COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 6 December 2002

Restricted
CDL-DI (2002) 1
Or. Eng.

Opinion no. 209/2002

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THE IMPLEMENTATION OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

On the basis of comments by

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M. Giorgio Malinverni (Member, Switzerland)
M. Franz Matscher (Member, Austria)
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Introduction

1. By a letter of 24 April 2002, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, Mr Eduard Lintner, requested, on behalf of its committee, the opinion of the Commission on the issues raised by the Parliamentary Assembly in its Recommendation 1477(2000) on execution of judgments of the European Court of Human Rights, in the light of the reply given thereto by the Committee of Ministers.

2. A working group, composed of Messrs. Jan Helgesen, Giorgio Malinverni, Franz Matscher and Pieter Van Dijk was subsequently set up within the Commission in order to study the question.

3. The Working Group held meetings in Venice on 4 July 2002 and on 17 October 2002, and subsequently in Paris on 29 November 2002; it prepared the following opinion, which was adopted by the Commission at its ...Plenary Session (Venice, ...).

A. Background

4. Having noted that the implementation[1] of certain judgments issued by the European Court of Human Rights (hereinafter "the Court") was causing considerable problems "threatening to undermine what ha[d] been achieved over the fifty years during which the Convention has operated", the Parliamentary Assembly of the Council of Europe decided to study the matter closely and entrusted its Committee of Legal Affairs and Human Rights (hereinafter "the Committee") with the task of determining the causes for non-execution and proposing possible remedies therefor.

5. On 7 January 2000 the Committee issued a preliminary report, in which it identified seven reasons for non-execution: political reasons, reasons to do with the scale of the reforms required, practical reasons relating to internal legislative procedures, budgetary reasons, reasons to do with public opinion, casuistical or unclear judgments of the Court and reasons relating to interference with obligations deriving from other institutions. The Committee considered possible solutions both at the national level and at the Council of Europe level. In its view, at the national level legislators should ensure that they have appropriate procedures for verifying that all new legislation which could interfere with human rights and fundamental freedoms complies with the European Convention on Human Rights (hereinafter referred to as "the Convention"), whilst governments should take the necessary action for executing the Court's judgments as swiftly as possible. Judges should work towards giving direct effect to the Court's judgments; to make their task easier, the Court's judgments should be available in the relevant national languages. At the Council of Europe level, the Committee envisaged *inter alia* the possibility of amending the Convention so as to give the Committee of Ministers the power to request interpretation by the Court of certain judgments and to ask the Court for clarification of the measures necessary to execute its judgments.

[1] The Commission prefers to use the term "implementation" as opposed to "execution" of judgments of the European Court of Human Rights, in that the first encompasses the obligation for member States to take into consideration the possible implications which judgments pronounced in cases to which they are not parties may have for their legal system and practice.

6. On 28 March 2000, Mr Luzius Wildhaber, President of the Court, in a letter addressed to the Chairman of the Committee, pointed out that the principle of subsidiarity, expressed in the Convention, and the declaratory character of the Court's decisions would prevent the Court from indicating to member States the measures to adopt in order to comply with a judgment. The same principle, he argued, rendered problematic the empowerment of the Committee of Ministers with entitlement to seek interpretational guidance from the Court on the measures necessary to comply with a judgment.

7. At the request of the Committee, at its 42nd Plenary Meeting (Venice, 31 March – 1 April 2000) the Commission adopted its comments on the preliminary report of the Parliamentary Assembly (see CDL (2000) 16). The Commission emphasised the role of monitoring that the Parliamentary Assembly could play vis-à-vis the monitoring exercised by the Committee of Ministers in the context of execution. It further stressed the importance of a "recommendatory role" that the Court could play in its judgments, which it considered not to be inconsistent with the declaratory character of these judgments. Such recommendatory role would not require an express legal foundation in the Convention. The Court should also indicate when appropriate that a previous judgment has not, or not completely, or not timely, been executed by the State concerned. The Commission also stressed that national authorities should be called upon to ensure that the Court's case-law is properly available in the national language to the domestic authorities and courts, and to improve the provision of university-level education and in-service training on the Convention and its protection machinery. The Commission underlined, however, that these authorities should be assisted notably by the Council of Europe through programmes of technical assistance and technical training.

8. On 12 July 2000 the Committee issued its final report on the matter of execution, in which it suggested, in addition to the possible solutions indicated in the preliminary report, that a system of "astreintes" (daily fines for delays in executing legal obligations) ought to be introduced, whereby the Committee of Ministers, after giving formal notice, could decide to impose an *astreinte* on States which persistently refuse to execute a judgment of the Court.

9. 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 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". The Assembly made a number of suggestions, addressed to the national authorities, the Court and the Committee of Ministers respectively, for dealing with the problems arising from the non-execution of Court judgments. As regards the Court, it considered in particular that it ought to:

i. ensure that its judgments are clear and its case-law coherent;
ii. oblige itself to indicate in its judgments to the national authorities concerned how they should execute the judgment so that they can comply with the decisions and take the individual and general measures required;
iii. more frequently indicate in a judgment whether a previous judgment has not been executed at all, not been completely executed, or not been executed in time by the state concerned.

10. On the same day, it adopted Recommendation 1477(2000) on "Execution of judgments of the European Court of Human Rights", whereby it urged the Committee of Ministers to:

i. amend the Convention so as to give the Committee of Ministers the power to ask the Court for a clarifying interpretation of its judgments in cases where the execution gives rise to reasonable doubts and serious problems regarding the correct mode of implementation;
ii. amend the Convention to introduce a system of "astreintes" (daily fines for a delay in the performance of a legal obligation) to be imposed on states that persistently fail to execute a Court judgment;
iii. ask the governments of High Contracting Parties to make more use of their right to intervene in cases before the Court, so as to promote the *erga omnes* significance of the decisions of the Court;
iv. when exercising its function under Article 46 paragraph 2 of the European Convention on Human Rights,
a. be more strict towards member states which fail in their obligation to execute judgments of the Court;
b. ensure that measures taken constitute effective means to prevent further violations being committed;
c. keep the Assembly informed of progress in the execution of judgments, in particular by the more systematic use of interim resolutions setting a timetable for carrying out the reforms planned;
d. instruct the Secretary General to reinforce and improve its technical assistance programmes;
e. ask member states to assist persons or organisations who contribute to the diffusion of information and to the training of judges and lawyers.

11. In order to reply to Recommendation 1477(2000), the Committee of Ministers entrusted the Steering Committee for Human Rights (CDDH) with the task of giving an opinion thereon. After the CDDH gave its preliminary opinion, the Committee of Experts for the improvement of procedures for the protection of human rights (DH-PR) was involved; it gave its views on the matter on 26-28 September 2001[2]. The CDDH subsequently adopted its final opinion concerning Recommendation 1477(2000) on 6-9 November 2001[3]. It expressed doubts about the effectiveness of a possible system of "astreintes", particularly in those cases where non-implementation is the result of causes other than the State's clear will not to implement the Court's judgment. The CDDH reserved its opinion as to the possibility of giving the Committee of Ministers the power of asking the Court for a clarifying interpretation in cases where execution gives rise to problems, but referred to the critical views expressed on the matter by the President of the Court in his letter of 28 March 2000 (see paragraph 6 above) and by the DH-PR. With regard to the request, addressed to the High Contracting Parties, to make more use of their right to intervene in cases before the Court, so as to promote the *erga omnes* significance of the decisions of the latter, the CDDH recalled that the Court's judgments have always such significance, in that it is inherent in the control system set out by the Convention that any contracting State, independently of being party to the case, should examine and apply each judgment, in order to ensure that its law and practice correspond to the Convention. Moreover, the CDDH pointed out that such interventions could risk a lengthening of the procedures before the Court. The CDDH agreed with the Parliamentary Assembly upon the need for the Committee of Ministers to be more strict towards States which fail in their obligation to execute judgments of the Court and invited the

2 See DH-PR (2001)10

3 See CDDH (2001)35, Appendix IV

Committee of Ministers to develop a series of responses in case of slowness or negligence in the execution as well as objective criteria for the identification of these cases.

12. On 9 January 2002, the Committee of Ministers adopted its reply to Recommendation 1477(2000)[4] in which it fully endorsed the views expressed by the CDDH in its final opinion.

