

The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability

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The purpose of judicial proceedings is a practical one: “[a] judgment of the European Court of Human Rights is not an end in itself, but a promise of future change, the starting point of a process which should enable rights and freedoms to be made effective.”¹ The Court has itself had occasion to state that the right of access to a court or tribunal “would be illusory if a Contracting State’s domestic legal

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¹ F. T u l k e n s, Execution and Effects of Judgments of the European Court of Human Rights: The Role of the Judiciary, in: Dialogue between Judges, Council of Europe, Strasbourg, 2006, 12.

system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. ... Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6", and the Court infers this right of execution from "the principle of the rule of law".² What the Court has affirmed in respect of the judgments of domestic courts and tribunals also applies to judgments of the Court itself, since the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention") is subsidiary to domestic legal systems.

Now more than ever, specially since the beginning of the 21st century and the different discussions that led to the signing of Protocol 14, the enforcement of judgments is considered to be one of the key factors that will improve the European human rights system.³ As written in the report of the Group of Wise Persons, "the credibility of the human rights protection system depends to a great extent on execution of the Court's judgments. Full execution of judgments helps to enhance the Court's prestige and the effectiveness of its action and has the effect of limiting the number of applications submitted to it".⁴ The Committee of Ministers has also made it clear that respecting judgments is one of the conditions of membership of the Council of Europe.⁵

Since the beginning of the system, no fundamental changes have emerged with regard to the content of the measures the defending State is to adopt following a judgment. Indeed it is a fact well-known that historically, developments on the extent of the obligation to conform with decisions made at the European level relate to three distinct matters: the payment of the just satisfaction, and/or the adoption of general and/or individual non-pecuniary measures. For the first time in 2007 the Committee of Ministers wrote up its first annual report on the execution of judgments of the European Court of Human Rights that was published on 26 March 2008 in response to the "increasing demands, from within the Council of Europe but also from national authorities and civil society, for transparency regarding the impact and efficiency of the mechanism set up to supervise execution".⁶ The second report was published in April 2009. Under the latest statistics, there is a remarkable increase in workload, despite a stagnation in the number of new cases transmitted to the Committee of Ministers and the spectacular growing of the

² ECtHR, *Hornsby v. Greece*, 19 March 1997, § 40. ECtHR, Second Section, *Paudicio v. Italy*, 24 May 2007, § 53.

³ The high-level debates during a series of round-table discussions at seminars organised mainly by the successive presidencies of the Committee of Ministers are published in: *Reforming the European Convention on Human Rights: A Work in Progress* (2009), Council of Europe Publishing, 718 p. The Protocol 14 *bis* recently adopted does not contain any provision related to the execution of the judgments.

⁴ CM (2006) 203, 15 November 2006, § 25. See also the final resolution in the case of *Stran Greek Refineries and Stratis Andreadis v. Greece*, (Final Resolution DH (97) 184).

⁵ See the interim resolutions in the cases of *Loizidou v. Turkey*, (ResDH (2001) 80), and *Ilaşcu and others v. Moldova and the Russian Federation*, (Interim Resolution CM/ResDH (2007)106).

⁶ 1st Annual Report, 9.

number of cases closed by final resolution in 2008 (400 cases formally closed by a resolution and 295 cases whose examination has ended in 2008 and which are awaiting a final resolution). The number of pending cases has grown from 4322 in 2005, to 5523 at the end of 2006 and more than 7000 in December 2007.⁷ However many pending cases are clone ones; thus 2183 of these pending cases relate to one single problem in one State, that is the excessive length of judicial proceedings in Italy.

The aim of this article is to focus on the major current changes since 2000 and to consider whether the system is really suitable for the major needs. According to the analysis and distinction made by R. Grant and R. Keohane concerning other fields,⁸ the European system of human rights seems to evolve towards a “participatory model of accountability”, as a plurality of actors are concerned by the monitoring procedure. However the option for a non-coercive system is preserved and is another major characteristic of the evolution of this system. These aspects reveal a profound divergence between the two European systems, the system of the Council of Europe and the system of the European Union.

I. From One Sole Organ to Multiple Organs to Control the Execution of Judgments Delivered by the European Court of Human Rights: Towards a “Participatory Model of Accountability”

According to the Convention, supervision of the execution of judgments is a matter for the Committee of Ministers alone. This arrangement has in reality become much more complex: the European Court has come to play a greater part in the process of supervising execution. It is also the Parliamentary Assembly of the Council of Europe which, of its own motion, has imposed on the Committee of Ministers an increasingly institutionalized right of inspection. It should nonetheless be noted that societal authorities, and more particularly the victim (or the victim’s representative), play no part in this arrangement, being absent from the meetings of the Committee of Ministers. This is a fundamental distinction with the Inter-American system of human rights where victims and their lawyers are very much involved in the monitoring process of the judgments of the Court. The execution of the judgment is therefore outside the control of the applicant (interstate applications are virtually non-existent). It must nevertheless be added that NGOs, national institutions and applicants are able to make documents available to the Committee of Ministers, which may be similar to the actual oral arguments and

⁷ The different figures are taken from the 2nd Annual Report, 33, 35 and 37.

⁸ R. Grant/R. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *American Political Science Review* (2005), 1, 29-43, who “distinguish two basic concepts of accountability: delegation and participation”, among which they expose a plurality of models.

may provide a starting point for consideration by the Department for the Execution of Judgments.⁹

A. The Interference of the European Court of Human Rights in the Execution of Its Judgments

1. Historical Background

It is well-known that the Court has always refused to indicate to the State the measures which need to be taken in order to execute a judgment. This fact is almost due to the nature of the obligation on the State to comply with judgments of the Court, which has always been interpreted as purely an obligation to produce a specific result: “the Court’s judgment leaves to the State the choice of the means to be used in its domestic legal system to give effect to the obligation under Article 53”.¹⁰ This is a corollary of the subsidiary nature of the Convention in relation to domestic systems and of the division of tasks between the Court and the Committee of Ministers. Moreover, the Court considers being in no position to make such an assessment, which presupposes a relatively detailed knowledge of the domestic system in question. The Court also argues that under the Convention, just satisfaction is the only measure that the Court can order a State to take.¹¹

Nevertheless, the Court’s lack of power to give directions has caused more and more criticism (from academic writers and the Parliamentary Assembly of the Council of Europe) as not being conducive to a prompt and proper execution of judgments. It is also true that the freedom to choose the means has turned out to be relatively limited in practice¹² and in some cases even an empty word. The applicants, now more so often than in the past, demand the Court to order the individual measures that a State must adopt. In the *De Clerck v. Belgium* case, they went as far as asking the Court to adopt a separate judgment for the payment of just sat-

⁹ Under Rules 9.1 and 9.2 adopted in 2006 by the Committee of Ministers. National authorities are also able to appear before the Committee of Ministers at the request of the Permanent Representative.

¹⁰ ECtHR, *Belilos v. Switzerland*, 29 April 1988, Series A no. 132, § 78. ECtHR, *Scordino v. Italy* (GC), 29 March 2006, § 233. 1st Section, *Abbasov v. Azerbaijan*, application no. 24271/05, 17 January 2008, § 36: “The Court reiterates that its judgments are essentially declaratory in nature (...).”

¹¹ Article 41 of the Convention provides as follows: “If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” See, for more details, our book, *The Execution of Judgments of the European Court of Human Rights*, Human Rights Files, no. 19, Council of Europe Publishing, 2nd ed., January 2008.

¹² This is the meaning of the Court’s slightly modified wording in ECtHR, *Papamichalopoulos and others v. Greece*, 31 October 1995, Series A no. 330-B, § 34: “The Contracting States that are parties to a case are *in principle* free to choose the means whereby they will comply with a judgment in which the Court has found a breach.” (emphasis added).

isfaction so as to “allow the Court to give its opinion on the adequacy of the measures adopted by the government to comply with the judgment (...).”¹³

Considering the execution of judicial decisions as a fundamental right and a component of the right to a fair process,¹⁴ European Courts (the ECtHR as well as the European Court of Justice) have unavoidably prepared the judicialization and parallel depoliticization of the process of execution. This provides them with the conditions to interfere in that process, specially in the event of difficulties or delays in the execution.¹⁵

Consequently, over the course of several years the Court has assumed a more important role in the execution of its judgments and has become a major player. The European Court is now clarifying the scope of its judgments more often. Such recommendations have now been extended to general measures, and the pilot judgment procedure has opened the way to more widespread use of the Court’s power of recommendation. By underlying its reasoning on Article 46, and undoubtedly on its paragraph 1, even if it does not explicitly mention it,¹⁶ the European Court of Human Rights recommends to, or even orders the States other specific measures to be adopted, even if the judgments are still, in principle, declaratory.¹⁷

2. The New “Pilot Case” Procedure

This concerns only few cases. In the most complex or serious cases, given that one judgment is not enough to clarify the different facets of the problem and the choice of measures available to redress the situation, the pilot case procedure has not been set in motion.¹⁸ “The Court seems to set aside the pilot procedure when the structural or systematic violations at issue relate to political sensitive events where the discretionary power of States has to be preserved. At the same time, the

¹³ Second Section, *De Clerck v. Belgique*, no. 34316/02, 25 September 2007, § 96. The translation is unofficial.

¹⁴ CourEDH, *Hornsby v. Grèce*, 19 March 97, § 40. Cf., more recently, *Dubenko v. Ukraine*, 11 January 2005, Second Section, § 44.

¹⁵ See our article *L’exécution des décisions des juridictions européennes*, *Cour de Justice des Communautés Européennes et Cour Européenne des Droits de l’Homme*, *Annuaire Français de Droit International* (2006), 676-724.

¹⁶ Article 46, “Binding Force and Execution of Judgments: 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

¹⁷ Cf. notably, *Abbasov v. Azerbaijan*, 1 Section, 17 January 2008, no. 24271/05, § 36: “The Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention.”

¹⁸ For example in the cases concerning serious abuses by security forces in Turkey, Chechnya and Northern Ireland.

Court takes into account the risk of non-implementation by the State of the measures recommended by the Court”.¹⁹

Of the cases for which the Committee of Ministers supervises the adoption of general measures, 95 % are not pilot cases. The case of *Broniowski v. Poland* was the first illustration of this method;²⁰ the Court specified the general measures to be adopted and decided to freeze examination of similar cases pending adoption of a domestic means of redress. In this case, the Grand Chamber held that the question of compensation under Article 41 was not ready for decision, a technique which allowed pressure to be put on the state and any remaining damage not compensated for at domestic level to be better assessed. According to the Grand Chamber judgment of 28 September 2005 endorsing the friendly settlement, this was a logical position consistent with the principle of subsidiarity in the European system and giving the state the option of adopting the requisite individual (pecuniary and/or non-pecuniary) measures at the same time as general measures.²¹ This process seems to have been a success. During the *Wolkenberg and others*, and *Witkowska-Tobola* cases,²² the new legislation for owners' compensation was judged to comply with the criteria adopted by the European Court of Human Rights at its Grand Chamber on 22 June 2004. Consequently the Court struck out the remaining 176 “Bug River” in October 2008 after 110 cases had already been struck out in December 2007.²³

However, the Court does not always have the means to assess the effectiveness of domestic measures. In its judgment of 1 March 2006 in *Sejdovic v. Italy*, the

¹⁹ J.F. Flauss, *Actualité de la CEDH* (March - August 2007), *AJDA*, 15 October 2007, 1918 et seq., 1919, cites the repeated violations of Articles 3 and 13 by Russia following the failure of the penitentiary system, 1920.

