recommendation it is indicated that, as regards the terms, the recommendation uses "re-examination" as the generic term. The term "reopening of proceedings" denotes the reopening of court proceedings, as a specific means of re-examination. Violations of the Convention may be remedied by different measures ranging from administrative re-examination of a case (e.g. granting a residence permit previously refused) to the full reopening of judicial proceedings (e.g. in cases of criminal convictions). The recommendation applies primarily to judicial proceedings where existing law may pose the greatest obstacles to reopening. The recommendation is, however, also applicable to administrative or other measures or proceedings, although legal obstacles will usually be less serious in these areas.

Sub-paragraph (i) of the recommendation is intended to cover the situation in which the injured party continues to suffer very

60 Recommendation of 19 January 2000, on the re-examination or re-opening of certain cases at domestic level following judgments of the European Court of Human Rights, R (2000) 2.

serious negative consequences, not capable of being remedied by just satisfaction, because of the outcome of domestic proceedings. It applies in particular to persons who have been sentenced to lengthy prison sentences and who are still in prison when the Court examines the "case". It applies, however, also in other areas, for example, when a person is unjustifiably denied certain civil or political rights (in particular in case of loss of, or non-recognition of legal capacity or personality, bankruptcy declarations, or prohibitions of political activity), if a person is expelled in violation of his or her right to family life, or if a child has been unjustifiably forbidden contacts with his or her parents. It is understood that a direct causal link must exist between the violation found and the continuing suffering of the injured party. Sub-paragraph (ii) is intended to indicate, in cases where the above-mentioned conditions are met, the kind of violations in which re-examination of the case or reopening of the proceedings will be of particular importance. Examples of situations mentioned under item (a) are criminal convictions violating Article 10, because the statements characterized as criminal by the national authorities constitute a legitimate exercise of the injured party's freedom of expression, or violating Article 9 because the behaviour characterised as criminal is a legitimate exercise of freedom of religion. Examples of situations mentioned under item (b) are those where the injured party did not have the time and facilities to prepare his or her defence in criminal proceedings, where the conviction was based on statements extracted under torture or on material which the injured party had no possibility of verifying, or where in civil proceedings the parties were not treated with due respect for the principle of equality of arms. As appears from the text of the recommendation, any such shortcomings must be of such gravity that serious doubt is cast on the outcome of the domestic proceedings. The recommendation does not deal with the problem of who ought to be empowered to ask for reopening or re-examination. Considering that the basic aim of the recommendation is to ensure adequate redress for the victims of certain grave violations of the Convention found by the Court, the logic of the system implies that the individuals concerned should have the right to submit the necessary requests to the competent court or other domestic organ. Considering the different traditions of the Contracting Parties, no provision to this effect has, however, been included in the recommendation. The recommendation also does not address the special problem of "mass cases", i.e. cases in which a certain structural deficiency leads to a great number of violations of the Convention. It was considered preferable

to leave it to the State concerned to decide whether in such cases reopening or re-examination is a realistic solution or other measures are more appropriate.

Another example of an individual measure that may be called for following a judgment is cancellation of a person's criminal record in respect of a conviction that led to a violation of the Convention. Such a measure may be taken, for instance, where the applicant has already served a sentence and the reference to his conviction in his judicial record is the only remaining consequence of the violation. In the Marijnissen Case, the Commission had found a violation of the reasonable time requirement under Article 6.[61] The case was not referred to the Court, so the Committee of Ministers had to act under (former) Article 32 as the final supervisory body. It agreed with the Commission. The Government of the Netherlands informed the Committee of Ministers that it accepted its decision; the sentence served against the applicant would not be executed and no mention of this sentence would appear in the applicant's judicial record. The Committee of Ministers decided that no further action was called for in this case.[62]

In the Van Mechelen Case, the Court had found a violation of Article 6(3)(d) on the ground that the applicants' conviction was based to a decisive extent on statements given by unidentified witnesses who were members of the police and whose reliability could not be tested by the defence.[63] During the examination of the case by the Committee of Ministers, the Government of the Netherlands gave the Committee information about the measures taken with a view to remedying the applicants' situation and preventing new violations. The applicants were provisionally released on 25 April 1997 on the orders of the Minister of Justice, and were subsequently, by letter of 22 July 1997, informed that they would not be required to serve the remainder of their sentences. Furthermore, the reasons why the sentences were not executed in their entirety were mentioned in their criminal records.[64]

In the Yaacoub Case, a friendly settlement was reached as the Belgian Government had decided to lift, as of 30 August 1992, the effects of an expulsion order made against the applicant.[65] The Belgian

61 Report of 12 March 1984, D & R 40 (1985), p. 83.
62 Resolution of 25 February 1985, DH (85) 004 .
63 Judgment of 23 April 1997, para. 66.
64 Resolution 19 February 1999, DH (99) 124.
65 Judgment of 27 November 1987, para. 14.

Government notified the Committee of Ministers of the date on which the effects of the expulsion order against the applicant were lifted. Prior to that date, it undertook to examine any request for safe-conduct enabling the applicant to enter Belgium, provided that it was based on valid reasons and was supported by appropriate evidence. The Committee of Ministers decided to resume consideration of this case at its first meeting after 30 August 1992, or earlier if appropriate.[66]

In the Case of D. v. United Kingdom, the Court had held that the applicant's proposed removal from the United Kingdom to St. Kitts would place him at risk of reduced life expectancy, of inhuman and degrading treatment and of invasion of his physical integrity.[67] The Government of the United Kingdom gave the Committee information about the measures taken to avoid the impending violation as found in the judgment. The applicant was granted an indefinite leave which would permit him to remain in the country, where he would continue to receive adequate medical treatment and palliative care.[68]

In the Case of A.P and T.P. v. Switzerland, the Court had found a violation of Article 6(2) since, irrespective of any personal guilt, the applicants had been convicted, as heirs, of an offence allegedly committed by a deceased person.[69] The Swiss Government informed the Committee of Ministers that by a judgment of the Federal Court the case of the applicants had been revised. Following this revision the cantonal tax authorities were obliged to reimburse the fine imposed on the applicants, with interests accruing the sum. The Committee of Ministers decided to resume consideration of the case as far as general measures were concerned when the legislative reforms had been carried out, or at the latest at its fist meeting in 2001.[70]

In the Vasilescu Case relating to, firstly, the unlawful seizure and the continued retention of valuables with respect to which the domestic courts had accepted the applicant's property rights and, secondly, the lack of access to an independent tribunal that could order their return, the Court had found a violation of Article 6(1) and Article 1 of Protocol No. 1.[71] The Romanian Government informed the Committee of Ministers that the Constitutional Court of Romania had rendered

66 Resolution of 29 September 1988, DH (88) 13.
67 Judgment of 2 May 1997, para. 54.
68 Resolution of 18 February 1998, DH (98) 10.
69 Judgment of 29 August 1997, para. 48.
70 Interim Resolution of 18 January 1999, DH (99) 110.
71 Judgment of 22 May 1998, paras. 41 and 54.

a decision declaring that, in order to comply with the Constitution, Article 278 of the Code of Criminal Procedure —concerning the right to appeal decisions of the public prosecutor— would be interpreted to the effect that a person who had an interest could challenge before a court any measure decided by the prosecutor. This decision became final and binding under Romanian law with its publication in the Official Journal of Romania and accordingly enforceable erga omnes. The Government considered that similar cases —where the valuables in question had been confiscated without any order from a competent judicial authority— were not likely to recur. The Committee of Ministers decided to resume consideration of the case until legislative reforms had been carried out, or at the latest at one of its meetings at the beginning of 2001.[72]