13. On 22 January 2002, the Parliamentary Assembly adopted resolution 1268(2002) about implementation of decisions of the European Court of Human Rights. It also adopted Recommendation 1546 (2002) on "Implementation of decisions of the European Court of Human Rights", whereby it reiterated its requests to the Committee of Ministers. The latter replied to this recommendation on 6 February 2002[5], referring back to its reply of 9 January.

14. In the meantime, on 7 February 2001 the Committee of Ministers had set up an Evaluation Group composed of the President of the Court, Mr Wildhaber, of the Deputy Secretary General, Mr Hans-Christian Krüger and of Ambassador Justin Harman, to make proposals on the means of guaranteeing the continued effectiveness of the Court. In its report of 27 September 2001[6], the Evaluation Group addressed *inter alia* the question of the execution of the Court's judgments in relation to "repetitive" applications, i.e. those applications which "would never have seen the light of day if general measures to prevent further violations had been taken or been taken more promptly by the State concerned". The Evaluation Group considered that the idea that the Committee of Ministers might be empowered to ask the Court for interpretation of a judgment in cases where problems arise as to its execution "could result in a blurring of the respective responsibilities of the Court and the Committee of Ministers as assigned by the Convention and draw the Court into an arena outside its purview". As to the idea of imposing astreintes, it wondered how such penalties could be calculated, given in particular that the implementation of general measures often requires a "lengthy legislative process that may be interrupted by extraneous events such as elections, changes of government and lack of parliamentary time". As to the proposal that the Court should give in its judgments a more precise indication of the measures to be taken by the respondent State, it ran, in the Court's opinion, counter to the notion, often expressed in the Court's case-law, that the State is better placed to assess, and should therefore enjoy freedom in choosing, those measures, provided that they are fully in line with the Court's conclusions and always under supervision of the Committee of Ministers. The Evaluation Group noted, however, a more recent practice of the Court, consisting of indicating (in the context of Article 41 of the Convention) measures that would constitute *restitutio in integrum*; it considered that further development of this practice in appropriate cases would be beneficial in the context of the execution of judgments.

15. On 8 November 2001, the Committee of Ministers issued a declaration "On the protection of Human Rights in Europe - Guaranteeing the long-term effectiveness of the European Court of Human Rights", whereby it instructed the Ministers' Deputies to pursue urgent consideration of all the recommendations contained in the Report of the Evaluation Group concerning, in particular, "the use of every means at their disposal to ensure the expeditious and effective execution of judgments of the Court, including those involving

4 See PACE Doc. 9311

5 See PACE Doc. 9375

5 See EG Court (2001) 1 of 27 September 2001

issues generating repetitive applications". At its 111th Session, on 7 November 2002, the Committee of Ministers issued a declaration on "The Court of Human Rights for Europe", in which it instructed the Ministers' Deputies, *inter alia*, to assign revised terms of reference to the CDDH, to be completed no later than 17 April 2003, on the basis of the priorities identified in its interim report, in the field, amongst others, of improving and accelerating execution of judgments of the Court.

B. An analysis of the problems encountered in the procedure of supervision of execution of the Court's judgments

16. Assessing the score of successful compliance with the Court's judgments is an extremely difficult task. The variety and nature of the difficulties encountered in ensuring execution and implementation of the Court's judgments inevitably affects this evaluation. If a lengthy period of time elapsed between the judgment and the final resolution of the Committee of Ministers[7] during which certain legislative changes have been accomplished, for instance, this may be on the one hand excused on account of the uncontrollable nature of democratic processes, and on the other hand criticized as a lack of clear political will to adopt the necessary measures in order to comply with the judgment. Furthermore, proceedings before the Committee of Ministers were, until recently, confidential

17. Execution of judgments of the Court depends on their operative provisions: execution within a literal meaning is only relevant when awards are made under Article 41 of the Convention. The execution of awards under Article 41 has very rarely raised serious issues, although at times delays in the payment of the sums awarded or in the relevant interests have been experienced.

18. Broader measures to be adopted in pursuance of Article 46 § 1 of the Convention fall within the margin of appreciation of the States. Such margin of appreciation, however, is nowadays to be exercised within the framework of the case-law built up in this respect by both the Court and the Committee of Ministers. Indeed, depending on the nature of the violation found, the individual or general measures to be adopted by the respondent State may be categorized, generally, as follows: need to amend a legal situation; need to take appropriate action in respect of agents of the State; need to encourage an appropriate interpretation of domestic legislation; need to reopen domestic proceedings.

19. When the violation derives directly from a legal situation pertaining in the relevant State and affecting an individual's rights irrespective of and prior to the enactment of a specific judicial or administrative decision, the State will have to intervene on and modify the legal situation in question with a view to making it compatible with the Convention. When the violation derives from the violation of internal law, the State will have to take appropriate action with regard to its responsible agent. When the violation derives from the interpretation of given legislation by the judicial or administrative authorities, the State will have to invite

[7] The average time between the judgment and execution for all States was 399,5 days for the years 1985-1991; 345,85 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. Detailed statistics about the rates of execution of judgments are available upon request from the Department for the Execution of judgments of the European Court of Human Rights, Directorate II, Council of Europe.

the latter to interpret and apply such legislation in a manner compatible with the Convention.[8] When a procedural guarantee of Article 6 of the Convention has been violated, the most appropriate remedy would be, at least in criminal cases, the reopening or re-examination of the relevant case by the domestic authorities (see paras. 76-78 below).

20. In order to have an idea of the nature of the problems with which the Committee of Ministers is faced in the discharge of its functions under Article 46 § 2 of the Convention, it is useful to examine the Annotated Agenda and Order of Business of the last Deputies' (DH) meeting (8-9 October 2002)[9].

21. At that meeting, the Committee of Ministers was due to examine 1456 cases. 128 of these cases raised specific questions in terms of individual measures, measures not yet defined or special problems. They concerned mostly excessive length of criminal or civil proceedings, unfairness of criminal or civil proceedings, interference with freedom of association, inhuman or degrading treatment. The Commission has examined the section of the Annotated Agenda devoted to the latter cases.

22. Measures which were sought to be achieved included: adoption by respondent States of adequate legislation allowing for reopening or re-examination of cases (in certain cases, similar legislation had been enacted but was considered to be insufficient by the Committee of Ministers); structural reforms of the judiciary; legal reforms; speeding up of procedures in which a breach of the reasonable time requirement in Article 6 of the Convention had been found and which had still been pending after the Court's judgments; translation into the national language and dissemination of the Court's judgments; issuing of instructions or circular letters to national authorities.

23. While certain of the above measures (such as the translation and publication of the Court's judgments or the issuing of circulars) did not seem to have raised particular problems, certain more complex ones (such as structural or legal reforms and enactment or amendment of legislation) required a bigger effort on the part of both the respondent States (in terms of studying the matter, drafting a proposal, launching the appropriate procedure for its adoption) and of the Committee of Ministers (in terms of evaluating the adequacy of the proposal). Accordingly, the length of time required for giving a final assessment of this second category of measures may indeed be justifiably significant.

24. The Commission noted that the Ministers' Deputies seem to follow in most cases a rather ad hoc and casuistic approach to the supervision of execution. Although there clearly appears to be a consolidated practice of the Committee of Ministers as to what measures must be sought in a certain type of case, there does not seem to be a systematic approach to the follow-up to Court's judgments. In the Commission's opinion, this renders it rather difficult to effectively keep track of the action taken by the respondent State.

25. The Commission also found that the number of cases was striking in which no substantial examination was possible in that information was awaited from the respondent States on pending internal proceedings or, more generally, about the action which the

[8] See F. Matscher, Le système de la Convention et le fonctionnement du mécanisme de contrôle, in : Recueil des cours, tome 270 (1997).

[9] See CM/Del/OJ/OT(2002)810

respondent States envisaged to take. It is true that the Annotated Agenda does not indicate the date upon which the information had been requested by the Secretariat from the respondent State. The Commission had nevertheless the impression that it often takes a long time before Governments provide the Secretariat with pertinent and exhaustive information on both the 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.

C. Execution of the Court's judgments: outline of the institutional framework

a) The obligation to abide by the judgments of the Court

26. In pursuance of Article 46 § 1 of the Convention, member States must abide by the Court's judgments in any case to which they are parties[10].