²⁰ ECtHR, Grand Chamber, 22 June 2004. See the author's article, *La Cour européenne au secours du Comité des Ministres pour une meilleure exécution des arrêts ‘pilote’*, 61 *Revue trimestrielle des droits de l'homme* (2005), 203-224. See also L. Garlicki, *Broniowski* and After: On the Dual Nature of ‘Pilot Judgments’, in: *Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views*, Kehl 2007, 177-192; V. Zagrebelsky, *Questions autour de Broniowski*, in: *Liber Amicorum* (note 20), 521-535.

²¹ ECtHR (GC), *Broniowski v. Poland* (friendly settlement), judgment of 28 September 2005, § 36: “It cannot be excluded that even before any, or any adequate, general measures have been adopted by the respondent state in execution of a pilot judgment on the merits (Article 46 of the Convention), the Court would be led to give a judgment striking out the ‘pilot’ application on the basis of a friendly settlement (Articles 37 § 1(b) and 39) or awarding just satisfaction to the applicant (Article 41). Nonetheless, in view of the systemic or structural character of the shortcoming at the root of the finding of a violation in a pilot judgment, it is evidently desirable for the effective functioning of the Convention system that individual and general redress should go hand in hand. The respondent state has within its power to take the necessary general and individual measures at the same time and to proceed to a friendly settlement with the applicant on the basis of an agreement incorporating both categories of measures, thereby strengthening the subsidiary character of the Convention system of human rights protection and facilitating the performance of the respective tasks of the Court and the Committee of Ministers under Articles 41 and 46 of the Convention.”

²² Judgments of 4 December 2007, no. 50003/99 and 11208/02, Section IV.

²³ Press Release 6 October 2008, “First ‘pilot judgment’ Procedure Brought to a Successful Conclusion Bug River Cases Closed”.

Grand Chamber acknowledged a “defect” in the Italian legal system that prevented a retrial of anyone convicted *in absentia*. Having regard to the subsequent reform of the Italian Code of Criminal Procedure, however, it considered it unnecessary to indicate any general measures, on the grounds that it was too early (in the absence of domestic case-law) to assess whether this reform had met the requirements of the Convention.²⁴ Taking into consideration the very wide terms of the recommendations made by the Court, and the fact that the Court only acts on the basis of one case, the monitoring that it is able to do remains general in nature and should never lead the Committee of Ministers to close a case automatically.²⁵

The freezing of pending cases, which allows pressure to be put on the state but is not without its drawbacks, was not specifically used subsequently.²⁶ It is true that “freezing of similar cases reduces possibility of having a wider picture of the situation and hence of the measures required”.²⁷ Yet in its judgment of 22 December 2005 in the case of *Xenides-Arestis* the Court’s Third Section made clear, not least in the operative part, the state’s obligation to “introduce a remedy which secures genuinely effective redress for the Convention violations identified in the [...] judgment in relation to the [...] applicant as well as in respect of all similar applications pending before it, in accordance with the principles for the protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 and in line with its admissibility decision of 14 March 2005”. The most surprising aspect of this case is that the Court required this remedy to be “available within three months from the date on which the [...] judgment [was] delivered” and stipulated that “redress should be afforded three months thereafter” (§ 40). This obligation was confirmed by the fact that the government had to provide the Court with “details of the remedy and its availability” (“within three months from the date on which the judgment [was] delivered”) and “to submit information concerning the redress three months thereafter”, as ordered in the operative part. In the case of *Burdov v. Russia*, the Court implemented the pilot-judgment procedure to the problem of non-enforcement or delayed enforcement of domestic judgments. The Court very clearly stated that the principle of subsidiarity also underpins the pilot-judgment procedure.²⁸ It is also fundamental to notice that in such a case the pilot-

²⁴ ECtHR, Grand Chamber, *Sejdovic v. Italy*, 1 March 2006, § 123.

²⁵ This is what happened in the cases of *Broniowski v. Poland* and *Xenides-Arestis v. Turkey*.

²⁶ According to F. Sundberg, “The new approach of ‘freezing’ does, however, create a situation outside the law ...”. It “might also, in complex situations, be a hindrance to execution, inasmuch as national authorities might have some difficulty in identifying appropriate measures of execution without more information provided by the Court through its examination of other cases”. (L’effectivité des recours internes suite à des “arrêts pilote”, in: G. Cohen-Jonathan/J.F. Flauss/E. Lambert Abdelgawad (eds.), *De l’effectivité des recours internes dans l’application de la Convention européenne des Droits de l’Homme*, Droit et Justice, No. 69, 2006, 259-275 and 262-263).

²⁷ CDDH (2007) 011 Addendum 1, Interim Report, 13 April 2007.

²⁸ ECtHR, First Section, *Burdov v. Russia* (No. 2), application no. 33509/04, judgment 15 January 2009, §§ 127-128: the Court stated that it “may decide to adjourn examination of all similar cases, thus giving the respondent State an opportunity to settle them in such various ways. If, however, the respondent State fails to adopt such measures following a pilot judgment and continues to violate the

judgment is a consequence of the failure of the State to fully implement previous cases.²⁹ However the indications to the State remain very vague.³⁰

The Group of Wise Persons, for its part, has also declared itself satisfied with the Court's "pilot judgment" procedure whilst calling for time-limits that are subject to supervision to be laid down (§ 105).³¹

This method of pilot cases is useful for compelling states to adopt effective domestic remedies (with retroactive effect, moreover), which the Committee of Ministers was hitherto able to do only through its supervisory role. As regards indication of general measures, the judgment is formulated in a more or less confusing and detailed manner. For instance, in the case of *Hutten-Czapska v. Poland*³² the Court, whilst remaining fairly vague in its statements expressly approved "the measures indicated by the Constitutional Court in its June 2005 Recommendations, setting out the features of a mechanism balancing the rights of landlords and tenants and criteria for what might be considered a 'basic rent', 'economically justified rent' or 'decent profit'".

The judgments of 10 November 2005 in *Tekin Yildiz v. Turkey* (Third Section) and of 8 June 2006 in *Sürmeli v. Germany* (Grand Chamber) show that this policy is being applied more widely even when there are no large-scale problems that might generate a rash of cases. In 2007 and 2008 this procedure was extended to other States.³³ It is worth mentioning the *Urbarska Obec Trencianske v. Slovakia* case³⁴ and the *Driza v. Albania* case, equally involving a violation of property law. According to the Court, "The escalating number of applications is an aggravating factor as regards the State's responsibility under the Convention and is also a threat to the future effectiveness of the system put in place by the Convention, given that in the Court's view, the legal vacuums detected in the applicant's particular case may subsequently give rise to other numerous well-founded applications".³⁵

Convention, the Court will have no choice but to resume examination of all similar applications pending before it and to take them to judgment so as to ensure effective observance of Convention".

²⁹ Ibid., § 137.

³⁰ Ibid., §§ 140-141: "The State may either amend the existing range of legal remedies or add new remedies to secure genuinely effective redress for the violation of the Convention rights concerned."

³¹ CM (2006) 203, 15 November 2006.

³² ECtHR, Grand Chamber, 19 June 2006, § 239.

³³ See, for instance, Fourth Section, *Ghigo v. Malta*, application no. 31122/05, judgment (just satisfaction), 17 July 2008, concerning a violation of Art. 1 Protocol 1.

³⁴ Fourth Section, *Urbarska Obec Trencianske Biskupice v. Slovakia*, application no. 74258/01, 27 November 2007. §150: "Firstly, the respondent State should remove all obstacles to the letting of land in allotments on rental terms which take account of the actual value of the land and current market conditions in the area concerned. Secondly, the respondent State should remove all obstacles to the award of compensation for the transfer of ownership of such land, the amount of which bears a reasonable relation to the market value of the property as of the date of transfer."

³⁵ *Driza v. Albania*, Fourth Section, application no. 33771/02, 13 November 2007, § 122. See also, 2nd Section, *Gülmez v. Turkey*, application no. 16330/02, 20 May 2008, concerning the lack of a public hearing under Article 6 of the Convention. § 63: It concludes that the State "should bring its legislation in line with the principles set out in Articles 57 §§ 2(b) and 59(c) of the European Prison Rules".

The Court's new policy has not been without its critics,³⁶ since it is not expressly enshrined in the Convention. In the Grand Chamber case of *Hutten-Czapska v. Poland*, Judge Zagrebelsky, who did not dispute the *erga omnes* effects of the European Court's judgments, was concerned that the "pilot judgment" method might upset the balance between the Court and the Committee of Ministers and make the mistake of shifting the Court on to the political terrain (particularly in the case in question, which involved a general measure that entailed an overhaul of property rights).³⁷ The Italian Government's position before the Grand Chamber in the *Sejdovic* case is also worth mentioning, as it might well be shared by other countries. By this line of reasoning (§§ 115-118): "(...) the new practice pursued by the Court ran the risk of nullifying the principle that states were free to choose the means of executing judgments. It also ran counter to the spirit of the Convention and lacked a clear legal basis." According to the Italian Government, this interpretation was confirmed by Protocol No. 14 and a literal reading of the Committee of Ministers resolution.³⁸ The government added that "[i]n any event, if the practice of indicating general measures were to be continued, it should at least become institutionalised in the Rules of Court or in the questions which the Court put to the parties, so that the parties could submit observations on whether a violation was 'systemic'". Some states have objected to these indications by the Court once they move outside the scope of "pilot case" procedures³⁹ given that the Court has itself stated, since the *Broniowski* case, that such indication of measures was an

³⁶ For a defence of the Court's new policy, see P. Leach, *Beyond the Bug River – A New Dawn for Redress before the European Court of Human Rights?*, 2 EHRLR (2005), 148-164.

³⁷ Grand Chamber, 19 June 2006. See the answer given by Judge Zupančič in his individual opinion on the same case: "In order to respect the spirit of the Convention, we may take these political hesitations seriously and ask the next question. Is it better for Poland to be condemned in this Court 80000 times and to pay all the costs and expenses incurred in 80000 cases, or is it better to say to the country concerned: 'Look, you have a serious problem on your hands and we would prefer you to resolve it at home ...! If it helps, these are what we think you should take into account as the minimum standards in resolving this problem ...?' Which one of the two solutions is more respectful of national sovereignty?"

³⁸ ECtHR, *Sedjovic v. Italy*, Grand Chamber, 1 March 2006, "In the Government's submission, this distribution of powers was confirmed by Article 16 of Protocol No. 14, which, in amending Article 46 of the Convention, introduced two new remedies: a request for interpretation and infringement proceedings. According to the explanatory report, the aim of the first of these was 'to enable the Court to give an interpretation of a judgment, not to pronounce on the measures taken by a High Contracting Party to comply with that judgment'. As regards the second, it was stated that where the Court found a violation, it should refer the case to the Committee of Ministers 'for consideration of the measures to be taken'. Lastly, in Resolution Res (2004) 3 the Committee of Ministers had invited the Court to identify any underlying systemic problems in its judgments, but not to indicate appropriate solutions as well. The distribution of powers between the Committee of Ministers and the Court as envisaged by the drafters of the Convention had therefore not been altered."

³⁹ ECtHR, Fourth Section, *Johansson v. Finland*, 6 September 2007, where the Court did not reply to the government but reminded it of its obligation to adapt its domestic law to the requirements of the Convention. See also the partly dissenting opinion of Judge Fura-Sandström in *L v. Lithuania*, Second Section, judgment of 11 September 2007; the judge held that the Court's order to the state in the operative part of the judgment to amend legislation on transsexuals within three months was groundless in the absence of a systemic problem.

exception and related to the existence of large-scale systemic problems. It is essential to underline that this procedure is a tool used by the Court at the service of the Committee of Ministers and states for the better execution of certain cases. It never modifies the obligation of national authorities to adopt general measures following a judgment. What is mostly interesting in that procedure is to reveal the importance for the Court to be more involved in the implementation procedure of its judgments, in opposition to the dual option adopted by the authors of the Convention.