In the Kalashnikov Case, concerning to the poor conditions in which the applicant was held in detention before trial between 1995 and 2000, due in particular to severe prison overcrowding and to an insanitary environment, and concerning the excessive length of both this detention and the criminal proceedings, the Court had found a violation of Articles 3, 5(1) and 6(1).[73] The Russian Government, in its information to the Committee of Ministers, referred in particular to two major reforms which had already resulted in significant improvement of the conditions of pre-trial detention and their progressive alignment on the Convention's requirements. The Committee of Ministers decided to examine at one of its meetings not later than 2004, further progress achieved in the adoption of the general measures necessary to effectively prevent this kind of violations of the Convention.[74]

In the area of the execution of the Court's judgements, positive developments were taken note of in the Sadak, Zana, Dicle and Doğan Cases against Turkey. After the decision by the Ankara Court of Cassation suspending the prison sentences of the four Turkish former members of Parliament, this court decided, on 14 July 2004, to quash the Ankara State Security Court's verdict in the retrial of four former Kurdish MPs, and to order a fresh hearing in an ordinary court. The Committee of Ministers noted that the Court of Cassation had found that shortcomings identified by the European Court of Human Rights in the 1994 trial had not been properly addressed in the retrial proceedings. It considered this to be a convincing example of

72 Interim Resolution of 8 October 1999, DH (99) 676.

73 Judgment of 15 October 2002, paras. 103, 121 and 135.

74 Interim Resolution of 4 June 2003, DH (2003) 123.

the positive impact of recent constitutional amendments, which were aimed at ensuring the direct application of the European Convention of Human Rights in the Turkish legal system.[75]

With respect to the fourth inter-State case of Cyprus against Turkey, the Committee of Ministers had noted that after a period of some years during which progress seemed rare, at recent meetings concrete information had been presented making it possible to register progress towards the execution of this complex and controversial judgment. In particular, the Committee of Ministers had been informed that a school had opened for Greek Cypriot pupils in the north of the island and that the Committee on Missing Persons had taken steps to bring its terms of reference further into line with the requirements of the Court judgment. That said, there were obviously still serious issues to be resolved.[76]

c. General measures

In certain cases it is clear from the circumstances that the violation resulted from particular domestic legislation or from the absence of legislation. In such cases, in order to comply with the Court's judgments, the State concerned must either amend existing law or introduce appropriate new one. In many cases, however, the structural problem that led to a violation, lies not in an obvious conflict between domestic law and the Convention but rather in case-law of the national courts. In that situation, a change of case-law of the national courts may preclude possible future violations. When courts adjust their legal stance and their interpretation of national law to meet the demands of the Convention, as reflected in the Court's judgments, they implement these judgments by virtue of their domestic law. In this way further similar violations may be effectively prevented. Precondition is, however, that the judgment is published and circulated among the national authorities, including the courts, accompanied, where appropriate, by an explanatory circular.

Following the judgment of the Court in the Jersild Case, the Danish Supreme Court acquitted, in a judgment of 28 October 1994, a journalist who had been charged with invasion of privacy by entering without permission an area which was not accessible to the public. In the City Court of Copenhagen and in the Eastern Division of the

75 Documents of the Committee of Ministers, CM/AS (2004)9 of 4 October 2004.
76 Ibidem.

High Court the journalist had been found guilty as charged. However, the Supreme Court acquitted the journalist as it found that this result was most in keeping with the jurisprudence of the European Court of Human Rights concerning Article 10. In this connection the Supreme Court made a special reference to the Jersild judgment as the latest authority. Moreover, following the Jersild judgment of the Court, the Special Court of Revision decided on 24 January 1995 to allow the case against, inter alia, Mr. Jersild to be reopened.[77]

In the Vogt Case, the Court had held that the exclusion from the public service of the Land of Lower-Saxony on account of the applicants' political activities as a member of the German Communist Party constituted a violation of her right to freedom of expression and of her freedom of association and also discrimination in the enjoyment of these rights.[78] The German Government informed the Committee of Ministers that the German Federal Ministry of the Interior had transmitted the judgment of the Court with a letter to the Länder indicating that the authorities would have to examine all future cases of this kind in detail, in the light of the Court's judgment, in order to prevent the repetition of violations similar to those found in the present case. The ministry was, however, of the opinion that it would not be possible to reopen old dismissal procedures on the basis of judgments of the Court. The Government noted further that the Convention is directly applicable in German law and considered that the German courts will not fail, in case they were to be seized with new cases of the same kind, to interpret the law in accordance with the judgments of the European Court.[79]

In the Gaygusuz Case, a Turkish national complained about a violation of the Articles 6(1), 8 and 14 of the Convention and of Article 1 of Protocol No. 1 by the Austrian authorities' refusal to grant emergency assistance to the applicant, an unemployed man who had exhausted entitlement to unemployment benefit, on the ground that he did not have Austrian nationality. The Court found a violation of Article 14 in conjunction of Article 1 of Protocol No. 1.[80] The Austrian Government informed the Committee of Ministers that the Austrian Constitutional Court, which was seized with several complaints regarding the constitutionality of the discrimination against foreigners

77 Resolution of 11 September 1995, DH(95)212.

78 Judgment of 26 September 1995, paras. 61 and 68.

79 Resolution of 28 January 1997, DH(97)12.

80 Judgment of 16 September 1996, para. 52.

provided for in Articles 33 and 34 of the Unemployment Insurance Act, had changed its earlier jurisprudence according to which benefits such as the emergency assistance did not fall under Article 1 of Protocol No 1, and had aligned it on that of the Court in the Gaygasuz Case. In consequence hereof the Austrian Constitutional Court had annulled with immediate effect the two provisions in question insofar as they reserved the right to emergency assistance to Austrian nationals. It had found it appropriate in the circumstances to deviate from its usual practice of postponing the full effects of its judgment to a future date. Immediately after this judgment, the Austrian Parliament had adopted a new law providing that the amendments to the Unemployment Insurance Act entered into force on 1 April 1998 and not on 1 January 2000.[81]

With respect to the length of proceedings in Italy the Court has been faced with continuous problems. In the Bottazzi Case, the Court drew attention to the fact that since 25 June 1987, the date of the Capuano Case, it has delivered 65 judgments in which it had found violations of Article 6(1) in proceedings exceeding a 'reasonable time' in the civil courts of the various regions of Italy. Similarly, under former Articles 31 and 32 of the Convention, more than 1.400 reports of the Commission resulted in resolutions by the Committee of Ministers finding Italy in breach of Article 6 for the same reason. The frequency with which violations were found showed that there was an accumulation of identical breaches which were sufficiently numerous to amount not merely to isolated incidents. Such breaches reflected a continuing situation that had not yet been remedied and in respect of which litigants had no domestic remedy. This accumulation of breaches accordingly constituted a practice that was incompatible with the Convention.[82] In its Interim Resolution, the Committee of Ministers recalled that excessive delays in the administration of justice constitute an important danger, in particular for the respect of the rule of law. The Committee further noted that the question of Italy's adoption of general measures to prevent new violations of the Convention of this kind had been before the Committee of Ministers since the judgments of the Court in the 1990s, and therefore highlighted the existence of serious structural problems in the functioning of the Italian judicial