27. The obligation to "make reparation" is three folded. When the Court has deemed necessary to award just satisfaction, it is the State's duty to pay the applicants the relevant sums. Interests are applicable after the expiry of the three-month delay for the payment.

28. The adoption of individual measures for the applicant's benefit may be necessary to ensure that the latter is put, insofar as possible, in the same situation as he or she enjoyed prior to the violation of the Convention. These may entail, for instance, the need to put an end, if possible retroactively, to an unlawful situation.

29. In addition, States may have to take general measures, such as legislative amendments, in order to prevent further violations of a similar nature[11].

30. Given that States have committed themselves to securing the enjoyment of the rights guaranteed by the Convention to anyone within their jurisdiction (Article 1 of the Convention) and that the interpretation of the provisions of the Convention ultimately rests with the Court (see Article 19 in conjunction with Article 44 of the Convention), the interpretations given by the Court in its judgments form part and parcel of the Articles of the Convention concerned and, consequently, share the legally binding force of the Convention *erga omnes*[12]. The Convention has thus, according to the famous French formula, "autorité de la chose interprétée".

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10 See J. Polakiewicz, Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofes für Menschenrechte, 1993, p. 251; P. Leuprecht, The Execution of judgments and decisions, in: R. St. J. Macdonald, F. Matscher and H. Petzold (eds), The European system for the protection of human rights, 1993, p. 792. See also F. Matscher, previously cited (note 8)

11 See Interim Resolutions DH (99) 436 and DH (99) 437 concerning excessive length of proceedings before the administrative courts and civil courts, respectively, in Italy, where the Committee of Ministers decided to resume its examination "of the question whether the announced measures will effectively prevent new violations of the Convention". See also the Court's President Luzius Wildhaber's address to the Parliamentary Assembly during the debate on the execution of judgments of the European Court of Human Rights, 28 September 2000.

12 See F. Matscher, supra, note 8, as well as CDL (2000) 16, § 2 (b). See also Article 26 of the Vienna Convention on the Law of Treaties.

31. Indeed, it is a matter of course that the Court's decisions will have effects extending beyond the confines of a particular case[13]. The Court's judgments, in fact, serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties[14]. This means that States parties, besides having to abide by the judgments of the Court pronounced in cases to which they are party, also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice; in this respect, it must be underlined that cultural differences may not be used as a pretext to escape the *erga omnes* effects of the Court's judgments.

b) The role of the Court

32. The Court's judgments are declaratory in character and have no direct effect in the internal law of the States[15]: the Court may not repeal, annul or modify domestic provisions or decisions[16]. It rules on whether or not a Convention provision has been breached in the impugned case, without, normally, saying what needs to be done in order to redress the violation and prevent further similar ones. The judgments are not directly enforceable, not even the operative part concerning just satisfaction, which, although obviously binding for the State concerned, is not directly enforceable by the Court or any organ of the Council of Europe[17].

33. 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".

34. The obligations incumbent on a State on account of the finding of a violation of the Convention on its part are therefore obligations of result. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will 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[18].

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[13] See the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, § 58.

[14] See the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, § 154 *in fine*.

[15] See Eur. Court HR, Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, § 58. See also Pelladoah v. the Netherlands judgment of 22 September 1994, Series A no. .., § 44.

[16] A proposal in this sense at the time when the Convention was drafted was not accepted: see D.J. Harris, M. O'Boyle, C. Warbrick, Law of the European Convention on Human Rights, Butterworths, 1995, p. 683.

17 See J.Polakiewicz, 'The Execution of Judgments of the European Court of Human Rights', in: R. Blackburn & J. Polakiewicz (eds), Fundamental Rights in Europe, 2001, p. 50 and note 3. The Court deems itself competent, however, to include a clause in its judgment to the effect that the compensation must be paid within a certain period: see the Moreira de Azevedo v. Portugal judgment (Article 50) of 28 August 1991, Series A no. …., point 1 of the operative part of the judgment.

[18] See Scozzari and Giunta v. Italy judgment of 13 July 2000, § 249.

35. Article 41 of the Convention provides that : "[i]f the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party". The wording of Article 41 indicates that the award of monetary compensation has a subsidiary character and should be pronounced only when full reparation is either not possible in the light of the nature of the violation (e.g. torture or ill-treatment) or not possible under the domestic legal system in question[19]. According to the Court's case-law, applicants do not have to exhaust all possible domestic remedies in order to obtain reparation in domestic law[20], unless the domestic law provides for a clear, speedy and effective procedure allowing to obtain reparation[21]. In the absence of proof – to be submitted by the Government - of the existence of such procedure, the Court rules on the applicant's claims under the heading of just satisfaction.

36. Surprisingly, the Court has, in the past, most often almost automatically proceeded with awards under Article 41, rather than addressing itself the possibility of achieving concrete reparation[22]. Indeed, the Court has normally not actively sought *restitutio in integrum* and has generally refrained from saying, or has been very reluctant to say what measures constituted adequate reparation for the violation found.

37. There are some exceptions[23], notably in respect of breaches of Article 6 of the Convention and of Article 1 of Protocol No. 1 thereto. As regards Article 6, the Court on some occasions has given explicit indications as to whether the reparation which had been afforded by the domestic authorities had been adequate. In the case of Piersack v. Belgium, for instance, it held that "the proceedings subsequently brought [had] essentially redressed the violation [of Article 6] found by the Court (…) [and] brought about a result as close to *restitutio in integrum* as was possible in the nature of things"[24]. In the Schuler-Zgraggen v. Switzerland case, it praised the domestic courts for the results of the rehearing procedure but criticised the lack of award of interest on account of the lengthy delay in the execution[25]. In a recent case, the Grand Chamber of the Court acknowledged that the rehearing of the applicant's case had

[19] And only if the applicant has claimed for it: see Sunday Times v. UK judgment of 6 November 1980 (Article 50) , Series A no. 38, § 14.

[20] See the De Wilde, Ooms and Versyp v. Belgium judgment (Article 50) of 10 March 1972, Series A no. 14, § 16.

[21] See, for instance, the Clooth v. Belgium judgment of 12 December 1991, Series A no. 225, §§ 51-52 and the Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, §§ 73-74.

[22] See the separate opinion of Judge Verdross annexed to the *De Wilde, Ooms and Versyp v. Belgium* judgment (Article 50) of 10 March 1972, , Series A no. 14. See also G. Dannemann, *Schadensersatz bei Verletzung der Europäischen Menschenrechtskonvention*, 1994, p. 51.

[23] As of 1 November 1998, the new Court has reserved its decision on just satisfaction in only 23 cases, 20 of which concerned Article 1 of Protocol No.1 and/or Article 6 of the Convention. The previous Court did so in 55 cases only.

[24] See the Piersack v. Belgium judgment of 26 October 1984, § 11, Series A no. 85.

[25] Judgment previously cited, supra, note 12.

provided redress for the violation of Article 6 of the Convention ascertained by the Second Section[26].

38. As regards Article 1 of Protocol no. 1, the Court, has stated explicitly that "a judgment finding a breach of a Convention provision imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach[27]. Accordingly, it has shown increased willingness to encourage the applicant and the State concerned to find an agreement: it has reserved its decision as to the just satisfaction, indicating that the most appropriate means of reparation for the violation occurred would be *restitutio in integrum*[28].

c) The role of the Committee of Ministers

39. The task of controlling the execution of the judgments issued by the Court lies, as said above, with the Committee of Ministers, pursuant to Article 46 § 2 of the Convention. The supervisory function of the Committee of Ministers is a collective responsibility. This means that the execution of a particular judgment is not only the legal obligation of the State concerned, but a common concern. Consequently, the position and practice of the Committee of Ministers towards its supervisory role concerning the execution of Court judgments reflect the lowest common multiple of the opinions of the Member States and of their determination to have this crucial part of the mechanism function effectively.

40. The Committee of Ministers has a general duty to scrutinize all measures taken by the State concerned to execute a judgment of the Court. Like the State's obligation to execute, the power of supervision of the Committee of Ministers extends to measures pertaining to the individual case, general measures and the award of just satisfaction[29]. The Committee of Ministers ensures in the first place that the applicant receives payment of pecuniary reparation ordered by the Court[30]. It also receives information from the relevant States of the

[26] See the Pisano v. Italy judgment of 24 October 2002 (striking out), § 45.