3. Extending the Recommendation Policy to Other Cases

This policy concerns both general and individual non-pecuniary measures.

With regard to general measures, in a recent case where the pilot-judgment procedure was not used, the Court, in the operative part of its judgment, nevertheless ordered the state, within three months, either to amend the legislation on transsexuals or, failing that, to pay a sum of money.⁴⁰ In other cases, the indication to adopt general measures is more or less detailed.⁴¹ It nevertheless reveals a concern of the Court to precise the obligations incumbent on the State.

As far as individual measures are concerned, the first indications related to interference with the right to property. The requirement for property to be returned also becomes more coercive when it is included in the operative part of the judgment.⁴² In more and more cases the Court is also recommending the reopening of domestic legal proceedings when this is the most appropriate form of redress.⁴³ The most representative cases here are those in which individuals have been tried by courts that have not met the requirements of independence and impartiality.⁴⁴ But

⁴⁰ Second Section, *L v. Lithuania*, 11 September 2007, “5. Holds, by 5 votes to 2, that the respondent state, in order to meet the applicant’s claim for pecuniary damage, is to adopt the required subsidiary legislation to Article 2.27 of its Civil Code on the gender-reassignment of transsexuals, within three months of the present judgment becoming final, in accordance with Article 44 § 2 of the Convention; 6. Holds, by 6 votes to 1, alternatively, that should those legislative measures prove impossible to adopt within three months of the present judgment becoming final, in accordance with Article 44 § 2 of the Convention, the respondent state is to pay the applicant EUR 40000 (forty thousand euros) in respect of pecuniary damage.” This case demonstrated the Court’s capacity to deal with questions on general measures as part of a decision on just satisfaction.

⁴¹ *Hasan and Eylem Zengin v. Turkey* case, Former Second Section, req. no. 1448/04, 9 October 2007. See also, *Tan v. Turkey* (Second Section, no. 9460/03, 3 July 2007), *Grande Oriente D’Italia di Palazzo Giustiniani v. Italy (No. 2)*, (no. 26740/02, First Section, arrêt du 31 May 2007).

⁴² ECtHR, Third Section, *Raicu v. Romania*, judgment of 19 October 2006: the Court ordered the state to return the flat; failing that, it provided for a specific sum to be paid.

⁴³ ECtHR, Third Section, *Abdullah Altun v. Turkey*, judgment of 19 October 2006, § 38 (concerning a violation of Article 6 § 1); ECtHR, First Section, *Majadallah v. Italy*, judgment of 19 October 2006 (violation of Article 6, §§ 1 and 3.d); ECtHR, *Zentar v. France*, judgment of 13 April 2006, § 35 (violation of Article 6, §§ 1 and 3.d). See in particular, ECtHR, *Sejdovic v. Italy* (GC), judgment of 1 March 2006, § 126 (right of due process). For administrative cases, see ECtHR, Second Section, *Mehmet and Suna Yigit v. Turkey*, 17 July 2007. See also Third Section, *Visan v. Romania*, application no. 15741/03, 24 April 2008, § 42.

⁴⁴ ECtHR, *Öcalan v. Turkey* (GC), judgment of 12 May 2005, § 210.

the Court has specified that such reopening of proceedings must be requested by the victim and take place in a court that respects the safeguards of Article 6 (§ 1).⁴⁵ In all these cases, this is a recommendation, since the Court refuses to order a state to reopen proceedings at the applicant's request, still less to reform its domestic legislation to include the possibility of reopening proceedings.⁴⁶ However, when such reopening is possible under domestic law, the Court has sometimes recommended this measure, including in the operative part of the judgment, in order to put pressure on the state authorities.⁴⁷

In these matters, the policy of the Court to demand a reopening of the case is also guided by the States' and Committee of Ministers' practices, particularly since the adoption of the Recommendation (2000) 2 of 19 January 2000. It easily refers to this practice when a reopening of the proceedings is possible through domestic law.⁴⁸ Nevertheless, recently the Court has been proving itself to be particularly zealous in soliciting the reopening of non-penal proceedings, where the legal security of the third party could rightfully be an obstacle to it. The Court equally follows a long-standing policy whereby, in the event of a property violation, the State is ordered to return the property to the victim who has been illegally dispossessed. It is necessary to add that the practice of reopening is currently changing. Indeed it used to be required in favour of the applicant victim mostly of a violation of its procedural rights. In these matters, it is remarkable to note that the applicants do not very much support such a measure and are content with the financial compensation.⁴⁹ Thus, even if more and more States have amended their law in order to allow the reopening of judicial cases, particularly in the criminal field, as long as the applicant is no longer detained, he/she prefers not to run the risk of a reopening involving a long judicial procedure with no guarantee of a better result. Nowadays, due to the evolving case-law, the reopening of cases is demanded by the European Court when a violation of Articles 2 or 3 on the procedural level has been stated, in cases where the persons responsible for the serious violations in the national order have benefited from clemency measures. The duty of the State to investigate and

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

⁴⁶ ECtHR, Second Section, *Hostein v. France*, judgment of 18 July 2006, § 49: "As for the applicant's request that a review mechanism for civil proceedings be incorporated into domestic law, the Court recalls that this right, as such, is not secured by the Convention."

⁴⁷ ECtHR, Third Section, *Lungoci v. Romania*, judgment of 26 January 2006: "Holds a) that the respondent state shall, if the applicant so desires, ensure that the proceedings are reopened within six months from the date on which the judgment becomes final, under Article 44 § 2 of the Convention, and that it shall at the same time pay her the sum of 5000 (five thousand) euros for non-pecuniary damage, plus any tax that may be chargeable, to be converted into Romanian lei at the rate applicable on the date of payment".

⁴⁸ *Nikoghosyan and Melkonyan v. Armenia*, no. 11724/04 and 13350/04, Third Section, 6 December 2007, § 58. Also, *Paykar Yev Haghtanak LTD v. Armenia*, no. 21638/03, Third Section, 20 December 2007, § 58. More recently, Third Section, *Calmanovici v. Romania*, application no. 42250/02, 1 July 2008, §§ 162-163.

⁴⁹ See, for example, Resolution CM/ResDH (2008)30, 27 March 2008, *Lyashko v. Ukraine*; *Grabchuk v. Ukraine*, final Resolution ResDH (2008)63.

prosecute the authors of such violations is now a component of the remedies of the victim. In these cases, the refusal to reopen will undoubtedly come from the State, as the practice of the Inter-American System has revealed. Today this is illustrated at the European level by the *Aksoy and other cases v. Turkey*.⁵⁰

Another evolving matter is linked to the tendency of the Court to increasingly give priority to the *restitutio in integrum*. In the case *V.A.M. v. Serbia*, dealing with the right to family life, the modalities of visits and custody of the children were put into question following a divorce. The European Court ordered the State to execute the orders given by the national judge to facilitate the meetings between the mother and her child before a final decision was taken in 1999 and to put a quick end to the civil hearing in course. Considering the amount of time that has already gone by since the order was passed, we should ask ourselves if the injunction will really be of service of the victim or if it will only complicate the task of the Committee of Ministers.⁵¹ The case *Yakistan v. Turkey* concerned the violation of the time length of provisional incarceration and of the provisional penal procedure. After consenting 12000 Euros for moral damages, the Court stated that "(...) an appropriate manner of putting an end to the violation would be to end the hearing as quickly as possible or to free the plaintiff during the time period of the hearing, as stated in Article 5 (3) of the Convention, using with the correct legal measures" (§ 49). It should be pointed out that the plaintiff in this case had already spent more than 11 years and 7 months in provisional incarceration. The other exception to the principle of declaratory nature of European judgments, according to the Court, applies for cases where there is no real choice between different ways of complying with the judgment. For instance, the only measure to comply with the *Assanidze v. Georgia* case was to free the victims⁵². It seems that the European judges apply also this policy mostly when there is a risk of delay in the implementation of the judgment. Indeed it is to be noticed that the most important initiatives concern recent States Parties to the Convention. The Court most probably feels the need to prove itself more instructive towards such States. The *De Clerck v. Belgium* judgment is of most interest, as it reiterates the principle of the declara-

⁵⁰ Second Annual Report (2008), 102. See also *Kakoulli v. Turkey*, no. 38595/97, Fourth Section, 22 November 2005.

⁵¹ Second Section, *V.A.M. v. Serbia*, req. no. 39177/05, 13 March 2007, § 166.

⁵² Clearly stated in *Abbasov v. Azerbaijan*, no. 24271/05, First Section, 17 January 2008, § 37. See also *Karanovic v. Bosnia and Herzegovina*, no. 39462/03, Fourth Section, 20 November 2007, §§ 29-30: "(...) the violation found in the instant case, by its very nature, does not leave any real choice as to the measures required to remedy it. § 30: In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the impugned situation, the Court considers that the respondent State must secure the enforcement of the Human Rights Chamber's decision at issue by way of transferring the applicant to the FBH Fund as well as paying the applicant 2,000 euros." See also Second Section, *Ilic v. Serbia*, application no. 30132/04, 9 October 2007, § 112 and § 6 of the operative part of the judgment: The Court ordered the State in the merits and the enacting terms of the judgment to ensure the enforcement of the decision adopted by the Housing Department of the Municipality of Palilula on 17 August 1994 and execute the administrative decision (allowing the plaintiff to recapture the right to his property) within three months on the date of which the judgment becomes final.

tory nature of the ECtHR judgments and states the scope of exceptions to this principle. For the issue of an unreasonable delay, as in the case under examination, the principle of judicial independence is an obstacle to all Court's injunctions in these matters. The Court nevertheless gives certain indications.⁵³

This pressure of the Court on the State to adopt measures of *restitutio in integrum* raises a new concern: what is the margin of appreciation of the State to oppose such a remedy? According to Article 41, the Court may afford just satisfaction "if the internal law of the High Contracting Party concerned allows only partial reparation to be made". This is compatible with general principles of international law which state that the *restitution in integrum* has priority over the financial compensation. Nevertheless, in international law of human rights, the *restitution in integrum* is seldom possible. This is currently illustrated by the *Loizidou* and other similar cases related to the violation of Article 1 Protocol 1 in Cyprus. Turkey opposes the *restitution in integrum* (the return of the property to the victims) arguing that this is not materially possible. In such cases the Committee of Ministers has not closed its examination, whereas in other cases concerning the same article, it has often considered the financial compensation as the sole remedy. The same concern has been raised before the Inter-American Court of Human Rights. In a judgment of 4 December 2008, the Constitutional Court of Venezuela stated that the judgment of the Inter-American Court of Human Rights (dated 5 August 2008) could not be implemented ("*inexecutable*"); indeed the Court of San José had ordered the State to restore judges in their former position, but the opposition comes from the fact that the judges had been only temporarily employed to this post.⁵⁴ Thus, in that matter, the European and Inter-American Courts should not be tempted to cross the white line.

The interference of the Court in the field of the execution of its judgments is also symbolically displayed by the new reference in the judgments of the Court to the resolutions (interim resolution more precisely) adopted by the Committee.⁵⁵

B. The Role of the Parliamentary Assembly

1. Enhancing the Complementary Role of Supervision by the Parliamentary Assembly

The involvement of the Parliamentary Assembly in the task of supervising the execution of judgments is the result of a gradual process and currently takes a

⁵³ Second Section, *De Clerck v. Belgique*, no. 34316/02, 25 September 2007, § 101. See also Fourth Section, *Johansson v. Finland*, application no. 10163/02, 6 September 2007, § 45.

⁵⁴ El Tribunal supremo de Justicia, Sala constitucional, no. 08-1572, 4 December 2008.