81 Resolution of 12 November 1998, DH(98)372.

82 Judgment of 28 July 1999, para. 22; see also judgment of 28 July 1999, Di Mauro, para. 23.

system.[83] At its session in October 2000, the Committee of Ministers noted with satisfaction that recently the highest Italian authorities had manifested —both at the national level and before the organs of the Council of Europe— their solemn commitment to finding eventually an effective solution to the situation. The Committee also expressed appreciation of the progress made in the implementation of the major reform of the Italian judicial system, undertaken in order to find long-term remedies, to ensure special expediency in the treatment of the oldest and most deserving cases and to alleviate the burden of the Court. It noted that the reforms, undertaken by the Italian authorities, had included three different lines of action: 1. deep structural modernisation of the judicial system for better long-term efficiency (notably through the introduction of Article 6 of the Convention into the Italian Constitution, the streamlining of the jurisdictions of the civil and administrative courts, the increased reliance on the single judge, the creation of the office of justices of the peace and also the subsequent extension of their competence to minor criminal offences, new simplified dispute settlement mechanisms, and the modernisation of a number of procedural rules); 2. special actions dealing with the oldest cases pending before the national civil courts or aiming at improvements which, while being of a structural nature, could already produce positive effects in the near future (in particular the creation of provisional court chambers composed of honorary judges, entrusted with the solution of civil cases pending since May 1995, an important increase of the number of judges and administrative personnel and two important resolutions by the Supreme Council of the Magistrature laying down a number of monitoring mechanisms and guidelines for judges in order to prevent further unreasonably long proceedings and also in order to speed up those which have already been incriminated by the European Court of Human Rights); and 3. reduction of the flow of applications to the Court and the speeding up of compensation procedures by means of the creation of a domestic remedy in cases of excessive length of procedures. The Committee acknowledged that the measures of the first group, aiming at a structural reform of the entire Italian judicial system, could not be expected to produce major effects before a reasonable time had elapsed, although it was already possible to see the first signs of a positive trend in the statistics recently provided to the Committee of Ministers by the Italian authorities. The Committee concluded that Italy, while making

83 See in this respect Resolution of 11 July 1997, DH(97)336; Interim Resolutions of 15 July 199, DH (99) 436 and DH (99) 437.

undeniable efforts to solve the problem and having adopted measures of various kinds which allowed concrete hope for an improvement within a reasonable time, had not, so far, thoroughly complied with its obligations to abide by the Court's judgments and the Committee of Ministers' decisions finding violations of Article 6 of the Convention on account of the excessive length of judicial proceedings. It called upon the Italian authorities, in view of the gravity and persistence of the problem: to maintain the high priority now given to the reform of the Italian judicial system and to continue to make rapid and visible progress in the implementation of the reforms; to continue their examination of further measures that could help effectively prevent new violations of the Convention on account of the excessive length of judicial proceedings; and to inform the Committee of Ministers with the greatest diligence of all steps undertaken to this effect. It decided to continue the attentive examination of this problem until the reforms of the Italian judicial system would become thoroughly effective and a reversal of the trend at domestic level would be fully confirmed. Meanwhile, the Committee of Ministers resumed its consideration of the progress made, at least at yearly intervals, on the basis of a comprehensive report to be presented each year by the Italian authorities.[84] In concluding its examination of the third annual report presented by the Italian authorities, on 29 September 2004, the Committee of Ministers noted with concern that an important number of reforms announced since 2000 was still pending for adoption and/or for effective implementation, and reminded the Italian authorities of the importance of respecting their undertaking to maintain the high priority initially given to the reforms of the judicial system and to continue to make rapid and visible progress in the implementation of these reforms. As regards the effectiveness of the measures adopted so far, the Committee of Ministers deplored the fact that no stable improvement could be seen yet: with a few exceptions, the situation generally worsened between 2002 and 2003[85] with an increase in both the average length of the proceedings and the backlog of pending cases. The Committee of Ministers accordingly confirmed its willingness to pursue the monitoring until a reversal of the trend at the national level would be fully confirmed by reliable and consistent data. In the light of this situation, the Committee of Ministers took note of the information provided by Italy concerning a follow-up plan aimed at ensuring the respect of the expected execution objectives. It invited

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

85 See CM/Inf(2004)23 rev.

Italy to submit rapidly complementary information requested as well as to complete the above-mentioned follow-up plan by an action plan. It also decided to examine the 4th report at the latest in April 2005.[86]

In the Cases of Akdivar, Aksoy, Çetin, Aydin, Mentes, Kaya, Yilmaz, Selçuk and Asker, Kurt, Tekin, Güleç, Ergi, and Yasa, the Court had found various violations of the Convention by Turkey, which all resulted from the actions of its security forces in the south-east of the country, a region subject to a state of emergency for the proposes of the fight against terrorism. The Turkish Government informed the Committee of Ministers that it had engaged in an important process, including notably the drafting of measures in respect of regulations and training, in order to implement fully and in all circumstances the constitutional and legal prohibition of the use of torture and ill-treatment. The Committee of Ministers noted that the actions of the security forces challenged in these cases took place in a particular context, i.e. the rise of terrorism during the years 1991-1993. However, it also noted that the principal problems, which gave rise to the violations found, had remained unaddressed subsequently, and that, in particular, investigations relating to these violations, when they took place, had not produced concrete and satisfactory results. The Committee of Ministers noted, in respect of the efficiency of criminal proceedings directed against agents of the security forces, that still, more than two years after the first judgments of the Court denouncing the serious violations of the human rights at issue in the case at hand, the information provided to the Committee of Ministers did not indicate any significant improvement of the situation with regard to offences falling within the jurisdiction of the state Security Courts and/or committed in the regions subject to a state of emergency. The Committee of Ministers called upon the Turkish authorities rapidly to complete the announced reform of the existing system of criminal proceedings against members of the security forces, in particular by abolishing the special powers of the local administrative councils in engaging criminal proceedings, and to reform the prosecutor's office in order to ensure that prosecutors will in the future have the independence and necessary means to ensure the identification and punishment of agents of the security forces who abuse their powers so as to violate human rights. The Committee of Ministers decided to continue, in accordance with its responsibilities

86 Documents of the Committee of Ministers, CM/AS (2004)9 of 4 October 2004.

under the Convention, the examination of the above cases until measures would have been adopted which would effectively prevent new violations of the Convention.[87] In its follow-up Resolution, the Committee of Ministers noted with satisfaction that Turkey had pursued and enhanced its reform process with a view to ensuring that its security forces and other law enforcement authorities respect the Convention in all circumstances and thus prevent new violations. In particular the Committee expressed appreciation of the Government's efforts to effectively implement the existing laws and regulations concerning police custody through administrative instructions and circulars issued to all personnel of the Police and Gendarmerie, which, inter alia, provided for stricter supervision of their activities. It also took note of the recent constitutional and legislative amendments, in particular those which limit to 4 days the maximum periods of detention before persons accused of collective offences are presented to a judge, and those which introduce the right of access to a lawyer after a maximum period of 48 hours in police custody in cases of collective offences committed in the state of emergency regions and falling within the jurisdiction of the State Security Courts. The Committee of Ministers expressed, however, concern about the continuing existence of new complaints of alleged torture and ill-treatment as evidenced notably through the new applications lodged with the Court. It noted with concern that, three years after the adoption of Interim Resolution DH(99)434, Turkey's undertaking to engage in a global reform of basic, in-service and management training of the Police and Gendarmerie remained to be fulfilled and stressed that concrete and visible progress in the implementation of the Council of Europe's Police Training Project was very urgent. The Committee of Ministers urged Turkey to accelerate without delay the reform of its system of criminal prosecution for abuses by members of the security forces, in particular by abolishing all restrictions on the prosecutors' competence to conduct criminal investigations against State officials, by reforming the prosecutor's office and by establishing sufficiently deterring minimum prison sentences for persons found guilty of grave abuses such as torture and ill-treatment. It called upon the Turkish Government to continue to improve the protection of persons deprived of their liberty in the light of the recommendations of the Committee for the Prevention of Torture (CPT) and decided to pursue the supervision of the execution of the judgments concerned until