[27] See Papamichalopoulos and others v. Greece judgment (Article 50) of 31 October 1995, Series A no. 330-B, § 34.

[28] "The Court considers, however, that in the circumstances of the case the issue of the application of Article 41 is not ready for decision. In the light of the violation that has been found of Article 1 of Protocol No. 1, the most appropriate form of redress in the present case would be by way of restitution of the land by the State, coupled with compensation for the pecuniary damage sustained, such as the loss of enjoyment, and compensation for non-pecuniary damage." (See the Belvedere Alberghiera v. Italy judgment of 30 May 2000, § 69, Reports of Judgments and Decisions 2000-VI. See also Carbonara and Ventura v. Italy judgment of 30 May 2000, § 79, Reports of Judgments and Decisions 2000-VI; Beyeler v. Italy judgment of 5 January 2000, § 134, Reports of Judgments and Decisions 2000-I ;the former King of Greece and others v. Greece judgment of 23 November 2000). In the Hentrich v. France case, the Court held that "given the violation found of Article 1 of Protocol No. 1, the best form of redress would in principle be for the State to return the land. Failing that, the calculation of pecuniary damage must be based on the current market value of the land." (*Hentrich v. France* judgment of 22 September 1994, Series A no. 296-A, § 71). See also the judgment *Zimmermann and Steiner v. Switzerland* of 13 July 1983, § 29.

[29] See Peter Leuprecht, 'The Execution of Judgments and Decisions', in: R. St.J. Macdonald, F. Matscher & H. Petzold (eds), The European System for the Protection of Human Rights, 1993, pp. 797-798.

[30] See F. Sundberg, Control of execution of decisions under the ECHR – some remarks on the Committee of Ministers' control of the proper implementation of decisions finding violations of the Convention, CDL-JU (1999)29.

individual and general measures that are designed to remedy the violation found by the Court and prevent future similar violations. The Committee of Ministers issues a final resolution when it deems to have discharged its functions under Article 46 § 2.

41. The main tool at the disposal of the Committee of Ministers is peer pressure. It has also had recourse, and recently more and more so, to pressure by publicity[31]. The adoption of "interim resolutions" is instrumental in exercising pressure on the Government concerned by making public the fact that the State has not yet executed the judgment. In such an interim resolution the Committee of Ministers provides information on the state of progress of the execution or, where appropriate, expresses concern and/or makes relevant suggestions with respect to the execution[32]. The availability of information about execution of judgments on the web-site of the Committee of Ministers also adds to publicity and moral pressure. Furthermore, there appears to be a new practice of issuing press releases after submission by the State concerned of its annual report on the progress of execution.

42. Further, a procedure of monitoring of respect of commitments may be opened before the Committee of Ministers 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[33] (suspension or termination of membership) is available to the Committee of Ministers (to be used, however, only in exceptional cases[34]).

d) The role of the Parliamentary Assembly

43. The Parliamentary Assembly keeps track of the way in which the Committee of Ministers exercises its supervisory function concerning the execution of judgments[35]. In that

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[31] 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 the Ministries' Deputies

[32] See Rule 7 of the above Rules.

[33] Under Article 3 of the Statute of the Council of Europe, "every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I." Article 8 of the Statute provides that: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine."

[34] 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.

[35] In its Resolution 1226(2000), the Assembly decided to:

"draw the attention of the public at large to the execution of judgments of the Court;

keep a permanent updated record of the execution of judgments, noting:

a) the just satisfaction afforded to applicants;

b) any legislative or even, possibly, constitutional reforms needed to avoid further violations;

hold regular debates about the execution of judgments, on the basis of the aforementioned permanent record, and in the case of the non-executed judgments referred to in this report, organise a debate within one year of the date of this resolution;

context, 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 pay the amount of damages fixed by the Court[36]. In this way it also gives publicity to failures on the part of States and contributes to the "mobilization of shame".

44. Ultimately, the involvement of the Parliamentary Assembly may result in a monitoring procedure in relation to a State where there is a serious or systematic failure to execute judgments of the Court.

e) The role of the Secretary General

45. The Secretary General may improve and redirect the programmes of technical assistance and technical training and call upon Member States to support individuals and organizations who assist in providing the required information and documents and in training judges, lawyers and law-enforcing authorities. Furthermore, pursuant to Article 52 of the Convention the Secretary General may 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.

D. A legal approach to the matter of execution of the judgments of the Court

46. The jurisdiction of the Court under the Convention is a very important legal mechanism for the promotion and protection of human rights in the Member States of the Council of Europe. Apart from the Court's own functioning and the contents of its case-law, the effectiveness of the mechanism depends to a large extent on the execution of its judgments. A timely and complete execution of the Court's judgments is of vital importance for the authority of the Court, for an effective legal protection of the victims of violations and for the prevention of future violations. As far as the Court's authority is concerned, the Court finds itself in a circular course: the willingness on the part of the Governments to execute its

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adopt recommendations to the Committee of Ministers, and through it to the relevant states, concerning the execution of certain judgments, if it notices abnormal delays, or if the state in question has neglected to execute or deliberately refrained from executing the judgment – if necessary holding an urgent debate to this end;

invite the parliamentary delegations of the states concerned to do their utmost to bring about the quick and efficient execution of judgments;

invite the minister for justice, or another relevant minister of the responding state to give the Assembly an explanation in person, in case of refusal to execute a judgment or in case of excessive delays;

consider as a reason to open a monitoring procedure the case of a member state refusing to implement a decision of the Court;

envisage, if these measures fail, making use of other possibilities, in particular those provided for in its own Rules of Procedure and/or of a recommendation to the Committee of Ministers to make use of Article 8 of the Statute."

[36] See for instance Recommendation 1576 (2002) on "Implementation of Decisions of the European Court of Human Rights by Turkey" .

judgments depends largely on the Court's authority, while the Court's authority depends largely on the willingness of the Governments to execute its judgments.

47. The issue of execution is crucial for any system of judicial review. It is, however, especially pertinent and problematic, and indeed "the crucial question" [37], for international jurisdictions, since execution lies mainly in the hands of sovereign States. And this the more so if the cohesiveness within the community of States concerned is weak or has weakened, and if the international judicial body has no power to put a sanction on non-execution of its judgments.

48. It may be argued that since the Court has so far seen itself as having almost no means to promote the execution of its judgments and the supervision is in the hands of the Committee of Ministers, the issue of execution is a political rather than a legal issue. However, States are under a legal obligation to execute the judgments of the Court (see para 23 above). In that respect, the issue of execution and its supervision is also a legal one and, consequently, justifies also a legal approach.

49. The record of execution of judgments has been rather positive so far; both the record of "spontaneous" execution and the record of supervision[38]. One cannot, however, escape the impression that, in certain cases, the Committee of Ministers has demonstrated a rather aloof way of supervision. In some cases it discontinued its supervisory cycle, because it was confronted with an obvious unwillingness on the part of the State concerned[39]. In other cases, it acknowledged the adoption of a certain piece of legislation or other measures, without examining whether this action in reality brought the situation in conformity with the Convention[40]. Both these attitudes are not in conformity with the purpose of the Committee's supervisory role.

50. The importance of enhancing execution of judgments of the Court is crucial. The proposals made by the Parliamentary Assembly aim at providing, on the one hand, effective means of assisting States in taking the appropriate and adequate measures within a reasonable time, and, on the other hand, means to persuade, where necessary, States to co-operate.

51. The Commission will endeavour to examine these proposals and to make further ones in the light of all the arguments which have been put forward by the different interlocutors.

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37 See P. Leuprecht, supra, note 24, p. 791.

38 For a review of the general measures adopted by States consequent on finding of violations by the Court, see the document prepared by the Committee of experts for the improvement of procedures for the protection of human rights (DH-PR) "List of general measures adopted since 1959 with a view to avoiding further violations of the European Convention on Human Rights and fundamental freedoms" (available from the Department for the Execution of judgments of the European Court of Human Rights, Directorate II, Council of Europe).