⁵⁵ Second Section, *Martins Castro and Alves Correia de Castro v. Portugal*, application no. 33729/06, 10 June 2008, § 64 which mentions the interim resolution (2007) 108.

number of forms.⁵⁶ First, members of the Assembly have no hesitation in using written questions to obtain explanations from the Committee of Ministers concerning the failure to execute certain judgments.⁵⁷ The Committee of Ministers is consequently required to provide a written answer.⁵⁸ When oral questions are put by members of the Assembly to the Chair of the Ministers' Deputies at each session, the Committee is frequently called upon to provide an explanation concerning judgments which have not yet been executed. One of the Assembly's four annual sessions now includes an agenda item on the execution of judgments. In addition to the drafting of a report, the discussion leads to the adoption of a recommendation and/or a resolution. With the adoption of Resolution 1226 (2000) on execution of judgments of the European Court of Human Rights, the Assembly decided to hold regular debates about the execution of judgments on the basis of a record of execution that it would keep. Its Committee on Legal Affairs and Human Rights decided to use two criteria when compiling this record: first, the time elapsed since the Court's decision (five years for the first record) and, second, the urgency attached to implementation of certain decisions. The use of this procedure is based on the principle that only national delegations "have the competence to call their governments to account within their own national parliamentary procedure",⁵⁹ in an objective manner, for action taken on a judgment. More generally, the Parliamentary Assembly "again calls upon national delegations to monitor the execution of specific Court judgments concerning their governments through their respective parliaments and to take all necessary steps to ensure their speedy and effective execution".⁶⁰

The Assembly also envisages, in cases where States prove more reluctant, asking the minister of justice of the state concerned to give an explanation in person to

⁵⁶ See A. Drzemczewski, *Quelques observations sur le rôle de la Commission des questions juridiques et droits de l'homme de l'Assemblée parlementaire dans l'exécution des arrêts de la Cour de Strasbourg*, in: *Trente ans de droit européen des droits de l'homme: études à la mémoire de Wolfgang Strasser*, 2007, 55-63.

⁵⁷ For example, see Written Question No. 402 from Mr Clerfayt (Doc. 9272) regarding Turkey's non-compliance with judgments concerning violations of Article 5 of the Convention and the Committee's reply dated 16 January 2002, Doc. 9327 of 21 January 2002.

⁵⁸ For example, following Written Question No. 378 of 10 September 1998 from certain members of the Assembly asking the Committee to explain the length of time necessary for full execution of all the judgments pending for more than three years without any sign of being executed, the Committee provided three explanations: the extent of the reforms undertaken, the difficulties encountered by member states in implementing certain reforms (such as constitutional amendments) and the need, in certain specific circumstances, to await the outcome of certain other similar cases pending before the organs of the Convention in order to clarify the requirements of the Convention in the relevant area and to provide guidance for proposed reforms. See also recently CM/AS(2007) Quest 487-488 final, 23 March 2007, Written Questions by Mr Austin to the Chair of the Committee of Ministers: a. No. 487: "Conditions of Detention for Mr Öcalan"; b. No. 488: "Execution of the Judgment of the European Court of Human Rights in the *Öcalan* case".

⁵⁹ Resolution 1268 (2002), *Implementation of Decisions of the European Court of Human Rights*, 22 January 2002, § 10.

⁶⁰ *Ibid.*, § 11.

members of the Parliamentary Assembly. This measure was included in Resolution 1226 (2000) on “Execution of Judgments of the European Court of Human Rights”; in that Resolution, the Assembly also decided to “adopt recommendations to the Committee of Ministers, and through it to the relevant states, concerning the execution of certain judgments, if it [noticed] abnormal delays”, to hold an “urgent debate”, if necessary, “if the state in question [had] neglected to execute or deliberately refrained from executing the judgment”, to open a monitoring procedure should a member state refuse to implement a decision of the Court, and even to “envisage, if these measures [failed], making use of other possibilities, in particular those provided for in its own Rules of Procedure and/or of a recommendation to the Committee of Ministers to make use of Article 8 of the Statute”. Finally, the Parliamentary Assembly has secured a promise from the Committee that a regular formal consultation will take place between the Committee’s Rapporteur Group on Human Rights and the Assembly’s Committee on Legal Affairs and Human Rights,⁶¹ so that the different national delegations can question their governments without delay where the latter fail to fulfil their obligation to execute judgments. The next report is expected for 2010.⁶²

The significance of this involvement lies above all in the ability of members of national parliaments to bring subsequent pressure to bear on the national legislature and executive to adopt the necessary measures, and also in their power to make formal recommendations to the national authorities in charge of policy making. Encouraged by official recognition of its role from the Committee itself,⁶³ the Assembly has even decided to step up its supervision by adopting a more proactive approach, giving priority to examination of cases which concern major structural problems and in which unacceptable delays of implementation have arisen. Its sixth report⁶⁴ selected a number of cases according to the above criteria, namely judgments “which [had] not been fully implemented more than five years after their delivery” and other judgments “raising important implementation issues, whether individual or general”. National delegations from 13 states⁶⁵ were asked to

⁶¹ See reply from the Committee of Ministers to Rec 1546 (2002) on Implementation of Decisions of the European Court of Human Rights (Parliamentary Assembly, first part of 2002 session, adopted texts, and CM/Del/Dec (2002) 781/3.1, § 14).

⁶² Following the appointment of a new member of the Parliamentary Assembly on that matter after Mr Jürgens has retired. See, for the last report: AS/Jur(2008)24, 26 May 2008, Mr Christos Pourgourides.

⁶³ Resolution 1516 (2006), 2 October 2006, Implementation of Judgments of the European Court of Human Rights, § 4: “In line with ... the Committee of Ministers’ Declaration of 19 May 2006 indicating that the Parliamentary Assembly will be associated with the drawing up of a recommendation on the efficient domestic capacity for rapid implementation of the Court’s judgments, the Assembly feels duty-bound to further its involvement in the need to resolve the most important problems of compliance with the Court’s judgments.”

⁶⁴ Document 11020, 18 September 2006, “Implementation of Judgments of the European Court of Human Rights”; rapporteur: Mr Erik Jürgens.

⁶⁵ Belgium, France, Germany, Greece, Italy, Latvia, Moldova, Poland, Romania, Russian Federation, Turkey, Ukraine and the United Kingdom.

provide information and/or take specific action to implement certain judgments, and the rapporteur visited five of them.⁶⁶ The Parliamentary Assembly further specified that it “reserve[d] the right to take appropriate action, notably by making use of Rule 8 of its Rules of Procedure (i.e. challenging the credentials of a national delegation), should the state concerned continuously fail to take all the measures required by a judgment of the Court, or should the national parliament fail to exert the necessary pressure on the government to implement judgments of the Court”.⁶⁷ The significance of the Parliamentary Assembly’s involvement lies above all in the public nature of its denunciation; it seeks to make members of the Assembly more accountable for the international commitments of their own governments. In the author’s view, this gradual involvement of the Parliamentary Assembly can only be salutary at this stage, especially as it entails close co-ordination with the Committee of Ministers and complements the latter’s role.

2. Extending the Synergy and Participatory Model of Accountability to the Council of Europe Commissioner for Human Rights

The year 2007 was marked especially by the adoption of the report by the Parliamentary Assembly, “Council of Europe Commissioner for Human Rights – stock-taking and perspectives”. The Assembly took note of the Commissioner’s willingness to invest more into the control of the judgments, especially the pilot-judgments. The Assembly focuses on the question of synergy between the organs at the European level. The Recommendation of the Assembly equally invites the Committee of Ministers “to make practical arrangements to fulfil the intention expressed in its Declaration of 19 May 2006 by organising, as quickly as possible, an initial annual tripartite meeting between representatives of the Committee of Ministers, the Parliamentary Assembly and the Commissioner in order to promote stronger interaction with regard to the execution of Court judgments”.⁶⁸ In 2008 the Commissioner organized a pilot-meeting with national institutions of 9 States. The aim of the meeting was the dissemination of good practices.⁶⁹ The objective was also to better understand the role to be assumed by such national institutions under Rule 9 (2) of the Rules of the Committee of Ministers adopted for the implementation of Article 46.⁷⁰ Nevertheless, it seems to us that the action of the Commissioner will be inevitably limited by the high degree of technicality of these

⁶⁶ Italy, Russian Federation, Turkey, Ukraine and the United Kingdom.

⁶⁷ See also Rec. 1764 (2006) of 2 October 2006, Implementation of Judgments of the European Court of Human Rights.

⁶⁸ Doc. 11376, 17 September 2007, Report of Mr Jean-Charles Gardetto, Resolution 1581 of 5 October 2007 and Rec. 1816 of 5 October 2007.

⁶⁹ CommDH/NHRS (2008) 7, 7 February 2008.

⁷⁰ According to Rule 9 (2), “The Committee of Ministers shall be entitled to consider any communication from non-governmental organizations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention”.

issues, the limited means, and the need, in this sensitive matter, of synergy with the Court, the Committee of Ministers and the Parliamentary Assembly. It could have a positive impact in cases of structural deficiencies or large-scale problems.⁷¹

This synergy is also to be spread to organs other than those of the Council of Europe, such as the European Union.⁷²

C. Extending the Participatory Model of Accountability to National Authorities

The challenge for all States consists of stronger synergy of national authorities involved in the supervision of the judgments. First the monitoring of the judgments troubles the principle of separation of powers (for instance due to the re-opening of judicial cases). Second, and foremost, the secretariat of the department in charge of the supervision of the judgments as well as the Committee of Ministers intend to hold all the national authorities accountable in view of better implementing the judgments, for instance, in the form of high-level meetings with diverse national authorities, or the organization of training seminars, etc. The main concern is therefore the consultation and cooperation between the internal organs in order to become more efficient.

This explains the enactment of the Recommendation (2008) 2 by the Committee of Ministers.⁷³ In that decision, the Committee, “h. underlining the importance of early information and effective co-ordination of all state actors involved in the execution process and noting also the importance of ensuring with national systems, where necessary at high level, the effectiveness of the domestic execution process” (...), recommends that member states “1. Designate a co-ordinator – individual or body – of execution of judgments at the national level, with reference contacts in the relevant national authorities involved in the execution process, (...) 5. To facilitate the adoption of any useful measures to develop effective synergies between relevant actors in the execution process at the national level either generally or in response to a specific judgment, and to identify their respective competences.”

⁷¹ T. Hammarberg, The Commissioner’s Role, in: Towards Stronger Implementation of the European Convention on Human Rights at National Level, Colloquy organized in Stockholm, 9-10 June 2008, 111-116.

⁷² Doc. 11230, Reply from the Committee of Ministers (28 March 2007) to the Rec 1764 (2006) of the Parliamentary Assembly, Implementation of Judgments of the European Court of Human Rights, § 7: “Better co-ordination with the European Union as well as with international organisations is another important task. (...) Important implementation issues may in particular be raised in the context of the regular meetings between the Assembly and the European Parliament. The latter may also wish to pay closer attention to such issues in the context of its annual reports concerning the respect for fundamental rights in the EU member states. The role of the new EU Fundamental Rights Agency could also be usefully explored in this context.”

⁷³ CM/Rec (2008) 2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, 6 February 2008.

Even if this Recommendation does not expressly mention agents, the practice among European States reveals that they are the main authority in charge of monitoring the implementation of the judgments at the national level. The status and powers of the governmental agents however may vary; in some countries, they even have the power to propose a legislative reform.⁷⁴ It is interesting to note that as the governmental agent assists the State before the Court, the argument according to which the governmental agent is the most appropriate person to interpret the stipulations deriving from the decision, confirms the position arguing that the execution phase would be an extension of the Court case.⁷⁵

D. Appraisal of the European Participatory Model of Accountability: More Advantages than Drawbacks?

1. "Strength Through Unity"

There are many examples of good practices and progress emerging from the fact the three organs (specially the Court, the Committee of Ministers and the Parliamentary Assembly) have agreed on some points and put pressure on States to comply with their obligations, or have convinced them to adopt some specific measures, even without uniting their efforts, but just through a positive cross-fertilization of norms. It is fundamental to illustrate this statement with a few examples.