87 Interim Resolution of 9 June 1999, DH (99) 434.

all necessary measures had been adopted and their effectiveness in preventing new similar violations had been established.[88]

In the Case of the Socialist Party v. Turkey, relating to the dissolution of this party on account of certain statements made in 1991 by one of the applicants, the Party's chairman, Mr Perinçek, the Court had found a violation of Article 11.[89] The Committee of Ministers noted that it had been informed that by judgment of 8 July 1998 —i.e. after the judgment of the Court— the Court of Cassation of Turkey had confirmed a criminal conviction imposed on Mr. Perinçek by the First State Security Court of Ankara on 15 October 1996, according to which the sanction of dissolution of the party also carried with it personal criminal responsibility. It noted, furthermore, that by virtue of this conviction, Mr. Perinçek had been sentenced to a 14-month prison sentence, which he started to serve on 29 September 1998. He had furthermore been banned from further political activities. The Committee of Ministers insisted on Turkey's obligation under Article 53 (the present Article 46) of the Convention to erase, without delay, through action by the competent Turkish authorities, all the consequences resulting from the applicant's criminal conviction on 8 July 1998 and decided, if need be, to resume consideration of the case at each forthcoming meetings.[90] In its next session, the Committee of Ministers noted with regret that action had still not been taken by the Turkish authorities to give full effect to the judgment of the Court and to the Committee's interim resolution. It urged Turkey, without further delay, to take all the necessary action to remedy the situation of the former Chairman of the Socialist Party, Mr. Perinçek.[91]

In 27 judgments against Turkey, the Court had found that the criminal convictions of the applicants on account of statements contained in articles, books, leaflets or messages addressed to, or prepared for, a public audience, had violated their freedom of expression guaranteed by Article 10 of the Convention. In its Interim Resolution on violations of the freedom of expression in Turkey, the Committee of Ministers encouraged the Turkish authorities to bring to a successful conclusion the comprehensive reforms planned to bring Turkish law into conformity with the requirements of Article 10 of

88 Interim Resolution of 10 July 2002, DH (2002) 98.
89 Judgment of 25 May 1998, para. 54.
90 Interim Resolution of 4 March 1999, DH (99) 245.
91 Interim Resolution of 28 July 1999, DH (99) 529.

the Convention.[92] At its subsequent meeting, having examined the significant progress achieved in a series of reforms undertaken with a view to aligning Turkish law and practice with the requirements of the Convention in the field of freedom of expression, the Committee of Ministers welcomed the changes made to the Turkish Constitution, in particular to its Preamble, to the effect that only anti-constitutional activities instead of thoughts or opinions could be restricted, as well as to Articles 13 and 26, which introduced the principle of proportionality and indicated grounds for restrictions of the exercise of freedom of expression, similar to those contained in paragraph 2 of Article 10 of the Convention. It noted also the recent, important legislative measures adopted as a result of these reforms, in particular the repeal of Article 8 of the Anti-terrorism Law and the modification of Articles 159 and 312 of the Turkish Criminal Code. The Committee of Ministers welcomed in this context the 'train the trainers' programme currently being carried out in the framework of the 'Council of Europe/European Commission Joint Initiative with Turkey: to enhance the ability of the Turkish authorities to implement the National Programme for the adoption of the Community acquis (NPAA) in the accession partnership priority area of democratization and human rights', noting that this programme aims, among other things, at devising a long-term strategy for integrating Convention training into the initial and inservice training of judges and prosecutors. The Committee of Ministers expressed appreciation in this context of the recent establishment of the Judicial Academy, as well as many Convention awareness-raising and training activities for judges and prosecutors initiated by the Turkish authorities. It welcomed furthermore the amendment of Article 90 of the Constitution, recently adopted by the Turkish Parliament, aimed at facilitating the direct application of the Convention and case law in the interpretation of Turkish Law. It encouraged the Turkish authorities to consolidate their efforts to bring Turkish Law fully into conformity with the requirements of Article 10 of the Convention and invited them to ensure, by appropriate means, that statements or accusations falling under Article 6 of the Anti-terrorism Law which serve the public interest and in respect of which the proof of truth is offered, or in respect of which the person concerned is in good faith about the truth, are not punishable and nor indeed the printing of other statements covered by this article which do not incite to violence. The Committee

92 Interim Resolution of 23 July 2001, DH(2001) 106.

of Ministers decided to resume consideration of the general measures in these cases within nine months, and outstanding individual measures concerning the respective applicants at its 897th meeting (September 2004), it being understood that the Committee's examination of those cases involving applicants convicted on the basis of former Article 8 of the Anti-terrorism Law would be closed upon confirmation that the necessary individual measures had been taken.[93]

In the Scozzari and Giunta Case, the Court found two violations of Article 8 of the Convention by Italy on account, on the one hand, of the delays in organising contact visits and the limited number of such visits between the first applicant and her children, after they had been taken into public care and, on the other hand, of the placement of the children in a community among whose managers were persons convicted for ill-treatment and sexual abuse of handicapped persons placed in the community.[94] The Committee of Ministers noted that, following Ms. Scozzari's taking up residence in Belgium, the Belgian Government had approached the Italian authorities in order to examine the possibilities of 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. It found that such a proposal could provide the basis for a solution respecting the Court's judgment. Considering the urgency of the situation, the Committee of Ministers encouraged the Belgian and Italian authorities to implement without delay the proposal so as to put an end to the violations found.[95] At its next session, the Committee of Ministers expressed regret that, more than one year after the Court's judgment, the latter had still not been fully executed; in fact, several problems at the basis of the Court's finding of a violation in respect of the placement in the Forteto community had not been remedied. It invited the Italian authorities rapidly to take concrete and effective measures in order to prevent that the children be irreversibly separated from their mother and to ensure that their placement respects the superior interests of the children and the mother's rights, as defined by the Court in its judgment.[96] The Committee of Ministers noted that certain general measures remained to be taken and that further information and clarifications were outstanding with regard to a number of other

93 Interim Resolution of 2 June 2004, DH(2004) 38.
94 Judgment of 13 July 2000, paras. 183 and 216.
95 Interim Resolution of 29 May 2001, DH (2001) 65.
96 Interim Resolution of 3 October 2001, DH (2001) 151.