39 See Resolution DH (90) 23 of 24 September 1990 concerning the judgment of 29 November 1988, Brogan and Others v. the United Kingdom, Rec. 1990-91, p. 76

40 See Andrew Drzemczewski and Paul Tavernier, L'exécution des décisions des instances internationales de contrôle dans le domaine des droits de l'homme", in: La protection des droits de l'homme et l'évolution du droit international", Colloque de Strasbourg, Paris 1998, p. 221.

E. Proposals for improving implementation of the Court's judgments

i. A more active role of the Court

52. In the Commission's opinion, in order to secure implementation of the judgments of the Court, it is important that the latter take up an active role in this respect. As can be deduced from Article 41 of the Convention, such role is not foreign to the Court's institutional functions and does not run counter to the division of competences between the Court and the Committee of Ministers: to the contrary, it would allow, in the Commission's view, a smoother and more effective functioning of the supervisory machinery.

53. Indeed, if the Court in most cases restricts itself to specifying the obligation to pay damages, it creates the impression – possibly also for the Committee of Ministers - that the State concerned may confine itself to doing just that, without remedying the violation itself[41].

a) Clear indication of the nature and cause of the violation found

54. The Commission is convinced that, for the effective exercise by the Committee of Ministers of its supervisory function in relation to the execution of judgments, a clear understanding of the implications of the judgment concerned is essential.

55. Accordingly, in its opinion it is important that, in the first place, the Court give as precise an indication as possible in its judgments (possibly in an *obiter dictum*) of the character and scope of the violation found, i.e. of whether it is on account of an odd malfunction of an otherwise good system or, for instance, of a problem or a gap in the legislation or a wrong interpretation of certain standards by the domestic courts.

56. Further, in cases where the violation may derive from more concurring circumstances, the Court should strive to indicate clearly whether all or only some of them would suffice for the violation to occur, bearing in mind that there may be future cases in which only some of the same circumstances pertain and where, in the absence of clear guidance, it would otherwise be necessary to seek another pronouncement of the Court in order to define clearly the scope of the obligations under Article 46 of the Convention – which would inevitably considerably, and unnecessarily, prolong the proceedings before the Committee of Ministers.

57. The Commission is cognizant that the Court does not act as a third - or fourth - instance and, consequently, not as a judicial body called upon to interpret and apply the domestic law of the State concerned but to judge on the conformity of the final domestic decision with the Convention. In its view, however, this would not be incompatible with a more explicit and clearer stance on what constitutes a violation of a Convention provision. The Court, in fact, would still confine itself to examining the circumstances of the case submitted to it, without stretching its examination beyond what is necessary to reach a conclusion thereabout.

58. A judgment drafted in such a manner would be better received and more easily implemented by the respondent State, and would undoubtedly assist the Committee of

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[41] See the *Olsson v. Sweden (No. 2)* judgment of 27 November 1992, § 93.

Ministers in its supervisory role. Moreover, such a judgment would also allow other Contracting States to deduce from it whether and to what extent the situation in their countries is comparable with the situation condemned by the Court, and what measures are required to remedy such possible situation[42]. Consultations could be envisaged between the Court and the Secretariat of the Department for the execution of judgments of the European Court of Human Rights within the Directorate General II in order to identify, on the basis of the difficulties encountered in the proceedings before the Committee of Ministers, the areas in which improvements or amendments in the Court's drafting technique would be beneficial. Such a procedure would, in the Commission's opinion, be preferable over the creation of the power of the Committee of Ministers to ask for formal clarification as suggested by the Parliamentary Assembly.

59. Such an approach to drafting judgments would also provide better guidance to those who want to translate them into other languages, and would thus contribute towards spreading the knowledge of the Court's case-law in member States of the Council of Europe.

60. On the other hand, the Commission wishes to point out that judgments are, of course, also better received by the States concerned and their implementation facilitated, if the Court leaves the States a margin of discretion in all those cases where the Convention allows for such a margin, and if the Court basis its judgments strictly on the legal and factual circumstances as these prevailed when the national authorities took their final decision in the case. Especially in asylum and immigration cases, there seems to be a certain tendency on the part of the Court to give its own evaluation of the facts, setting aside the evaluation by the national authorities, and to base its judgment on the facts as they have developed at the moment the Court decides the case. This would make it very difficult for the States to anticipate on the Court's case-law to take adequate measures to implement the judgment.

b) Indications as to the remedies to be sought and attempt to obtain *restitutio in integrum*

61. In the Commission's view, in application of Article 41 of the Convention the question of the possible award of just satisfaction is subsidiary to that of *restitutio in integrum*. The Court should thus address the question of whether and to what extent concrete reparation is possible, prior to examining whether and to what extent it is appropriate to award, instead or in addition, just satisfaction[43]. The Court would need to give indications as to what would constitute adequate reparation in the type of case under consideration, in order to express its view as to whether such reparation would be possible, wholly or in part, under the applicable national legislation.

62. In such scenario, the Court would play an active role in the matter of ensuring implementation of its own judgments, even in the absence of a provision similar to that of Article 63 § 1 of the American Convention: in general terms, it would give directions as to the individual and general measures whose realisation is necessary in given cases of

42 See President Wildhaber's address to the Parliament Assembly during the debate on the execution of the judgments of the European Court of Human Rights, 28 September 2000.

43 See Gérard Cohen-Jonathan, « Quelques considérations sur la réparation accordée aux victimes d'une violation de la Convention européenne des droits de l'homme », in : Mélanges en hommage à Pierre Lambert », Bruxelles, Bruylant, 2000.

Convention breaches. Further, in relation to individual cases, once it would find that it is possible to put the applicant, insofar as possible, in the same situation as he or she enjoyed prior to the violation of the Convention, i.e. to achieve *restitutio in integrum*, it would monitor its achievement and subsequently, if necessary, would grant monetary compensation should this restriction not be possible or sufficient (it may grant moral damages, for instance).

63. The Commission considers that it is essential that the Court, in each case where it finds a violation, after indicating clearly the grounds for it, indicates also what remedy or remedies are *in abstracto* suitable to redress the violation found (the Commission has already underlined this in its document CDL (2000) 16), and subsequently states whether and for what reasons it considers that *restitutio in integrum* is possible in the particular circumstances of the case under consideration. Whenever it appears that *restitutio in integrum* is possible, the Court should reserve its position on the matter of just satisfaction and allow the parties to work together towards achieving a satisfactory solution. Only after this negotiation phase should the Court resume consideration of the case and rule as to whether any just satisfaction is necessary and appropriate[44]. The Committee of Ministers' supervisory task would be, as a result, facilitated and the proceedings before it might speed up considerably.

64. The Commission is aware that the Court has shown a marked reluctance to indicate in its judgments to the State concerned in what way it may remove the violation found, which is considered to run counter to the principle of subsidiarity and the consequent freedom (and accountability) of States in choosing the means of complying with the Court's judgments.

65. In the Commission's opinion, however, there is no risk of betraying the principle of subsidiarity. In fact, the Court would not be called upon to say what exact measures the respondent State is to take, which would overstep the limits of the Court's competence[45] and, moreover, would not be viable[46], given that it would require an in-depth and up-to-date knowledge of the whole of the domestic system in question, coupled with the political and socio-economic situation of that country. Quite to the contrary, the decision as to what measures are most appropriate to achieve *restitutio in integrum* would be left for the State to make, in the course of its negotiations with the applicant, taking into account the means available under the national legal system as well as the pertinent case-law of the Court and the practice of the Committee of Ministers. The State would also be, of course, in the position to put forward before the Court any argument it wished about the possibility of *restitutio in integrum*, both in general and in the specific case.

66. Furthermore, the Court is already called to express a view on whether the reparation afforded is adequate, under Articles 37 and 38-39 of the Convention. Indeed, before accepting to strike a case out of its list, the Court must be satisfied that the matter has been resolved and that respect for human rights as defined in the Convention or its Protocols does

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[44] See, on the one hand, the judgment of 14 September 1987, *De Cubber v. Belgium (Article 50)*, § 21, and, on the other hand, the judgment of 26 October 1984, *Piersack v. Belgium (Article 50)*, § 11

[45] The possibility of introducing in the Convention a provision equivalent to Article 63 of the American Convention might nevertheless be considered.

[46] See the *Papamichalopoulos v. Greece* previously cited, § 34.

not justify to pursue examination of the application. The matter is considered to be resolved when the applicant has obtained full reparation in domestic law[47].