Concerning the payment of default interest after the expiry of the delay to pay the just satisfaction, even before the Court imposes default interest on the just satisfaction, the Committee of Ministers has required that the sum actually paid by States make full reparation for the harm sustained. That was the position in the case of *Stran Greek Refineries and Stratis Andreadis*.⁷⁶

With regard to the question of re-opening national judicial decisions following a judgment of the European Court of Human Rights, there has been a wonderful

⁷⁴ For more details on that question, see our article, *L'exécution des arrêts de la Cour Européenne des Droits de l'Homme* (2008), *Revue Trimestrielle des Droits de l'Homme* (2009), 651. See also, *The Role of Governmental Agents in Ensuring Human Rights Protection*, Proceedings of the Seminar in Bratislava (April 2008), Council of Europe, September 2008, 126 p. The information on the States are detailed in: CDDH, DH-PR, *Information on Execution of Judgments of the European Court of Human Rights at the National Level*, 27 November 2006, DH-PR (2006) 007 rev Bil. In Russia, the governmental agent has the power to suggest legislative reforms: V. Milinchuk, *L'exécution des arrêts nationaux: l'expérience russe*, in: *Vers une mise en oeuvre renforcée de la CEDH au niveau national*, Colloque de Stockholm (June 2008), Ed. Du Conseil de l'Europe, September 2008, 68 et seq., 69.

⁷⁵ This is, for instance, the position of the Dutch government: DH-PR (2006) 007, 25.

⁷⁶ The interest rate for compensation was in the region of 6 to 7 % of the principal established by the Court. See Resolution DH (97) 184 of 20 March 1997: "stressing Greece's obligation to safeguard the value of the amounts awarded", the Committee of Ministers ascertained that the sum paid, "increased in order to provide compensation for the loss of value caused by the delay in payment, [corresponded] to the just satisfaction awarded by the Court".

positive cross-fertilization between the three organs. The practice was initiated by the Committee. Then some documents of the Parliamentary Assembly required adoption of domestic measures to allow reopening of national proceedings.⁷⁷ Thus these developments have at the same time prompted a change in the Court's "policy" in this field. The reopening of proceedings has been held by the European Court to be a measure as close to *restitutio in integrum* as possible⁷⁸ and even "the ideal form of reparation in international law".⁷⁹ Consequently, the availability of such a procedure in national law "demonstrates a Contracting State's commitment to the Convention and the case-law to which it has given rise".⁸⁰ The Court has gradually taken the further step of not simply contenting itself with establishing, after the event, the beneficial effects of the reopening of domestic proceedings, but of recommending this measure prior to the event as offering the most appropriate remedy or an appropriate way of redressing the violation. This is particularly the case in proceedings where the right to an independent and impartial tribunal has been violated.⁸¹ In the *Öcalan v. Turkey* case, the Grand Chamber clearly endorsed this "general approach".⁸² The same applies to conviction of an applicant after an unfair trial.⁸³ The most recent case-law has innovated further, showing a tendency on the Court's part to compel states to reopen proceedings on certain conditions (option in domestic law, applicant's request, most effective means of achieving *restitutio in integrum*, respect for procedural safeguards during new proceedings). In the operative part of its *Claes and others v. Belgium* judgment,⁸⁴ where it found that there had been a violation of the right to a tribunal established by law, the Court gave the state the alternative of reopening the proceedings or paying a pre-determined amount in just satisfaction. This alternative may be explained by the fact that it was found to be below the threshold of gravity of the consequences foreseen by a reopening of the case. In its *Lungoci v. Romania* judgment,⁸⁵ concerning a similar violation of the right of access to a court, after noting in the reasons for the decision (§ 56) that the reopening of proceedings was a possibility, the Court held (operative part, 3. a) that the state should ensure that the proceedings were reopened if the applicant so desired, whilst at the same time requiring the payment of 5000 euros for non-pecuniary damage. Regarding the technical ques-

⁷⁷ See, for example, Rec. 1684 (2004), Implementation of Decisions of the European Court of Human Rights, 23 November 2004, and Resolution 1411 (2004), Implementation of Decisions of the European Court of Human Rights, § 18.

⁷⁸ ECtHR, *Piersack v. Belgium* (Article 50), 26 October 1984, § 11.

⁷⁹ ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland*, application no. 32772/02, 4 October 2007, § 56.

⁸⁰ *Ibid.*, § 55.

⁸¹ *Gençel v. Turkey*, 24 March 2004. Second Section, *Ceylan v. Turkey* (No. 2), 11 October 2005, § 38.

⁸² *Öcalan v. Turkey* (GC), 12 May 2005, § 210.

⁸³ *Bracci v. Italy*, 13 October 2005.

⁸⁴ ECtHR, First Section, 2 June 2005.

⁸⁵ *Lungoci v. Romania*, 26 January 2006.

tions with respect to the reopening of national procedures, the question was raised of whether or not individuals must (instead of may) be released pending the new proceedings. The refusal to release defendants was criticised by the Parliamentary Assembly of the Council of Europe in the case of *Sadak, Zana, Dicle and Dogan v. Turkey*⁸⁶ and also by the Committee of Ministers in an interim resolution.⁸⁷ Relying on the presumption of innocence and the Court's judgment, the Committee of Ministers now considers that, in addition to the reopening of proceedings, the release of applicants is an integral part of the right to reparation "in the absence of any compelling reasons justifying their continued detention pending the outcome of the new trial".⁸⁸ It is undisputable that these overall developments offered more incentives for States to allow the reopening in their legal system.

These are only a few examples which suffice to demonstrate the effectivity and positive impact of the interaction between the three European organs.

2. Complexity v. Efficiency

Some difficulties have arisen the last years in terms of determining what measures have to be adopted to comply with the judgment, as both the Court and the Committee of Ministers tend to supervise such an execution. Under Article 41 of the Convention, it is only where *restitutio in integrum* proves to be legally or physically impossible that it will be replaced by compensation. In fact, the Court frequently accepts that the finding of a violation in itself constitutes just satisfaction for the applicant,⁸⁹ even before considering whether *restitutio in integrum* could be obtained in the national system. This has given rise to criticisms and misunderstandings from several States, which tend to resist before the Committee of Ministers to the adoption of non-pecuniary individual measures, arguing that the payment of the just satisfaction is to remedy the violation in itself, and/or that the Court has not indicated in its judgment the need to adopt such a measure. This is particularly true for a State like France and for a measure such as the reopening of national procedures. States are currently facing a potential distinct assessment from the European Court of Human Rights and from the Committee of Ministers. This stems from the fact that the Court and the Committee are not in the same position to consider the consequences of such a reopening in a specific case. The Court

⁸⁶ Doc. 10192, Implementation of Decisions of the European Court of Human Rights by Turkey, 1 June 2004, report by Mr Jürgens, §§ 7-9.

⁸⁷ ResDH (2004) 31 of 6 April 2004.

⁸⁸ Ibid.: "Stressing, in this connection, the importance of the presumption of innocence as guaranteed by the Convention; deplors the fact that, notwithstanding the reopening of the impugned proceedings, the applicants continue to serve their original sentences ...; stresses the obligation incumbent on Turkey, under Article 46, paragraph 1, of the Convention, to comply with the Court's judgment in this case notably through measures to erase the consequences of the violation found for the applicants, including the release of the applicants in the absence of any compelling reasons."

⁸⁹ For one of many examples, see ECtHR, *Jamil v. France*, judgment of 8 June 1995, Series A no. 317-B, § 39.

tends to mostly take into account the type of violation; for instance, the infringement to the procedural guarantees under Article 6 (1) are liable to give raise to such a re-opening. On the opposite, rather than considering the type of violation, the Committee of Ministers seems first and foremost to assess the individual's current situation. Has the victim served his or her sentence? Is he or she still in prison? More generally, has he or she suffered very serious adverse consequences as a result of the violation (aside from the deprivation of liberty, the lack of compensation for a past detention, defamation, a loss of civil or political rights, limitations on exercising professional activities, etc.)? Secondly, the Committee of Ministers takes into account whether the applicant, or the applicant's lawyer, wishes to reopen the proceedings, as this is not always desired. The applicant may not be in favour of this particularly cumbersome and uncertain measure of relief (see *supra*). The criterion of a request from the applicant has recently come to exercise a systematic influence on the Court's decisions.⁹⁰ However, the wishes of the applicant can only be considered in the event of procedural violations.⁹¹ In civil matters, where a third party has a right to legal stability, reopening a case might be worse than any other measure; the judgment of the European Court may in itself be recognised in national law as conferring a right to claim compensation, a remedy the applicant will probably prefer to a reopening. Thus, France is opposed to the reopening of procedures in civil and administrative matters, arguing that the Court did not mention this remedy in its judgments in the cases at issue. France tends to consider that it is not the role of the Committee of Ministers to demand that states take measures in addition to what the Court states in its judgments. Indeed the difficulty and ambiguity for the Committee of Ministers stems from the fact that the European Court requires the State to adopt certain individual non-pecuniary measures only in certain cases. As a result, unless specified, the State refuses to enact such measures. For example, in the case of *Tais* (1 June 2006), the French delegation opposes the reopening of the inquiry concerning the violation of Article 2 of the Convention.

Globally it seems that the combination of actions of the European Court, the Committee of Ministers and the Parliamentary Assembly have proved their efficiency in the last years. However it is clear that a stronger cooperation is necessary as it is at the national level.

⁹⁰ For a recent example, see *Duran Sekin v. Turkey*, 2 February 2006, § 45: "The most appropriate form of relief would be to ensure that the applicant is granted in due course a retrial by an independent and impartial tribunal, if requested."

⁹¹ See the cases of *Botten v. Norway* (ResDH (97) 220) and *T and C v. the United Kingdom* (ResDH (2007) 134), in which the Committee of Ministers respected the applicants' opposition to the reopening of their cases.

II. Maintaining a Non-coercive System for the Supervision of the Execution of Judgments of the European Court of Human Rights: Is It Still a Suitable Option?

The delays in which the judgments are frequently implemented, as well as the increasing number of cases involving plan actions, could have encouraged the European organs to move towards a more coercive system. This has not been the case until now.

A. The Failure of the Only Available Coercive Measure Among the European System

Exclusion from the Council of Europe is one response theoretically open to European organs where a state categorically refuses to execute a judgment. Under Article 8 of the Statute, “[a]ny member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.” Persistent failure to execute a judgment could be interpreted as a serious violation of the “principles of the rule of law and of the enjoyment ... of human rights and fundamental freedoms” within the meaning of Article 3 of the Statute. In reality, this measure has never been used. The case of *Loizidou v. Turkey* led the Committee of Ministers officially to brandish the threat of exclusion for the first time, although the threat was implausible. The current practice also confirms the non-feasibility of this measure in the field of international human rights. It seems more appropriate to recourse to other channels: the interference of other international organisations, such as the European Union, the OSCE, or even the United Nations.

B. The Refusal of Combining Daily Fines to the New Infringement Procedure

Both European monitoring systems are fundamentally different. At the level of the European Union, the process, initially of political and administrative nature, is becoming more and more prejudicial because of the procedures implemented by Articles 226 and 228.⁹² Thus it is quite different from that of the Council of

⁹² C. Harlow/R. Rawlings, *Accountability and Law Enforcement: The Centralised EU Infringement Procedure*, 31 *E.L. Review* (2006), 452, 473-474.

Europe, as it belongs to a more directive model, based more on menace and sanctions than on discussion and persuasion.