measures, including, where appropriate, information on the impact of these measures in practice. It recalled that the obligation to take all such measures is all the more pressing in cases where procedural safeguards surrounding investigations into cases raising issues under Article 2 of the Convention are concerned. The Committee of Ministers decided to pursue the supervision of the execution of the judgments concerned until all necessary general measures would have been adopted and their effectiveness in preventing new, similar violations had been established and the Committee of Ministers had satisfied itself that all necessary individual measures had been taken to erase the consequences of the violations found for the applicants. It resumed consideration of these cases, as far as individual measures were concerned, at each of its DH meetings, and, as far as outstanding general measures were concerned, it decided to review their adoption at the latest within nine months from the date of its interim resolution.[97]

Following the idea submitted in the context of the Committee of Ministers' supervision of the implementation of Ryabykh v. Russia judgment, a high-level seminar was held with participation of the Russian highest judiciary, prokuratura, executive authorities and advocacy to discuss the prospects for further reforms of the supervisory review procedure, one of the topics at the heart of the Russian judicial reform. The violation of the Convention found in the Ryabykh Case was due to the quashing by the Presidium of the Belgorod Regional Court in March 1999 of a final judicial decision in the applicant's favour, following an application for supervisory review lodged by the President of the same court under Articles 319 and 320 of the Code of Civil Procedure as they were then in force. The latter gave the President discretionary powers to challenge at any moment final court decisions. The Court found that this supervisory review by the Presidium infringed the principle of legal certainty and thus the applicant's right to a court.[98] Subsequently, the Russian Federation adopted some general measures with a view to remedying the systemic problem at the basis of the violation. According to the new Code of Civil Procedure, the time period for lodging an application for supervisory review is limited to one year (Article 376) and the list of State officials empowered to lodge such an application is significantly narrowed (Article 377). While these measures were welcomed by the Committee of Ministers, doubts were expressed as

97 Interim Resolution of 23 February 2005, DH(2005) 20.

98 Judgment of 24 July 2003, paras. 57- 58.

to whether the measures taken were sufficient to prevent new similar violations of the principle of legal certainty. The Russian authorities were thus invited to continue the reform of the supervisory review procedure, bringing it in line with the Convention's requirements, as highlighted, inter alia, by the Riabykh judgment. Given the complexity of the issue and the ongoing reflection on the matter in Russian legal circles, it was suggested, at the Committee of Ministers' meeting (8-9 December 2004) to hold a high-level seminar with a view to taking stock of the current nadzor practice and to discussing prospects for further reform of this procedure in conformity with the Convention's requirements. As a result, the Directorate General of Human Rights organized a seminar in Strasbourg, in close cooperation with the Russian authorities. The participants in the Conference welcomed the reforms of the supervisory review procedure adopted by the Russian Federation through the new Codes of Criminal, Commercial (Arbitration) and Civil Procedure (in force respectively since 1 July 2002, 1 January 2003 and 1 February 2003). It was notably suggested by many participants that the supervisory review in its amended form was closer to respect the legal certainty principle enshrined in the Convention, especially in criminal and commercial matters. More reservations were, however, expressed, from the Convention viewpoint, as to the existing supervisory review procedure in civil matters. The conclusions of the seminar will be reported to competent Russian authorities with a view to contributing to their reflection on possible further reforms of the nadzor procedure. The Committee of Ministers will be also informed of the seminar in the context of its supervision of the execution of the Court's judgment in the Riabykh case.[99] Given the time needed for the enactment of the new legislative measures, the Committee of Ministers decided to postpone its examination of the case until the legislative reforms have been carried out, or at the latest, until its first meeting in 2006.[100]

d. Other functions performed by the Committee of Ministers

During the Council of Europe Summit in Vienna in October 1993, one of the points discussed was the implications of the geographical enlargement of the Council of Europe as a result of the political changes which had taken place in Central and Eastern Europe as from

99 Seminar held in Strasbourg, 21-22 February 2005.

100 http://www.coe.int/T/E/Human_rights/execution/

1989. On that occasion, the Heads of State and Government of the Member States of the Council of Europe stated that:

> the Council is the pre-eminent European political institution capable of welcoming, on an equal footing and in permanent structures, the democracies of Europe freed from communist oppression. For that reason the accession of those countries to the Council of Europe is a central factor in the process of European construction based on our Organisation's values. Such accession presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect of human rights.[101]

In that context, the Committee of Ministers has repeatedly expressed the view that the opening up to the Central and Eastern European countries cannot take place at the cost of lowering the norms and standards of human rights protection established by the Council of Europe. In connection with the requests for accession of new Member States, the question arose, how to determine whether the State concerned fulfilled the requirements for membership. Apart from the procedure of Article 52 of the Convention, the Council of Europe lacks a mechanism under which the Member States can be kept under constant surveillance on their compliance with the commitments accepted within the Council of Europe.

Against this background and inspired by the Vienna Summit, where the Heads of State and Government resolved to ensure full compliance with the commitments accepted by all Member States within the Council of Europe, the Committee of Ministers adopted a declaration on compliance with these commitments.[102] The declaration envisages a political mechanism under which the Members States of the Council of Europe, its Secretary General or its Parliamentary Assembly may refer questions of implementation of commitments concerning the situations of democracy, human rights and the rule of law to the Committee of Ministers. On 20 April 1995, the Committee of Ministers adopted the procedure for implementing the above-mentioned declaration. When considering issues referred to it, the Committee of Ministers will take account of all relevant information available from different sources such as the Parliamentary Assembly and the OSCE. The mechanism will not affect the existing procedures arising from statutory or conventional

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101 Council of Europe Summit, Vienna, 9 October 1993; see NQHR, Vol. 11, No. 4, 1993, p. 513.

102 Declaration of the Committee of Ministers of the Council of Europe of 10 November 1994 on the Compliance with Commitments accepted by Member States of the Council of Europe, Yearbook XXXVII (1994), pp. 461-462.

control mechanisms. At least three meetings of the Ministers' Deputies at A level, fixed in advance, will be devoted to this question every year. At the first meeting and subsequently every second year, unless decided otherwise, the Secretary General will present a factual overview of the compliance with the commitments. The discussions will be confidential and held in camera 'with a view to ensuring compliance with commitments, in the framework of a constructive dialogue.' Finally, in cases requiring specific action, the Committee of Ministers may decide to request the Secretary General to make contacts, collect information or furnish advice; to issue an opinion or recommendation; to forward a communication to the Parliamentary Assembly or to take any other decision within its statutory powers.

Although the mechanism has been in existence for more than ten years, it is still different to make an evaluation of its functioning. It in fact does not provide the Committee of Ministers with more powers than it already had. It also may result in even less willingness on the part of the Member States to make use of the inter-State complaint mechanism under Article 33 of the Convention. The new mechanism has, however, the advantage that it may create a platform for the Committee of Ministers and the Member States to discuss and examine on a structural basis the human rights situation in all Member States of the Council of Europe. It also provides a more convenient tool for the Member States to employ a kind of 'early warning system' when there are indications that one of the Member States does not fulfil its obligations. If the Member States are fully aware of their responsibilities concerning the collective enforcement of human rights, the new mechanism may add a new dimension to the protection of human rights in Europe. In the more than 50 years of its existence, there have been situations in which silent diplomacy might have had a better result than the existing complaint procedures.