67. Finally, although the practice of reserving the decision on just satisfaction in cases where *restitutio in integrum* appears possible may be more burdensome for the Court (the Commission is cognizant that the Court has recently adopted the, quite opposite, practice of joining, where possible, admissibility and merits of applications[48]), it would result in a more effective and speedier processing of applications before the Committee of Ministers and, in the long run, in more cases ending in a friendly settlement (once States are aware, on the basis of the Court's case-law, of what practical consequences a particular judgment may have) and thus fewer application-processing before the Court. Ideally, friendly settlements would include measures designed both to redress the violation suffered by the applicant and to prevent further similar violations from taking place[49]. It goes without saying that this practice would be particularly useful in the case that the Court would deal with leading cases only in a situation as proposed by the Evaluation Group and at present examined.

68. The Commission further considers that, whenever possible and appropriate, the Court should express its opinion on the execution of a previous similar judgment[50].

ii. Adoption of legislation allowing for review or reopening of domestic proceedings following the finding by the Court of a violation of a Convention provision

69. In the perspective of attempting to achieve *restitutio in integrum* whenever possible, the Commission considers that the adoption by all member States of legislation allowing for re-examination or reopening of the domestic proceedings which the Court has found to be flawed from the viewpoint of a Convention provision is a priority which should be pursued in all possible venues and on all possible occasions. The importance of such legislation has been stressed and reiterated by the Committee of Ministers, most lately in its Recommendation No. R (2000)2[51]. Recently, also the Court has implicitly endorsed the practice of the Committee

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[47] See Explanatory note to Protocol no. 8, Strasbourg, 1985, p. 15, § 35.

[48] See the new Rule 54A of the Rules of Court entered into force in October 2002.

[49] See the example of friendly settlement in the recent case of Benzan v. Croatia (judgment of 8 November 2002) concerning the applicant's allegations that the conditions of his detention amounted to inhuman and degrading treatment. The Croatian Government committed themselves, in addition to paying a certain sum in the applicant's favour, to renovating the prison in question before September 2003.

[50] See the *Vermeire v. Belgium* judgment of 29 November 1991, §§ 25-27 and the *Schuler-Zgraggen v. Switzerland (Article 50)* judgment of 31 January 1995, §§ 14-15. See also, more recently, the Messina no. 2 v. Italy of 28 September 2000, §§ 81-82.

[51] See Recommendation No. R (2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministries' Deputies. For a detailed study on the matter of re-examination of cases following judgments of the Court, see :Elisabeth Lambert-Abdelgawad, "Le réexamen de certaines affaires suite à des arrêts de la Cour européenne des droits de l'homme" in: Révue trimestrielle des droits de l'homme, 2001, pp. 715-742.

of Ministers to pursue reopening of domestic proceedings in cases of infringements of the right to a fair trial[52].

70. The Commission fully subscribes to this view. It considers nevertheless that it is important to draw due distinctions between criminal cases, in which it is undisputed that reopening or review is, in principle, the ideal form of redress, and civil and administrative cases. Indeed, in some of the latter, such as those involving Article 8 of the Convention, although review of the domestic procedure may be desirable there as well, due respect must be had in all these cases for the legitimate interests of third parties.

71. The Commission further considers that it would be extremely useful if the Committee of Ministers would elaborate general guidelines on the type of measures which would constitute adequate implementation of Resolution No. R(2000)2 (for instance, if and to what extent the legislation on reopening or reexamination of cases should be retrospective, whether there is an additional need for striking convictions from criminal records etc.).

iii. Possibility for the Committee of Ministers to apply for interpretative judgments

72. Rule 79 of the Rules of Court provides for the possibility that a party requests from the Court the interpretation of a judgment within a period of one year following the delivery of that judgment[53]. The Parliamentary Assembly, in its Recommendation 1477 (2000) to the Committee of Ministers, recommends that the Committee of Ministers be also given the power to ask the Court for a clarifying interpretation of its judgments "in cases where the execution gives rise to reasonable doubts and serious problems regarding the correct mode of implementation" (see para. 10 i. above).

73. It must be noted at the outset that, so far, there have been very few cases of interpretation by the Court of its own previous judgments, particularly under (former) Article 50 of the Convention[54]. The Committee of Ministers has nonetheless undoubtedly been confronted with a variety of problems concerning the interpretation of a given judgment or the possibility of its application *mutatis mutandis* to other similar cases (see para. 46 above).

74. In the Commission's opinion, however, these problems will significantly decrease in number and significance if the Court is to accept to take up an active role in the matter of implementation of its own judgments and to draft the latter with a view to simplifying and

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[52] See the Pisano v. Italy judgment, previously cited, § 45.

[53] According to Rule 79, "(2) the request shall be filed with the Registry (…) and state precisely the point or points in the operative provisions of the judgment on which interpretation is required. (3) The original Chamber may decide of its own motion to refuse the request on the ground that there is no reason to warrant considering it. Where it is not possible to constitute the original Chamber, the President of the Court shall complete or compose the Chamber by drawing lots. (4) If the Chamber does not refuse the request, the Registrar shall communicate it to the other party or parties and shall invite them to submit any written comments within a time-limit laid down by the President of the Chamber. The President of the Chamber shall also fix the date of the hearing should the Chamber decide to hold one. The Chamber shall decide by means of a judgment.

[54] See the Ringeisen v. Austria judgment of 23 June 1973, Series A no. 16; Allenet de Ribemont v. France judgment of 7 August 1996, Reports of Judgments and Decisions 1996-III, p. 903; Hentrich v. France judgment of 3 July 1997, Reports 1997-IV, p. 1286)

accelerating the task of the Committee of Ministers (see paras. 46-49 above). Accordingly, the Commission would not urge, at this stage, the empowerment of the Committee of Ministers to seek interpretation of judgments. It finds however that the time-limit of one year from the *delivery* of the judgment for parties to a case to apply for interpretation of the relevant judgments is indeed rather short. To the extent that this would only require an amendment to the Rules of Court, the Commission recommends that the delay be extended. Furthermore, it should be made to start running from the date when the judgment delivered by a Section *becomes final pursuant to Article 44 of the Convention*.

iv. Possibility of imposing « astreintes »

75. The Parliamentary Assembly, in its Recommendation 1477 (2000) to the Committee of Ministers, recommends the introduction into the Convention of a system of "astreintes" (fines for delays in the performance of a legal obligation) (see para. 10 ii. above).

76. The Commission recalls, as a recent example, that such mechanism of financial penalties was introduced in the EC Treaty[55] in 1993 as a tool of ensuring adequate and timely execution by Member States of judgments of the Court of Justice of the European Communities[56].

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[55] Article 226 reads as follows: "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice." Article 228 reads: 1. "If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice. 2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice. If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time‹limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 227".

56 See M.A. Theodossiou, "An analysis of the recent response of the Community to non-compliance with the Court of Justice judgments: Article 228(2) E.C.", E.L. Rev. February 2002, pp. 25-46.
The procedure for imposing such penalties may be summarised as follows. Initially, the European Commission engages in a process of negotiation with the State author of the infringement, seeking to achieve compliance without recourse to legal procedures. Should this administrative phase not lead to satisfactory results, the European Commission may bring the matter before the Court of justice, seeking that it issue a judgment declaring the violation. The ECJ has adopted a very broad concept of violation. It has repeatedly stated that either active or omissive conducts by national authorities engage the State's responsibility and that all the different powers of the State may be held liable for infringement of Community law. Examples of violation are the failure to implement a particular directive, in general or in a particular case; the maintenance in force of an infringing statute; a decision of a national court, which is not in compliance with European Community law. Moreover, the Court excluded the possibility that the difficulties of parliamentary procedures or the legislative paralysis caused by a change of government may be invoked by the Member States as effective defences to enforcement actions.
The European Commission proposes a pecuniary sanction to be imposed on the recalcitrant State, which the Court is free to follow or not.
In establishing the amount of the penalty payment, the European Commission applies three criteria:
a) the seriousness of the infringement;
b) its duration;
c) the need to ensure that the penalty itself is a deterrent to further infringement.