At Strasbourg, infringement proceedings have been recognized only very recently and are subject to a different approach from that taken at EU level. Infringement proceedings were eventually introduced by the new Article 46 as reworded by Protocol No. 14, which has not yet entered into force.⁹³ As is also the case in the European Union, the procedure is entirely in the hands of a political body, the Committee of Ministers. The decision will be taken in the form of a reasoned interim resolution, which must in principle be preceded, at least six months beforehand, by a notice to comply served on the recalcitrant state. Certain problems can be anticipated even before Protocol No. 14 enters into force. How will the Court be able to rule on this matter when it still refuses to consider the consequences of its judgments and holds that it has no means of knowing how a state should set about executing a judgment in a particular case? In all probability, the Court will take the opinion of the Committee of Ministers and endorse it. At EU level, although the Court of Justice of the European Communities has held that the Commission is not obliged to indicate the means to end an infringement, it is undeniable that the latter often does so in practice. The same should apply to the Committee of Ministers, with both organs having to prove that a state has not complied with a judgment.

As in the European Union, the preventive effect of such proceedings is undeniable and is their major advantage: specific mention is made of it in the explanatory report moreover.⁹⁴ States are always afraid of such proceedings, especially as referral to the Court must be preceded by formal notice to comply served on the state by the Committee. Another possible preventive effect, although less certain, might be achieved if the Strasbourg Court were encouraged to indicate more often and more systematically in its judgments that a previous judgment had not been executed by the state concerned, or not in its entirety, or within the prescribed time-limits; a Recommendation in that way was made by the Venice Commission and the Parliamentary Assembly of the Council of Europe but was not taken into account.⁹⁵

⁹³ Under the future Article 46 § 4: "If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1." § 5 adds: "If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

⁹⁴ § 100. Cf. the opinion of the former President of the Court, Luzius Wildhaber, *The Execution of Judgments of the European Court of Human Rights: Recent Developments*, in: *Common Values in International Law: Essays in Honour of Christian Tomuschat, Pierre-Marie Dupuy et al.* (eds.), 2006, 671-681, 681.

⁹⁵ Opinion No. 209/2002, § 7.

Therefore, the procedure followed by the Committee prioritizes fundamentally the exchange between the concerned authorities and the collective discussions during the DH Committee meetings. This is a bilateral process, even multilateral for the most sensitive cases. It is important to mention as well the recent efforts to achieve more transparency among the activities of the Committee, which is demonstrated by the availability of more public documents⁹⁶. In the same vein the Committee published in February 2008 and in April 2009 the first and second annual reports on the execution of the judgments.

Contrary to the opinion of the Parliamentary Assembly, the final solution does not opt for daily fines in view of supporting the infringement procedure. The Parliamentary Assembly had even pronounced itself in favour of daily fines (without any infringement procedure) “to be imposed on states that persistently fail to execute a Court judgment”:⁹⁷ the result is the opposite: the recognition of an infringement procedure without any fines. According to the opinion of some experts and judges, daily fines may have had “on the defendant states opposing the implementation a psychological positive impact”.⁹⁸ But this proposal was criticised by some organs, especially the Steering Committee for Human Rights and the Venice Commission, in so far as the delay may be due to technical and not political reasons. One of the arguments was that such a system of “astreintes” would introduce a notion of “punishment” which does not, at present, exist in the Convention system. Moreover, this delay is already sanctioned by pecuniary compensation as other applicants are liable to submit their case before the European Court of Human Rights. The defendant State may thus be condemned to pay another just satisfaction for repetitive violations.⁹⁹ The concern is also to determine which authority (the Court, the Committee of Ministers or another organ) will be in charge of imposing such fines. What may the role of the applicants be in that regard? The Venice Commission thus concludes that (§ 85) “at this stage the added value of the introduction of a penalty-imposing mechanism in the Convention system would be insufficiently clear and that such introduction would be politically and practically

⁹⁶ Cf. Rule no. 8 “Access to information”, of the Rules adopted by the Committee of Ministers for the application of Article no. 46 § 2, of the European Convention on Human Rights.

⁹⁷ Resolution 1226 (2000), 28 September 2000, Execution of Judgments of the European Court of Human Rights, § 11A (ii). See also Rec. 1477 (2000), Execution of Judgments of the European Court of Human Rights, 28 September 2000, and Rec. 1546 (2002), Implementation of decisions of the European Court of Human Rights, 4(i).

⁹⁸ F. Tulkens *et al.*, Annexe 4, “Brèves réflexions (...)”, 183. Wouter Vandenhole, “Chapter V. Execution of Judgments”, in Protocol no. 14 and the Reform of the European Court of Human Rights, P. Lemmens/Wouter Vandenhole (eds.), 2005, 101-121, 120: “This, together with the lack of any accompanying financial sanction, makes it unlikely that much additional pressure will result from these infringement procedures (...)”.

⁹⁹ See Opinion 209/2002 of the Venice Commission, CDL-AD (2002) 34, 18 December 2002, § 82. The Venice Commission was of the opinion that, if the introduction of daily fines may be useful in case of refusal in principle of the State to implement the 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”. In other cases the Venice Commission was reluctant to extending the daily fines to other cases (linked to practical difficulties in reforming the national system), which are by far more numerous.

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".

If the system of the European Union seems to reveal an aggressive policy of fines which tends towards a form of punitive damages,¹⁰⁰ the system of the Council of Europe fundamentally moves towards a more convincing model.¹⁰¹

C. Authority and Conviction Through Clarification and Transparency

1. Referral to the Court In the Event of a "Problem of Interpretation" Concerning a Judgment

At the European system of human rights level, the referral to the Court for an interpretation is always justified by the will of the States to shed light on their obligations in order to comply with the judgments. This has been illustrated in the three cases *Ringeisen*, *Allet of Ribemont* and *Hentrich*. It is noticeable that the government has opposed the admissibility of the application in the *Ringeisen* and *Hentrich* cases in the event that the Court would encroach upon the jurisdiction of the Committee of Ministers. In the first case, *Ringeisen*, in examining the interpretation, the Court states that "In considering the request, the Court is exercising inherent jurisdiction: it goes no further than to clarify the meaning and scope which it intended to give to a previous decision which issued from its own deliberations, specifying if need be what it thereby decided with binding force. Such competence is therefore in no wise irreconcilable with Article 52 (Art. 52) or, moreover, with Article 54 (Art. 54) which makes the Committee of Ministers responsible for supervising the execution of the Court's judgments".¹⁰²

According to the new Article 46 (§ 3),¹⁰³ this further referral is calculated to deal with a phenomenon that has been clearly identified by legal opinion and Council of Europe organs: the lack of clarity in a judgment is sometimes detrimental to its

¹⁰⁰ E. Lambert Abdelgawad, L'exécution des décisions des juridictions européennes (Cour de Justice des Communautés Européennes et Cour européenne des droits de l'homme, AFDI, 2006, 677-724, 718-723.

¹⁰¹ According to M. Marmo, because of the adoption of Protocol 14, the Council of Europe is seen as "moving towards an enforcement mechanism in order to preserve the overall success of the organization": M. Marmo, The Execution of Judgments of the European Court of Human Rights – a Political Battle, 15 MJ 2 (2008), 235 et seq., 252.

¹⁰² *Affaire Ringeisen v. Autriche*, 23 June 1973, A 16, § 13.

¹⁰³ "If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee."

prompt and proper execution. It is worth looking at the background to the preparation of this new provision in order to gain a clearer understanding of its actual scope. For fear of challenging the quality of the judges' work and the separation of duties between the Committee and the Court, it was simply a question, at first, of the Committee of Ministers' "informing" the Court of problems,¹⁰⁴ and consequently no amendment to the Convention was required. Furthermore, for fear that the Court might drift towards indicating the means of executing its judgments, considerable reservations on this subject were expressed by the Evaluation Group to the Committee of Ministers on the European Court,¹⁰⁵ by the President of the Court¹⁰⁶ and by the Steering Committee for Human Rights CDDH in its Opinion concerning Recommendation 1477 (2000) of the Parliamentary Assembly on the execution of judgments of the Court, adopted in November 2001. The Venice Commission, in its Opinion No. 209/2002, considered that it might be advisable to encourage the Court to indicate the means of executing its judgments: this procedure would "be preferable over the creation of the power of the Committee of Ministers to ask for formal clarification as suggested by the Parliamentary Assembly" (§ 61).

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

2. Other Measures

Alongside the discussions pursued by Ministers' Deputies since 2002, the results of which have yet to be made public, even if the effects were already visible in terms of the treatment of individual cases or new working methods, the question

¹⁰⁴ See CDDH-GDR (2001) 010, 15 June 2001, Activity Report, Appendix I, Second meeting, April 2001, Item 5. Suggestion A.ii.3 is headed, "Informing the Court of the Execution of Judgments": (§ 27) "The aim was not to give the Committee of Ministers authority over the work of the Court, but to inform the Court of the difficulties which could arise with certain of its judgments during the execution stage."

¹⁰⁵ EG Court (2001) 1, 27 September 2001, Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, § 49.

¹⁰⁶ CDL-AD (2002) 34, 18 December 2002, Opinion No. 209/2002, § 6.

of identifying the possible causes of delay and negligence has been referred to the (CDDH). Among its practical proposals, this committee has suggested preparing a vade-mecum to provide guidance to national authorities on execution of judgments in the form of practical advice and improving the preparation of Human Rights meetings by making the annotated agenda available as soon as possible (six weeks before the meeting), and has drawn attention to the need to share information on execution among all parties concerned and the urgent need for an online global database¹⁰⁷ with relevant and up-to-date information on the execution situation. The Working Group also emphasised the need to identify quickly any situations revealing systemic problems, and the obligation for a state to present an action plan to the Committee (in accordance with the Committee's guidelines, which should set out good practice); the action plan might also mention effective domestic remedies as a means of taking care of repetitive cases. These various proposals have been adopted: the vade-mecum and execution database have come into being early in 2008.

In the event of delay by a state, the report suggested "developing the practice of Committee of Ministers' press releases, press statements and Chairman's declarations". "The CDDH noted that adequate responses ought also to be developed on a more general level and include information-sharing with other relevant Council of Europe bodies", which might take place during tripartite meetings of the Chair of the Committee of Ministers, the Chair of the Parliamentary Assembly's Committee on Legal Affairs and Human Rights and the Human Rights Commissioner after publication of the annual report.¹⁰⁸ Indeed, the Commissioner for Human Rights, through his visits to the countries concerned, has been able to play a part in bringing about the necessary adjustments of domestic legislation to the Convention. It was also suggested that a yearly meeting should be held by government agents to examine the specific issue of execution of judgments. All these proposals have been, or are gradually being, implemented. All in all, greater co-ordination among the various Council of Europe players is undoubtedly beneficial and is also supported by the Committee of Ministers.¹⁰⁹ On 25 October 2006 the Ministers'

¹⁰⁷ Along the lines of HUDOC, according to a French proposal. This proposal arose from the fact that "in a country such as France, which has an extensive civil service, delays and lack of response to Secretariat requests can occur because of the time spent in the many inter-departmental contacts that have to be made in the specialist ministries and the work involved in compiling scant information on the situation of cases, often duplicated from one department to another".

¹⁰⁸ CDDH (2006) 008, 7 April 2006, Appendix 4, § 22. The First Annual Report of the Committee on the execution of the judgments was published in February 2008.