Since the adoption of its 1994 Declaration on compliance with commitments, the Committee of Ministers has developed three distinct, and sometimes inter-related, monitoring procedures: monitoring the application of the 1994 Declaration, thematic monitoring and specific post-accession monitoring. The 1994 Declaration may be perceived as a special mechanism that enables the Committee of Ministers to examine any situation or subject related to the implementation of commitments in the fields of democracy, human rights and the rule of law and to take specific action, when required. Thematic monitoring is a Committee of Ministers' tool which permits it to

verify the implementation of commitments accepted by Member States from the angle of specific subjects. This procedure can lead to the re-adjustment of co-operation and assistance programmes and intergovernmental work, where appropriate. Specific action, in application of the 1994 Declaration, may also be taken to this effect. The Committee of Ministers has also set-up country specific post-accession monitoring procedures in order to closely follow progress achieved and difficulties encountered by new Member States with respect to their specific obligations and commitments.

e. Monitoring the application of the 1994 Declaration on compliance with commitments

In this Declaration on compliance with its commitments accepted by the Member States of the Council of Europe, the Committee of Ministers decided that it would consider the questions of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any Member State which is referred to it either by Member States, or by the Secretary General, or on the basis of a recommendation from the Parliamentary Assembly. When considering such issues the Committee of Ministers will take account of all relevant information available from different sources such as the Parliamentary Assembly and the OSCE.

The Secretary General will forward to the Committee of Ministers information deriving from contacts and co-operation with Member States that are liable to call for the attention of the Committee of Ministers.

The Committee of Ministers will then consider in a constructive manner matters brought to its attention, encouraging Member States, through dialogue and co-operation, to take all appropriate steps to conform with the principles of the Statute in the cases under discussion. In cases requiring specific action, the Committee may decide to: request the Secretary General to make contacts, collect information or furnish advice; issue an opinion or recommendation; forward a communication to the Parliamentary Assembly; or take any other decision within its statutory powers.[103]

By virtue of paragraph 1 of the Declaration, 'questions of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any Member State'

[103] Declaration Adopted by the Committee of Ministers on 10 November 1994 at its 95th Session.

may be brought before the Committee of Ministers by Member States, by the Secretary General, or on the basis of a recommendation from the Parliamentary Assembly. To-date, the Committee of Ministers has been seized twice on the basis of this paragraph. On both occasions, this concerned the specific situation in the Chechen Republic of the Russian Federation. This was done for the first time by the Secretary General, in June 2000, and a second time by the Parliamentary Assembly in April 2003 in its Recommendation 1600 (2003).

Likewise, by virtue of paragraphs 5 and 6 of the 1995 Procedure for implementing the 1994 Declaration, any Delegation within the Committee of Ministers or the Secretary General may ask to put the situation in any Member State on the agenda of a special (in camera) monitoring meeting, on the basis of its own concerns or with reference to a discussion in the Parliamentary Assembly. The request should be accompanied by specific questions. These paragraphs were used once by the Secretary General in early 2002 concerning the situation in Moldova.[104]

f. Thematic monitoring

Thematic monitoring was set up in 1996 and applies to all Member States. In the years 1996-2004, ten themes have been dealt with by the Committee of Ministers, namely: Freedom of expression and information, Functioning and protection of democratic institutions; Functioning of the judicial system; Local democracy; Capital punishment; Police and security forces; Effectiveness of judicial remedies; Non-discrimination, with emphasis on the fight against intolerance and racism; Freedom of conscience and religion and Equality between women and men. Work on these themes has now been terminated.[105]

Further to discussions on the theme relating to the functioning of democratic institutions, the Committee of Ministers, by virtue of paragraph 4, second indent, of the 1994 Declaration, forwarded a communication to the Parliamentary Assembly in January 2000 on the basis of its thematic monitoring on the functioning of democratic institutions.[106]

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104 See Monitor/Inf (2005)1, 19 January 2005, p. 2.

105 Monitor/Inf (2005)1, 19 January 2005, p. 3.

106 See document CM/Monitor(2000)2 (also issued as AS/Inf(2000)01). See also Resolution 1308 (2002) onrestrictions concerning political parties in the Member States of the Council of Europe adopted by the Assembly in November 2002, as well as, for instance, Assembly Resolutions 1280 (2002), 1358 (2004) and 1363

In June 2000 and 2001, following the examination of the theme 'Freedom of expression and information,' the Secretary General was instructed, by virtue of paragraph 4, first indent, of the 1994 Declaration, to make contacts and collect information on this theme.[107] The Secretary General carried out the request through, notably, in loco visits to four Member States in 2000 and 2001 (Albania, Russian Federation, Turkey and Ukraine) and to nine Member States in 2002 and 2003 (the four States previously mentioned as well as Azerbaijan, Georgia, Moldova, Romania and "the former Yugoslav Republic of Macedonia").[108]

g. Specific post accession monitoring

Since Armenia and Azerbaijan joined the Council of Europe in 2001, an ad hoc Ministers' Deputies Monitoring Group (GT-SUIVI. AGO) has reviewed democratic developments in both countries through dialogue and in loco visits. Progress reports are discussed by the Committee of Ministers on a regular basis. Independent experts, appointed by the Secretary General and assisted by the Monitoring Department, have examined cases of alleged political prisoners in both countries.

Regular monitoring procedures have been instituted with respect to Bosnia and Herzegovina's, Georgia's, and Serbia and Montenegro's obligations and commitments. The reports, which are submitted on a quarterly basis with respect to Bosnia and Herzegovina and Serbia and Montenegro and on a six-monthly basis with respect to Georgia, are examined by the Ministers' Deputies' Rapporteur Group on Democratic Stability.

Proposals to allow European Court of Human Rights to decline cases

The foreseeable development of cases from the perspective of execution of judgments is also dramatic. There is every reason to suppose that the predicted increase in the Court's case-load will lead to a significant increase in the number of judgments sent to the Committee of Ministers for supervision of their execution. While in the year 2000, 495 new judgments were sent to the Committee of

(2004) on the functioning of democratic institutions in Azerbaijan, Moldova and Georgia.

107 See Monitor/Inf (2005)1.

108 See CM/Monitor(2003)8 final 2.

Ministers, the figure for 2001 had already risen to 650 by the beginning of September 2001. This suggests that the total number for this year will be around 825 judgments. Past, ongoing and future increases in the number of cases registered and processed by the Court will undoubtedly mean that the annual number of new judgments requiring supervision will continue to increase, most probably to around 1.100 in 2002 and possibly reaching some 1.400 in 2003. In terms of the overall number of pending cases, the figures are equally telling: 2.161 in 2000 and 2.650 at September 2001. Finally, the workload concerning specifically the supervision of the adoption of general measures is also rising: whereas in 2000 the adoption of 181 general measures had to be supervised, the figure at September 2001 was around 200. This part of the work is particularly time-consuming.[109]

In October 2002, the Committee of Ministers' Steering Committee for Human Rights, (CDDH) issued a report setting out its interim conclusions on the reform proposals. Among other things, the CDDH agreed to examine further whether to allow the Court the power to decline to examine in detail applications that raise 'no substantial issue' under the European Convention; how to filter applications without creating a separate division within the Court and how to handle repetitive cases. It agreed not to pursue further the proposals to send back applications to national authorities; to create a separate division to deal with the preliminary examination of applications; to create a system of regional courts or to give the Court a wider competence to give advisory opinions.

If adopted, this proposal would mean that the Court would no longer issue rulings on all cases that meet the current admissibility criteria. Instead, the Court would only rule on cases that raise 'substantive' issues under the European Convention. Individuals whose complaints the Court considers raise 'no substantive issue' would not be able to get a ruling by the Court about whether their Convention rights have been violated, even if the case falls within the current admissibility criteria. This would mark a radical departure from the current system, where the right to individual application is at the heart of the European Convention system for the protection of human rights.