77. As to the desirability of a system of "astreintes" in the Convention system, the Commission stresses that it would introduce a notion of "punishment" which does not, at present, exist in the Convention system; indeed, the sums of money which the Court orders respondent States to pay to applicants merely correspond to the pecuniary and moral damage the latter suffered and the costs and expenses they incurred (the Court does not award punitive damages either). Interests payable on these sums after the expiry of the three-month time-limit are designed to compensate for the depreciation of money only.

78. The Commission agrees with the Assembly that, in principle, this penalty-imposing system would endow the Committee of Ministers with a new tool of exerting pressure on States. However, it considers it necessary to examine what the added value of this tool would really be.

79. In the first place, as was stressed by the CDDH, while it might be useful in those cases where the State in question has not abided by a judgment out of either a clear political decision or lack of political will, or possibly in cases where reasons of public opinion block the State's execution, it is more questionable whether the Committee of Ministers would have recourse to it in those cases, which are by far more numerous, where the non-enforcement depends on other factors, such as problems or delays relating to the internal democratic processes and procedures, or in cases where a beginning of execution has taken place but it is doubtful whether it is adequate or sufficient, or in cases where the delay is caused by the lack of financial means.

80. Furthermore, one cannot underestimate certain viability problems of this proposed innovation. Indeed, it seems logical to imagine (though this is clearly not the only option), drawing inspiration from the system of the EEC, that the power to impose the "astreintes" would be given to the Court, whereas it would be the Committee of Ministers' task (in the absence of a suitable, independent body within the Council of Europe) to initiate the procedure when considering that a State has failed to perform its obligations under Article 46 of the Convention. Thus, after an adversarial procedure before the Court, and a monitoring procedure before the Committee of Ministers, another procedure would be opened before the Court (procedure which would arguably be adversarial, with the Committee of Ministers, the respondent State and possibly the applicant or applicants becoming parties to it).

81. In this respect, however, the Commission recalls the notorious problems of case-load which the Court is experiencing and which have raised the question of whether the Court should continue to deal with all applications that are lodged with it in the same, detailed manner as it has done so far. Against this background, any proposal leading to increasing rather than alleviating the workload of the Court should be cautiously considered. Indeed, effectiveness of judgments of the Court is to be held as a priority (see para 15 above), so that the aim of the astreintes procedure would possibly justify the additional work. However, this

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In addition, a "basic uniform flat - rate amount" of 500 € per day of delay is applied.
The amount of the fine payable per day of delay is calculated applying the following formula:
Pd = (Fr x Cs x Cd) x N
where:
Pd is the daily penalty payment; Fr is the flat-rate amount; Cs is the seriousness coefficient; Cd is the duration coefficient; N reflects the ability of the Member State to pay.
There is no coercive mechanism in case of non-execution of the penalty. The doctrine suggests that the astreintes sums dues by a Member State should be withheld from the funds assigned to that State under the European program of Structural Funds

justification would only be valid, strictly speaking, for certain particularly important cases as well as for the cases which involve issues generating repetitive applications. The difficult question arises of whether the other cases, including the "clones" ones, should be barred from this procedure (if they were not, the Court would risk, even more than it does already, a paralysis). One could argue that they should. However, it is not possible, in the Commission's opinion, to rule out that the Committee of Ministers would think fit to initiate the penalty-imposing procedure in a series of repetitive cases in order to put pressure on a State. In fact, once the tool is introduced in the system, it would be difficult, if not inappropriate, to limit its use. Yet, if this were not done, the serious risk would exist that these cases would jam the Court.

82. In conclusion, the Commission considers that at this stage the added value of the introduction of a penalty-imposing mechanism in the Convention system would be insufficiently clear and politically and practically insufficiently feasible to justify a reform of the Convention on this point. In order to consider further the possibility of introducing such mechanism in the European system, in the Commission's opinion it would be necessary to carry out a detailed and thorough study of all the possible options, including of what bodies should be involved and of the procedure and modalities of access to the mechanism. The Commission is well prepared to carry out such a study, if requested.

v. More frequent use of third Party's intervention

83. The Parliamentary Assembly, in its Recommendation 1477 (2000) to the Committee of Ministers, also recommends the latter "to ask the governments of High Contracting Parties to make more use of their right to intervene in cases before the Court[57], so as to promote the *erga omnes* significance of the decisions of the Court" (see para. 10 iii. above).

84. Undoubtedly, third-party intervention offers States the possibility of putting forward additional arguments before the Court and also, possibly, of illustrating that the situation under consideration is common to other States or exists under other legal systems, or is of concern for other societies[58].

85. The Commission therefore considers that States should have recourse to this useful institution in all appropriate cases of great importance, where the judgment may have an *erga omnes* significance or, at least, may affect that third State. Possible abuses thereof, which would unduly prolong the procedure before the Court and unnecessarily overburden the latter's workload, may be prevented by the Court through a restrictive policy of permission. It is necessary, to this end that States be put in the conditions of doing so, through appropriate

[57] As regards the possibility for Contracting States which are not a party to the proceedings to intervene in a case, Article 36 § 2 of the Convention provides that "the President of the Chamber may, in the interests of the proper administration of justice, invite (as well as, under Rule 61 of the Rules of Court, grant leave to) any Contracting State which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or (in exceptional cases) to take part in hearings. Rule 61 adds that requests for leave for this purpose must be duly reasoned and submitted in one of the official languages, within a reasonable time after the fixing of the written procedure

[58] For a recent example of third-party intervention, see the case of A. v. the United Kingdom (no. 35373/97, decision of 5 March 2001), concerning parliamentary immunity, where the Governments of the Netherlands, Ireland and Italy intervened by submitting written comments.

means of publicity of potentially interesting cases (for instance through press releases, case-law information notes and surveys[59] etc.).

vi. Financial and technical assistance on the part of the Council of Europe for the adoption of adequate general measures

86. The adoption by a member State of general measures necessary to achieve compliance with a judgment of the Court may entail very significant expenditures, which the State might not be in the position to bear, particularly in cases where a series of applications is pending before the Court raising the same issues and likely to lead to an award by the Court of important sums for just satisfaction.

87. It may be argued that, in a situation of real shortcoming of funds, the State's limited finances would be better spent on implementing the necessary reforms (thus preventing further or continuing violations of the Convention), rather than on paying just satisfaction to those individuals who have already suffered such violations. This is particularly relevant for those cases where the situation from which the violation has stemmed affects numerous individuals (hence the possibility of having numerous similar applications to the Court) and where a structural reform would be needed in order to remedy it (for instance, cases of unreasonably lengthy duration of proceedings on account of structural shortcomings, or of inhuman and degrading conditions of detention on account of inadequate prison premises). In such cases, the State would have to pay (often considerable) sums for just satisfaction to a number of individuals, whereas these sums could be invested in the structural reforms (recruitment and training of new judges or renovation of prisons in the examples cited).

88. It is certainly not the Commission's task to address this issue, which involves a possible change in the Court's approach to awards of just satisfaction under Article 41 of the Convention. The Commission takes the view, instead, that the Council of Europe should in certain exceptional circumstances support member States with objectively proven budgetary constraints and provide financial – as well as technical – assistance in order to allow them to comply with their obligations under Article 46 of the Convention. Such assistance is often necessary in order to allow new democracies to bring their legislation and practice into conformity with the principles and standards of the Council of Europe, an obligation which they undertook upon joining the Council and which the latter must be also accountable for.

vii. Possibility for individuals to apply to the Court for alleged breaches of Article 46 of the Convention

89. As long as a judgment of the Court has not been fully executed, the violation with respect to the original victim may be continuing. This may give rise to a new application with the Court. However, it would be very burdensome for the latter if he or she would again have to exhaust local remedies with respect to the complaint which in fact is a continuation of the previous complaint. Moreover, if the non-execution relates to the payment of costs or damages, it is unlikely that a (new) violation of one of the rights and freedoms laid down in the Convention could be found[60].

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[59] Available at the Court's website, at www.echr.coe.int/Eng/General.htm

[60] The European Commission for Human Rights found that, in cases where the Committee of Ministers had discharged its functions by the adoption of a resolution, the Commission could not examine "whether a High Contracting Party has complied with its obligations under a judgment given by the European Court of Human

90. Arguably, it would be appropriate for the Court to adopt the position that a violation by a State of its obligation under the first paragraph of Article 46 of the Convention may be directly brought before the Court by the victim thereof (as may be brought, for instance, an alleged violation of Article 34). The Commission however considers that this is rather a matter of implementation that does not fit well into the Constitutional task of the Court but should effectively be dealt with by the Committee of Ministers under the supervision of the Parliamentary Assembly.

viii. Withholding of sums from a State's contribution to the budget of the Council of Europe to pay just satisfaction

91. The possibility for the Committee of Ministers to decide that the sum owed by a State under a just satisfaction award made by the Court should be withheld from that State's contribution to the budget of the Council of Europe may also be envisaged.