¹⁰⁹ CM/AS (2007) Rec 1764 final, 30 March 2007, Implementation of Judgments of the European Court of Human Rights. Parliamentary Assembly Rec. 1764 (2006): "5. The Committee also fully shares the Assembly's view that better synergies should be developed between various Council of Europe bodies and institutions with a view to more effective implementation of judgments. From this perspective, the Assembly's enhanced involvement in this area is most welcome. The Committee encourages other bodies of the Council of Europe to mainstream in their respective activities the Convention's requirements, as set out in the Court's judgments. An important role should in particular be played in this area by the Council of Europe Commissioner for Human Rights, the Venice Commission and the European Commission for the Efficiency of Justice (CEPEJ). The tripartite meetings be-

Deputies appointed nine experts to participate in the work of the working group on execution of the Court's judgments set up by the DH-PR (Committee of Experts for the Improvement of Procedures for the Protection of Human Rights), the purpose of which is to come up with additional practical proposals for supervision of execution of judgments in the event of slow or negligent execution. The CDDH also appointed nine experts on the DH-PR to participate in this new forum. The first outcome of these discussions was the Recommendation adopted last March 2008 and already analysed.

The Second Annual Report contains some statistics on the delay of implementation of the judgments. With regard to the payment of just satisfaction, 36 % of the sums were paid in the required delay, 7 % out of the delay, the other cases are still pending. 11 % of the cases demanding large-scale measures have been pending for more than 5 years, 35 % for a delay between 2 and 5 years and 52 % for less than 2 years.

In a document issued on 15 December 2008, the CDDH tried to propose objective indicators of slowness in execution.¹¹⁰ It concluded that exceeding the time limit of 3 months for the payment of just satisfaction and of 6 months for the adoption of individual and general measures, following the date on which the judgment became final, could be considered, in principle, a primary indicator of slowness. Other measures have been adopted in 2008 in conformity with the spirit of collective guarantee and public order of the European system of human rights. Indeed a new Human Rights Trust Fund was set up in 2008 on a Norwegian initiative by the Council of Europe, the Council of Europe Development Bank and Norway, joined by Germany and the Netherlands.¹¹¹ The first execution projects will start in 2009; they should contribute to improve the national implementation of the Convention. One of the first projects to be funded relates to the problem of non-enforcement of national judgments in Ukraine.

D. Appraising the Efficiency of the Overall System

1. The Phenomenon of Non-compliance: A Minor Concern

It is important not to overestimate the phenomenon of non-compliance with judgments of international courts. As regards the International Court of Justice, the most comprehensive study to date has shown that "in fact, only the judgment delivered in the *Fisheries Jurisdiction* case was never implemented".¹¹² Execution

tween the Committee of Ministers, the Assembly, and the Commissioner for Human Rights may be an appropriate format to address the most important issues arising in the implementation of judgments."

¹¹⁰ CDDH (2008) 014, 15 December 2008, § 22.

¹¹¹ Second Annual Report (2008), 24.

¹¹² A. Azar, *L'exécution des décisions de la Cour Internationale de Justice*, Bruylant, Brussels, 2003, 291.

would seem to “depend on states’ political interests rather than fear of sanctions”.¹¹³ In the two European systems, failure to comply with judgments has remained a minority phenomenon, which has not necessarily increased in proportion to the Organisation’s enlargement but which is undoubtedly tolerated less because of this new context. A target of 100 % efficient and rapid execution is utopian. More than cases of non-compliance, it is cases of late execution that seem to raise difficulties. The Court of Justice of the European Communities has stated that “measures to comply with a judgment must be initiated immediately and must be completed as soon as possible”.¹¹⁴ The assessment is made case by case, in the light of the measures remaining to be taken by the state when the Court’s judgment is delivered.¹¹⁵ Regarding the Council of Europe, the average time between the Court’s delivery of a judgment and its actual execution has almost trebled since the late 1990s.¹¹⁶ Numerous delays have been recorded even for payment of just satisfaction, for which a time-limit of three months is set.¹¹⁷ Delay in executing judgments is reflected in the constant and exponential increase in the Committee of Ministers’ workload; while an average of 800 cases were on the agenda of each of its six Human Rights meetings in 2000,¹¹⁸ today that figure is nearly 6000. The number of cases for which final resolutions are submitted has risen accordingly.¹¹⁹ The qualitative challenge is to ensure that general measures are implemented promptly in order to avoid repetitive cases.¹²⁰ This is a major challenge, since any delay in adopting general measures results in new applications to the Court.

Systematic refusal by a state to execute a judgment is uncommon. According to the Parliamentary Assembly, the problems of implementation are at least seven-fold: political reasons; reasons to do with the reforms required; practical reasons relating to national legislative procedures; budgetary reasons; reasons to do with public opinion; judgments drafted in a casuistical or unclear manner; reasons rela-

¹¹³ Foreword by G. Guillaume, summarising the argument of Azar, (note 112).

¹¹⁴ CJEC, 5 November 1986, *Commission v. Italy*, Case 160/85, ECR 1986, 3245; CJEC, 7 March 1996, *Commission v. France*, Case 334/94; CJEC, 4 July 2000, *Commission v. Hellenic Republic*, C-387/97, § 82.

¹¹⁵ See Opinion of Advocate General Mischo dated 12 June 2003, Case 278/01, *Commission v. Spain*.

¹¹⁶ According to statistics provided by the Department for the Execution of Judgments of the European Court of Human Rights. Cited in Footnote 7, CLD-AD (2002) 34, 18 December 2002, Venice Commission, Opinion on the Implementation of the Judgments of the European Court of Human Rights adopted on 13-14 December 2002 (Opinion No. 209/2002).

¹¹⁷ See CM/Del/OJ/DH (2007) 997 Statistics/Statistiques Public, 11 July 2007, Annotated Agenda: for cases in which there is no confirmation of payment of the capital sum due for over six months, we may note, among the worst offenders, Romania (26 cases), Ukraine (46 cases), France (63 cases), Italy (67 cases) and Slovenia (110 cases).

¹¹⁸ Figures taken from EG Court (2001) 1, 27 September 2001, Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights.

¹¹⁹ See CM/Del/OJ/DH (2007) 997 Statistics/Statistiques Public, 11 July 2007, Annotated Agenda: 41, 137 and 274 for the first three meetings in 2007.

¹²⁰ F. Sundberg, *Le contrôle de l’exécution des arrêts de la Cour européenne des Droits de l’Homme*, Mélanges en hommage au Doyen G. Cohen-Jonathan, 2004, 1530, § 47.

ting to interference with obligations deriving from other institutions.¹²¹ The commonest reasons seem to be those relating to the scale of the reforms required and the cumbersome nature of national legislative procedures.

With regard to the payment of just satisfaction, only three cases have raised major concern. The Committee of Ministers has regularly pointed out that the obligation to abide by the judgments of the Court is unconditional; a state cannot rely on the specificities of its domestic legal system to justify failure to comply with the obligations by which it is bound under the Convention. Nevertheless some States attempted to condition the payment of the just satisfaction.

Three cases need to be mentioned here. In the case of *Raffineries Grecques Stran and Stratis Andreadis v. Greece* (9 December 1994), the Court ordered the State to pay nearly 30.000.000 US dollars just satisfaction following the finding of a violation of Article 6 (1). A delay of over two years was necessary to make full payment, including default interest. A strong interim resolution was delivered in that case¹²² and the Chairman of the Committee of Ministers also wrote to the Minister of Foreign Affairs of Greece¹²³. The Committee of Ministers checked that the applicants had expressly accepted the new modalities of payment (the payment was made in US dollars).¹²⁴ The two other cases concern Turkey. In the *Loizidou* case, Turkey tried to condition the payment upon the global settlement of all property cases in Cyprus. In the interim resolution of 6 October 1999, the Committee noted that “the conditions of payment envisaged by the Government of Turkey cannot be considered to be in conformity with the obligations flowing from the Court’s judgment” and urged the State “to review its position and to pay the just satisfaction awarded in this case in accordance with the conditions set out by the European Court of Human Rights so as to ensure that Turkey, as a High Contracting Party, meets its obligations under the Convention”.¹²⁵ In the *Xenides-Arestis* case, Turkey wanted to clarify the nature of the violation which had led to the allocation of just satisfaction, to know what was covered by the amount awarded by the Court. In its decision adopted on 18 September 2008, the Committee of Ministers “reaffirmed that in any event the amounts awarded by the Court have been due

¹²¹ Resolution 1226 (2000), Execution of judgments of the European Court of Human Rights.

¹²² DH (96) 251, 15 May 1996: “Whereas, the Government of Greece has declared that, considering the size of the just satisfaction awarded to the applicants and the economic problems in Greece, it is not able to make immediate full payment; Concluding that the modalities of payment envisaged by the Government of Greece cannot be considered to be in conformity with the obligations following from the Court’s judgment, Strongly urges the Government of Greece to proceed without delay to the payment of the amount corresponding to the value of the just satisfaction at 9 March 1995.” “Decides accordingly, if need be, to resume consideration of the present case at each of its forthcoming meetings.”

¹²³ Underlying that “the credibility and effectiveness of the mechanism for the collective enforcement of human rights established under the Convention is based on the respect of the obligations freely entered into by the Contracting parties and in particular on respect of the decisions of the supervisory bodies”, DH (97) 184.

¹²⁴ Final Resolution (97) 184, 20 March 1997.

¹²⁵ Interim Resolution DH (99) 680 concerning the Judgment of the European Court of Human Rights of 28 July 1998 in the case of *Loizidou against Turkey*, 6 October 1999.

since 23 August 2007 and called upon Turkey to pay these amounts without further delay”.¹²⁶

Political difficulties are less common, but, when they do arise, constitute formidable obstacles to the execution of judgments: the interstate case of *Cyprus v. Turkey*,¹²⁷ still pending before the Committee of Ministers, is a current example. In such situations, intervention by a variety of players in addition to political pressure is often effective. Thus, in the past, intervention by the European Union has encouraged Turkey to meet its obligations under Article 46 of the Convention, which is also a condition of any future accession.¹²⁸ Faced with a very weak political process, the judicial approach has allowed the re-establishment of a climate of confidence and the objective paving of the way for what can be legitimately discussed.

2. From Interim Resolutions to Memoranda

a) Historical Background

Where the state objects to or delays taking the necessary measures, according to Rule 16 adopted by the Committee of Ministers on the basis of Article 46 (§ 2), “the Committee of Ministers may adopt interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution”. This practice was introduced with the case of *Ben Yaacoub*¹²⁹ and has since been repeated. Interim resolutions take various forms. The first type of interim resolution consists in taking note that no measures have been adopted and in inviting the state to comply with the judgment;¹³⁰ this is a simple public, official finding of non-execution. The second type provides the Committee of Ministers with the opportunity to note certain progress and to encourage the state to adopt measures in the

¹²⁶ See Decision adopted at the 1028th DH Meeting – 5 June 2008, Section 4.3 and the decision adopted at its 1035th DH Meeting – 17 September 2008, Section 4.3: “The Deputies, (...) 1. recalled the two divergent interpretations put forward regarding what precisely was covered by the amount awarded in respect of pecuniary damage in the judgment of the European Court of 7 December 2006 on the application of Article 41; 2. Noted in this respect the clarifications supplied by the judgment of *Demades v. Turkey* of 22 April 2008 whilst emphasising that this judgment is not yet final; (...)”.

¹²⁷ ECtHR, *Cyprus v. Turkey*, 10 May 2001.

¹²⁸ According to the Committee of Ministers, the beneficial effect of better co-ordination with the European Union and the new Fundamental Rights Agency should be further exploited to ensure proper execution of judgments: CM/AS (2007) Rec 1764 final, 30 March 2007, Implementation of Judgments of the European Court of Human Rights, Parliamentary Assembly Rec. 1764, § 7.

¹²⁹ ECtHR, *Ben Yaacoub v. Belgium*, 27 November 1987, Series A no. 127-A, Interim Resolution DH (88) 13 of 29 September 1988 and Final Resolution DH (92) 58 of 10 November 1992.