Besides its concern at the possible effects on individuals if their right to have their cases examined by the Court is diminished.

109 Council of Europe, Survey of Activities, European Court of Human Rights, http://www.echr.coe.int/Eng/InfoNotesAndSurveys.htm.

According to Amnesty International such a change would not help the Court overcome the problems it faces due to the increase in the number of applications received. The Court's problem is not a lack of judicial time, but a lack of Registry time for the processing applications.[110] The freeing up of judicial time through more rigorous 'filtering' of cases is more likely to add to the processing problem rather than solve it.

An expansion of the existing friendly settlement process, as envisaged by the Evaluation Group, which could be seen as a convenient means of reducing the Court's caseload, must not be to the detriment of the individual right of application (including determinations of the merits of most cases). It should be stressed, however, that the striking out of applications under Article 37 of the Convention should be regarded as a wholly exceptional procedure. The suggestion that an applicant's consent could be dispensed with in striking an application out of the list should be rarely, if ever, invoked. This would require a clear admission of liability by the respondent Government in the particular circumstances of the applicant's case, and could only apply where the applicant's position is manifestly unreasonable. There would have to be a rigorous consideration by the Court of the respondent Government's settlement offer and a careful assessment as to whether the offer provides as full a remedy as is appropriate in the circumstances. This must include a detailed consideration of the nature of the application and the substance of the alleged Convention violation(s), as well as the extent of any admission of responsibility and undertakings by the respondent Government. It is suggested that the Court must also ensure that any such undertaking is sufficiently specific (in relation to both the measure which the State has agreed to adopt and the timetable for its implementation) to enable the Committee of Ministers effectively to supervise its enforcement. Finally, the Court should set out its reasons in full for any such decision.

Amnesty International noted with the concern the use of the striking out procedure without the applicant's consent in Akman v Turkey, Judgment of June 26, 2001, in the context of a right to life case concerning the fatal shooting of the applicant's son by the Turkish security forces. The Court's judgment in Akman failed to resolve the

110 As indicated by the Report of the Evaluation Groups to the Committee of Ministers on the European court of Human Rights, § 69, available at http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm

dispute as to what happened to the applicant's son, and that it failed to refer either to the obligation under Article 2 to provide an effective investigation into the incident or the obligation under Article 13 to provide an effective remedy. It is also of concern that the respondent Government in the Akman case gave no undertaking to attempt to investigate the circumstances of the case or to consider whether criminal or disciplinary proceedings should be brought. The striking out of such a case in those circumstances fails to ensure "respect for human rights" as required by Article 37 and risks damaging the Court's credibility.

It is acknowledged that the Court's fact-finding hearings may be time-consuming and expensive, however, in exceptional cases, such procedures are essential to the Convention system and must be continued. Such hearings have been conducted in complex and serious cases where there has been no or inadequate investigations by the national authorities, accordingly it is the very failure of the national authorities to provide an effective remedy in respect of violations of the Convention which creates the need for the Court to hold fact-finding hearings. There are particular situations, such as allegations concerning torture or death in custody raising issues under Articles 2 and/or 3 of the Convention, where it is the State, rather than the applicant, which has the capability to obtain and/or preserve essential evidence. Where the State fails in its duties in this respect, the case may only be capable of authoritative resolution by the hearing of oral evidence. Where the national authorities fail to conduct such independent, impartial and thorough hearings, the European Court should do so. Given that the burden of proof falls essentially on the applicant to establish her/his case, to deny an applicant an oral hearing in some circumstances would be significantly to disadvantage the applicant.

Conclusion

It was common ground that the existing machinery of the Convention is overburdened with work. Several factors have attributed to the overwhelming workload of the supervisory organs in Strasbourg. The length of proceedings under the Convention, the enlargement of the Council of Europe, the wide acceptance of the right of individual petition, the acceptance of the jurisdiction of the Court, and above all the fact that the complaints lodged are more complex than at the start of the control mechanism.

The drafting of a new Protocol amending the control mechanism of the Convention was a unique opportunity to revise the role of the Commission. The drafters of the Protocol could have looked at the competence and tasks of the Inter-American Commission on Human Rights. This Commission, can initiate for example. on its own motion fact finding missions, when there are serious indications of gross and systematic violations of human rights in a certain country. It does not have to wait until a complaint in that respect has been lodged. It cannot longer be hold that Europe does not need such an active kind of supervision.[111]

Also the Parliamentary Assembly keeps track of the way in which the Committee of Ministers exercises its supervisory function concerning the execution of judgments. In that respect it adopts resolutions and addresses recommendations to the Committee of Ministers, including recommendations to put pressure on the Government concerned to adopt the necessary measures and/or to pay the amount of damages fixed by the Court.[112]

The Secretary General of the Council of Europe may under Article 52 ECHR request any Member State explanations as to the manner in which its internal law ensures the effective implementation of the Convention, including the manner of execution of the Court's judgments. It seems that the Secretary General recently has intensified the use of his competence under Article 52.[113]

The Court itself should be able play a more active role in the supervision of the execution of its judgments by the respondent States. However, it should be acknowledged that the Court's powers do not include that to order the respondent State to take specific measures in order to remedy the violation found, unlike the Inter-American Court of Human Rights which, pursuant to Article 63(1) of the American Convention on Human Rights, "may rule, if appropriate, that the consequences of the measure or situation that constituted the breach of [a provision of the Convention] be remedied." The obligations incumbent on a State on account of a violation on its part are therefore obligations of result. Subject to monitoring by the Committee of

111 See M. Kamminga, "Is the ECHR equipped to cope with gross and systematic violations?," NQHR, Vol. 12 (1994), pp. 153-164.

112 See Recommendation 1576 (2002) on "Implementation of Decisions of the European Court by Turkey."

113 See also Council of Europe. 25-02-2003, Steering Committee for Human Rights, CDDH-GDR (2003) 014.

Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 ECHR.[114]

These measures should be considered seriously in order to find a solution for the overwhelming workload of the Court and it should be taken for granted that an eventual solution may not be to the detriment of the access of the individual to the Court. One of the major steps taken by the drafters of Protocol No. 11 is the guarantee of direct access of the individual to the Court. If we would accept the proposal not to deal on the merits of a case when it raise no substantive issue, would open the door for rejecting cases, without even to give substantial reasoning for it. Although the Strasbourg system is under a heavy pressure and some may say the Strasbourg is the victim of its own success. I would rather say, it is not a victim of its own success, but a victim of a general reluctance of the Member States, to take the European Convention seriously. Human rights violations first of all should be redressed at the domestic level and the Strasbourg Court should only be used as an ultimum remedium.

In the great majority of cases, the Committee is able to fulfill its function under Article 46 without difficulty. In some cases, however, problems do arise. Political motives or strongly held cultural ideas may render difficult or delay the passing of legislation, as may pressures on parliamentary time. Given the increased number and complexity of the execution problems posed, the Committee is more and more facing difficulties in ensuring States' rapid compliance with judgments. Moreover, in recent years some States have challenged, on the occasion of several individual cases, the authority of the Court's judgments with regard either to "just satisfaction" or to specific measures required by the judgments. The Committee's position has, however, always remained that States have, under Article 46 of the Convention, unconditionally undertaken to comply with the judgments of the Court.