92. Such measure, for which a clear legal basis does not currently exist and would have to be provided, would have the advantage of allowing to achieve the payment in favour of the applicant in situations of political impasse (the State in question might be more willing to reimburse a debt to the Council of Europe rather than to the applicant). It would in addition give a strong signal that Council of Europe's member States are ready to assume fully their collective responsibility.

93. The Commission, however, has doubts as to the desirability of the introduction of such measure. It considers in the first place that from a theoretical point of view it would be preferable to withhold the sum in question from a possible "reliquat" of the State's contribution of previous years. It is cognizant however that, in practice, even assuming that there were a "reliquat" in favour of the debtor State, the amount thereof would be in most cases insufficient for the purpose.

94. Furthermore, in the Commission's opinion, the measure in question (in the same manner as a decision by the other member States to pay the outstanding sum themselves) would not contribute towards reaffirming and enhancing the obligation for member States to abide by the Court's judgments. Indeed, it would seem to afford recalcitrant States a "way out" from a situation of explicit refusal to comply with the Court's orders. **Other means of pressure on the recalcitrant State**

95. Another possible measure designed to put pressure on recalcitrant States would be to exclude them temporarily from periodic high-level responsibilities such as the rotating Chair of the Committee of Ministers, or participation in the Bureau of the Parliamentary Assembly.

96. Despite the relatively little incidence in terms of frequency of this type of rights, in the Commission's opinion a temporary exclusion therefrom – particularly if adequately publicized - might constitute an effective (possibly ancillary) means to persuade a State to execute a judgment. Accordingly, it deserves consideration.

Rights, supervision of judgments being entrusted to the Committee of Ministers" (see No. 19255/92 and 21655/93, Oberschlick v. Austria, dec. 16.5.95, D.R. 81, p. 5; No. 10243/83, Times Newspapers Ltd and others v. UK, dec. 6.3.85, D.R. 41, p. 123; see also No. 19438/92, Jacobsson v. Sweden, dec. 29.3.93, D.R. 74, p. 220).

x. Peer pressure in national parliaments

97. As was stressed by the Commission in its previous opinion on the preliminary report of the Parliamentary Assembly on the execution of judgments of the Court and monitoring of the case-law of the European Court and Commission of Human Rights (CDL (2000)16), members of the Parliamentary Assembly have an important role to play in their national parliaments, by *inter alia* promoting or even initiating the enactment of the required legislation or the amendment of the existing one, as well as by putting pressure on the competent authorities in order to urge them to change practices which run counter to Council of Europe's standards.

xi. A more systematic approach by the Committee of Ministers to the matter of supervision of compliance with the Court's judgments

98. Having examined the annotated agendas for the Deputies' meetings devoted to supervision of the Court's judgments, the Commission cannot escape the impression that a much stricter attitude should be adopted towards respondent States. At the moment, there do not appear to be official mechanisms whereby these States are urged to provide exhaustive information in due time as required by the Secretariat or whereby States are sanctioned if they fail to do so. It would instead appear highly advisable to set up such mechanisms in order not to delay unduly the procedure before the Committee of Ministers.

99. In the Commission's opinion, it would further be advisable to take a less ad hoc approach to the matter of implementation execution of the Court's judgments. The Committee of Ministers should develop guidelines (such as those contained in Recommendation R (2000)2) on what measures are to be taken by the respondent States following the finding by the Court of a breach of a particular Convention provision, so that member States may know in advance what consequences they may face. These guidelines, which should of course be inspired by both the practice of the Committee of Ministers and the more explicit case-law of the Court in this respect (see para 74 above) would, in the Commission's opinion, allow for a stricter approach by the Committee of Ministers to the supervision of execution of the Court's judgments.

100. Finally, the Commission finds that it would be useful if the Secretariat did not have to rely exclusively on the respondent States in order to obtain information about the legal and factual situation in these States, but could use other sources of information such as national human rights institutions or non-governmental organisations.

xii. Endowment of the Council of Europe's department for the Execution of judgments of the European Court of Human Rights with additional means and establishment of institutionalised links between that department and the Court's registry

101. At each meeting, the Ministers' Deputies have to supervise implementation of several hundred cases. The department for the Execution of the Court's judgments, which assists the Deputies in this task, is currently composed of nine lawyers in all. In the Commission's opinion, it is unrealistic to expect such a small team effectively and timely to keep track of the factual developments in the hundreds of cases of which they are responsible and to be specialised in the domestic legal system of 44 countries, let alone envisaging and developing global strategies and adequate follow-up methods for ensuring implementation of judgments.

102. It would thus appear necessary to endow this department with additional means in order to allow it to increase its size and competences.

103. Furthermore, the Commission is of the view that stable links should be created and institutionalised between this department and the Court's registry, in order to allow the first to benefit from the unique, vast expertise of the latter in terms of both knowledge of the specific cases and domestic legal background and their understanding of the Court's case-law and "language".

F. Conclusions

104. On the basis of the above observations, the Commission concludes as follows:

a) The State to which the judgment is addressed, is under the obligation, according to the first paragraph of Article 46 of the Convention, to fully and timely implement the judgment. For those other Contracting States, for whose legal system and/or legal practice the judgment is also relevant, Article 1 of the Convention implies the obligation to also take the judgment into consideration.

b) Supervision of the execution of the judgments of the Court is the primary responsibility of the Committee of Ministers according to the second paragraph of Article 46 of the Convention. Nevertheless, the Court should play a facilitating role in this respect, thus enhancing and speeding up the proceedings before the Committee of Ministers. In addition, the Parliamentary Assembly has also an important role to play in order to facilitate and promote the effective performance by the Committee of Ministers of its supervisory function. A regular dialogue between the Committee of Ministers and the Parliamentary Assembly concerning the execution of the judgments by the States concerned is very useful to this end.

c) In order to facilitate the supervision by the Committee, it is advisable that the Court give as precise an indication as possible in its judgments of the character and scope of the violation found, and of the kind of measures that may be appropriate to remedy such violation.

d) Awards of just satisfaction are subsidiary to *restitutio in integrum*. The Court should therefore, whenever possible, pursue the possibility of achieving *restitutio in integrum*, while leaving the choice of the concrete measures for achieving it to the respondent State. It should thus reserve its decision on just satisfaction and resume examination of the case only if the parties fail to find a satisfactory agreement or when an award under Article 41 is nevertheless appropriate.

e) Legislation allowing for reopening or review of proceedings following the finding by the Court of a violation of the Convention should be adopted with no further delay by all member States, at least as far as criminal proceedings are concerned.

f) The empowerment of the Committee of Ministers to seek interpretation of judgments does not seem, at this stage, as a priority. The Commission nevertheless recommends that the time-limit for the parties to apply for interpretation of a judgment be extended and made to start running from the date when the judgment *becomes final* and that the Court allow for

consultations with the Secretariat of the Department for the execution of judgments of the Court within Directorate General II of the Council of Europe.

g) The introduction of the possibility for the Court to impose "*astreintes"* would seem to have too little added value as to justify an amendment of the Convention on this point at this stage. However, the issue merits further study on its possibilities and implications.

h) The recommendation by the Parliamentary Assembly that States should more frequently ask for permission to intervene in those important cases before the Court where they foresee a certain relevance of the outcome for their own legal system and/or legal practice, should be endorsed but abuses should be avoided in order not to unduly prolong the procedure before the Court and unnecessarily overburden the latter's workload.

i) The Council of Europe should support member States with objectively proven budgetary constraints and provide financial – as well as technical – assistance in order to allow them to comply with their obligations under Article 46 of the Convention

l) Peer pressure should be exercised by members of the Parliamentary Assembly in their respective national parliaments.

m) The department for the Execution of judgments of the European Court of Human Rights should be provided with additional means, and stable, institutional links should be created between this department and the registry of the Court.