If, in case of problems, the confidential scrutiny by the other governments at the Committee's meetings should fail to achieve the necessary result, the Chairman-in-Office of the Committee can be invited to make direct, usually confidential, contacts (letters, meetings, etc.) with the Minister of Foreign Affairs of the respondent State. Furthermore, public interim resolutions may be adopted, notably to

114 See in more detail Council of Europe, Opinion on the Implementation of the Judgments of the European Court of Human Rights, CDL-AD (2002) 34.

convey the Committee's concerns to interested States, organizations and parties and to make relevant suggestions to the authorities of the respondent State. If there are serious obstacles to execution, the Committee will adopt a more strongly worded interim resolution urging the authorities of the respondent State to take the necessary steps in order to ensure that the judgment is complied with. The Rome Ministerial Conference called upon the Committee of Ministers to seek further measures that might be taken in this connection.

According to the Rules for the application of Article 46, the Committee's agenda is public (Rule 1a). Information provided by the State to the Committee of Ministers and the documents relating thereto are also accessible to the public (Rule 5). This Rule has the advantage of ensuring that applicants and their lawyers are kept duly informed about the state of proceedings before the Committee. The Deputies recently decided that, in application of these Rules, the annotated Agenda and Order of Business of each meeting, which contains information on the progress of execution of judgments, would be rendered public a few days after the meeting. According to Article 21 of the Statute of the Council of Europe, the Committee's deliberations remain confidential. On each of the last three points, the Committee may decide otherwise.

Just as the number of applications filed with the Strasbourg institutions has continued to increase very substantially, so too has the number of cases considered by the Committee of Ministers (24 cases at the February 1992 meeting; 273 at that of September 1995; an average of 800 cases at each of the six 2-day meetings in 2000, with a peak of 1,885 at the meeting of September 2000; an average of 1,000 cases at each of the six 2-day meetings in 2001, with a peak of approximately 2,300 cases to be examined at the meeting to be held in October 2001).

The working methods of the Committee have been under more or less constant review in recent years. The latest reform undertaken in 2000 implied the adoption of new Rules for the application of Article 46 para. 2 and a radically revised documentation system. Emphasis has also been given to the use of written procedures and of internet technology.

In order to save valuable Committee of Ministers' time, cases raising similar problem(s) vis-à-vis a certain State are examined together en bloc and payment control and other routine control (such

as publication and dissemination of judgments) are usually dealt with through written procedure, i.e. without any debate. Despite these efforts, it is the general experience that, because of the sheer volume of material to be dealt with, not all cases raising problems, and thus requiring debate, receive as much attention as they might need.

On 28 September 2000 the Parliamentary Assembly adopted resolution 1226(2000) on 'Execution of judgments of the European Court of Human Rights,' in which it underlined that the responsibility for the problems of execution of Court's judgments lay primarily with the States, but also pointed out that it lay partly with the Court, its judgments being at times not sufficiently clear, and with the Committee of Ministers, 'which …[did] not exert enough pressure when supervising the execution of judgments.'[115] In its report of the European Commission for Democracy through Law (Venice Commission) it noted its impression that it often takes a long time before Governments provide the Secretariat with pertinent and exhaustive information on both factual development of cases and the legal situation pertaining in the country. In the Commission's opinion, this insufficient and unsatisfactory co-operation by member States constitutes another major shortcoming in the procedure before the Committee of Ministers.[116]

The Inter-American Commission on Human Rights plays a role which to a certain extent is comparable to that of the Committee of Ministers of the Council of Europe. It has three categories of powers. One with respect to all member States of the Organization of American States; another vis-à-vis the State Parties to the American Convention on Human Rights and a third with regard to the OAS member States not Parties to the American Convention. Thus, apart from its quasi judicial character it also acts as political body, while the Inter-American Commission on Human Rights fully meets the requirements of independence. In this respect, the drafters of Protocol No. 11 completely neglected the role which the Inter-American Commission on Human Rights has played and plays in enforcing

115 According to the statistics made available by the Department for the Execution of judgments of the European Court of Human Rights, Directorate II, Council of Europe, the average time between a judgment and its execution for all States was 399,5 days for the years 1985-1991, and 345,85 days for the years 1995-2001. Cases currently before the Committee of Ministers have been pending for an average of 731,64 days. New cases before the Committee of Ministers have been 1060 (estimates July 2002), 755 in 2001, and 504 in 1999.

116 Council of Europe, Opinion No. 209/2002, 18 December 2002, CDL-AD (2002) 34, p. 8.

respect for human rights and fundamental freedoms in the American continent.

The main tool at the disposal of the Committee of Ministers is peer pressure. It also had recourse, and recently more and more so, to pressure by publicity.[117]

The Council of Europe lacks a mechanism under which the Member States can be kept under constant surveillance on their compliance with the commitments accepted within the Council of Europe. On 10 November 1994 the Committee of Ministers has tried to fill this gap and adopted a declaration on compliance with commitments. This declaration envisages a political mechanism under which the Members of the Council of Europe, its Secretary General or its Parliamentary Assembly may refer questions of implementation of commitments concerning the situations of democracy, human rights and the rule of law to the Committee of Ministers. On 20 April 1995, the Committee of Ministers adopted the procedure for implementing the above-mentioned declaration. This mechanism does not affect the existing procedures arising from statutory or conventional control mechanisms. The discussions will be confidential and held in camera 'with a view to ensuring compliance with commitments, in the framework of a constructive dialogue.' Finally, the Committee of Ministers in cases requiring specific action, may decide to request the Secretary General to make contacts, collect information or furnish advice; to issue an opinion or recommendation; forward a communication to the Parliamentary Assembly or take any other decision within its statutory powers. Whatever opinion may be given on this mechanism it certainly does not provide the Committee of Ministers with more powers than it already had. It also will probably result in even less willingness on the part of the Member States to make use of the already existing inter-state complaint mechanism under Article 33 ECHR.

The mechanism has, however, the advantage that it creates a platform for the Committee and the Member States to discuss and examine on a structural basis the human rights situation in all Member States of the Council of Europe, while this only could take place on an ad hoc basis. It also provides a more convenient tool for the Member States to give room to an 'early warning system' when there are indications that one of the Member States does not fulfill

117 See in particular Rules 1 a), 5 of the new "Rules for the application of Article 46(2) of the ECHR", approved by the Committee of Ministers on 10 October 2001 at its 736th meeting of Ministries' Deputies.

its obligations. In the more than fifty years of its existence, there have been situations, that silent diplomacy could have had a better result than the existing complaint procedures.[118] This monitoring role of the Committee of Ministers could also be used as a procedure of monitoring commitments in respect of a State which refuses to execute a judgment of the Court. As ultimum remedium, the application of Article 8 in conjunction with Article 3 of the Statute of the Council of Europe (suspension or termination of membership) is available to the Committee of Ministers.[119]

118 See in this respect: Andrew Drzemczewski, Monitoring by the Committee of Ministers of the Council of Europe: A useful 'Human Rights' Mechanism?, Baltic Yearbook of International Law, Volume 2, 2002, pp. 83-103.

119 See Resolution DH (70) 1 of 15 April 1970 concerning the inter-State applications of Denmark, Norway, Sweden and the Netherlands v. Greece, Rec. 1959-1989, p. 44.