¹³⁰ See, for example, Interim Resolution ResDH (2001) 79 of 26 June 2001 in the case of *Matthews v. the United Kingdom*: “Noting, however, that more than two years after the Court’s judgment, ... no adequate measures have yet been presented with a view to preventing new similar violations in the future; urges the United Kingdom to take the necessary measures to secure the rights ...”.

future; this allows the Committee to comment directly on possible means of complying with the Court's judgment. This is the most common type of resolution. Mention must be made of the resolution entitled "Action of the Security Forces in Turkey: Measures of a General Character" – in which the Committee dissects the measures adopted and their results and makes suggestions as to ways of complying with the judgment¹³¹ – and the resolution on action of the security forces in Northern Ireland.¹³² In this way the Committee of Ministers may hope to exert pressure on national parliaments.¹³³ These types of resolution are also used for interstate cases.¹³⁴ Finally, a third category, used only exceptionally, is designed to threaten a state with more serious measures, owing to the time which has elapsed and the urgency of the situation. The most recent resolution adopted in the case of *Loizidou v. Turkey* comes within this third category.¹³⁵ In the case of *Ilaşcu and others v. Moldova and the Russian Federation* (Grand Chamber judgment of 8 July 2004),¹³⁶ the fourth Resolution, ResDH (2006) 26 of 10 May 2006, recalls that "the obligation to abide by the judgments of the Court is unconditional and is a requirement for membership of the Council of Europe"; furthermore, the Committee declares its "resolve to ensure, with all means available to the Organisation, the compliance by the Russian Federation with its obligations under this judgment" and "calls upon the authorities of the member states to take such action as they deem appropriate to this end". In response to the latter injunction, a statement was made by the Finnish Delegation on behalf of the European Union and

¹³¹ Resolution DH (99) 434 of 9 June 1999. See also Interim Resolution ResDH (2002) 98 of 10 July 2002, Action of the Security Forces in Turkey: Progress Achieved and Outstanding Problems.

¹³² Interim Resolution CM/ResDH (2007) 73 of 6 June 2007 concerning *McKerr v. the United Kingdom* and five similar cases.

¹³³ Interim Resolution ResDH (2001) 178 of 5 December 2001 concerning monitoring of prisoners' correspondence in Italy – measures of a general character. See also CM/ResDH (2007) 74 of 6 June 2007 on excessively lengthy proceedings in Greek administrative courts and the lack of an effective domestic remedy, where the Committee urges the Greek authorities to pass two Bills on acceleration of administrative court proceedings and introduction of an effective domestic remedy.

¹³⁴ See Interim Resolution ResDH (2007) 25 of 4 April 2007 concerning the judgment of 10 May 2001 in the case of *Cyprus v. Turkey*, in which the Committee "welcomes the progress achieved", allowing the Committee to "also close its examination of the violations established in relation to the issues of education and freedom of religion", and "requests Turkey to rapidly take all the additional measures required to ensure the full and complete execution of the judgment".

¹³⁵ Interim Resolution ResDH (2001) 80 of 26 June 2001: "Stressing that acceptance of the Convention, including the compulsory jurisdiction of the Court and the binding nature of its judgments, has become a requirement for membership of the Organisation; ... declares the Committee's resolve to ensure, with all means available to the Organisation, Turkey's compliance with its obligations under this judgment; calls upon the authorities of the member states to take such action as they deem appropriate to this end." Following this resolution, the 2003 partnership agreement between Turkey and the European Union introduced the requirement for the respect of the Court's judgments.

¹³⁶ The judgment called upon the respondent states "to take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release" (operative part, § 22) and stated that continuation of their detention "would necessarily entail a serious prolongation of the violation of Article 5 ... and a breach of the respondent states' obligation under Article 46 § 1 of the Convention to abide by the Court's judgment".

with the support of 14 other countries (including candidates for accession), in which they recalled the requirement to execute the judgment, lamented the effect of this failure to execute judgment on the credibility of the Council of Europe and the European Court of Human Rights and called for the most recent interim resolution to be drawn to the attention of the UN and OSCE. The case has been considered at virtually all the meetings of the Ministers' Deputies (and not just at Human Rights meetings) since 2004 and has also given rise to action by the Parliamentary Assembly and a statement by the Secretary General of the Council of Europe¹³⁷ – all to no avail. The failure to execute the judgment has led to the case being referred to the European Court again.¹³⁸

b) Current Practice

One new development expressly laid down in the resolutions is that the Committee itself is now able to identify cases in which there exists a systemic or structural problem. If the European Court does not actually find any systemic failing, the Committee of Ministers can itself identify such a failing in order to put pressure on a state to execute a judgment more quickly.¹³⁹ In the case of such systemic problems, the Committee demands evidence of a notable lessening of the problem in addition to adoption of general measures; such evidence may be provided by national statistics or the number of similar cases brought before the Court.¹⁴⁰ However, this evolution is part of the prolongation of the Committee's practice which consists of identifying, with the state, the general measures required according to the terms of the judgment.

In order to remedy the shortcomings of interim resolutions, which take a long time to draft and adopt, it is thus suggested, in a document dated November 2006, that faster and more instructive decisions should replace interim resolutions in certain circumstances, and should be followed by press releases.¹⁴¹ The use of Memo-

¹³⁷ For a history of the measures relating to supervision of execution in this case, see in particular CM/Notes/983/H46-1, 12 December 2006, and CM/Inf/DH (2006) 17 rev21. See also Press Release 766 (2006) of 8 December 2006: Thirteen Years of Illegal Detention in the Middle of Europe.

¹³⁸ *Ivantoc, Popa and others v. Moldova and Russia*, No. 23687/05. This is why the Committee of Ministers decided to suspend the examination of this case: see CM/Res DH (2007) 106 of 12 July 2007.

¹³⁹ See, for example, Interim Resolution ResDH (2006) 12 of 28 March 2006, *Metropolitan Church of Bessarabia and others v. Moldova* (judgment of 13 December 2001), Interim Resolution ResDH (2006) 1 of 8 February 2006 concerning the supervisory review procedure (*nadzor*) in civil proceedings in the Russian Federation, and CM/ResDH (2007) 74 of 6 June 2007 on excessively lengthy proceedings in Greek administrative courts and the lack of an effective domestic remedy: "Stressing the importance of rapid adoption of such measures in the cases at issue as they reveal structural problems giving rise to a large number of new, similar violations of the Convention."

¹⁴⁰ See CM/ResDH (2007) 84 of 20 June 2007 in *Immobiliare Saffi* and 156 other cases against Italy concerning non-execution of court orders to evict tenants. See also Interim Resolution CM/ResDH (2007) 75 of 6 June 2007 in 44 cases against Poland relating to excessively lengthy detention on remand.

¹⁴¹ Among the most recent: CM/Inf/DH (2007) 30, 14 June 2007, Non-enforcement of domestic judicial decisions in Ukraine: general measures to comply with the European Court's judgments;

randa tends to multiply. Facing situations of structural violations of which the execution could pose difficulties,¹⁴² the aim is to encourage complete reformation of the system. These Memoranda may either prepare or follow the eventual adoption of interim resolutions. These documents explain precisely the reflection of the department in charge of the execution. The memorandum is also a way of avoiding interim resolutions which might not be followed by concrete measures. For instance, the last Memorandum adopted is about the “Actions of the Security Forces in the Chechen Republic of the Russian Federation”.¹⁴³

Such Memoranda make it possible to go into much greater detail regarding the action to be taken to execute these judgments and to review the measures already taken, their effects and the work still to be done. The purpose is to help a state make headway with executing judgments, which often necessitate wide-ranging measures. These documents help states to improve the creation of overall action plans and may back up adoption of an interim resolution if a state evidences particular delay or negligence. It is also a matter, above all, of making information, which is usually confined to exchanges between the secretariat and the respondent state, public¹⁴⁴ in order to put pressure on the state concerned to expedite adoption of the necessary measures. These documents can also publicise the good practice of states in which similar cases or problems have arisen. The Committee of Ministers may concurrently take the initiative of convening a special seminar with the authorities in order to facilitate execution in certain cases.¹⁴⁵

Parallel to this new practice of Memoranda, one has to focus on the relative failure of interim resolutions, particularly on the question of the adoption of individual measures, especially in cases of serious violations, for example, in the case of *Ülke v. Turquie* where the applicant is under the current risk of life imprisonment¹⁴⁶. One cannot help but notice the obvious failure in the case of *Dorigo v. Italy*, in which three interim resolutions had alerted the authorities of the urgent necessity to adopt individual measures (reopening of the procedure or pardoning the applicant still imprisoned). The decision of the Committee of Ministers concluding a violation of Article 6 (1) was enacted in 1999. In its final resolution, the Committee deplores “first, the considerable delays noted in implementing its decisions and

CM/Inf/DH (2006) 19 rev3, 4 June 2007, Non-enforcement of Domestic Judicial Decisions in Russia: General Measures to Comply with the European Court’s Judgments; and CM/Inf/DH (2006) 32 revised 2, 12 June 2007, Violations of the ECHR in the Chechen Republic: Russia’s Compliance with the European Court’s Judgments.

¹⁴² CM/Inf/DH (2007), 7 February 2007, *United Macedonian Organisation Ilinden – Pirin and others v. Bulgaria*.

¹⁴³ CM/Inf/DH (2008) 33E, 11 September 2008.

¹⁴⁴ Thus such documents, originally classified as restricted, were declassified at the 976th Human Rights Meeting of Ministers’ Deputies (17 and 18 October 2006).

¹⁴⁵ See CM/Inf/DH (2006) 45, 1 December 2006: Round Table on Non-enforcement of Court Decisions against the State and Its Entities in the Russian Federation: Remaining Problems and Solutions Required – Conclusions of the Round Table of 30 and 31 October 2006.

¹⁴⁶ Resolution CM/ResDH (2007) 109 of 17 October 2007.

resolutions in this case, notwithstanding the importance and urgency of the measures required to remedy the consequences of the violation for the applicant, and, secondly, the fact that the applicant has thus been obliged to serve nearly all the prison sentence passed on him in the unfair trial".¹⁴⁷ The case of *Hulki Gunes v. Turkey* has posed the same difficulties as *Hakkar v. France* and *Dorigo v. Italy*. The victim continues to serve life imprisonment (he had initially been condemned to death). The Committee, in an updated interim resolution (5 December 2007, (2007) 150), and following the intervention of the Chair of the Committee of Ministers, states that "a continuation of the present situation would amount to a manifest breach of Turkey's obligations under Article 46, paragraph 1, of the Convention". In the case *Ilaşcu and others v. Moldova and Russian Federation*, the interim resolution adopted in 2007 followed four preceding resolutions. Powerless, the Committee decided to suspend the examination of the case, as *MM. Ivantoc et Popa* raised their case again before the European Court.¹⁴⁸

The failure of interim resolutions is also shown in another fundamental field, the protection of the environment. In the case of *Ahmet Okyay and others v. Turkey*, the Committee adopted an interim resolution in order to denounce the lack of execution nine years after the national judicial decisions ordering the closing of three thermal nuclear power stations. The Committee is reduced to the sole power of urging "the Turkish authorities to enforce the domestic court order imposing either closure of the power plants or installation of the necessary filtering equipment without further delay".¹⁴⁹ Nobody knows how long this situation will last and what the level of damages to the environment will be.

While the European Union has relied mainly on a constraint-based model, on infringement proceedings coupled with daily fines and on a delegation or elite model of accountability to compel states to enforce the judgments of the Court of Justice of the European Communities promptly, the Council of Europe has opted for a very different approach: that of persuasion, co-ordination among the various national and European bodies concerned, and accountability of authorities at different levels, in keeping with the participatory model of accountability. There is reason to believe that this approach is better suited to human rights law. This model has proved effective; despite the increasing number of cases pending before the Court and the Committee, and also the more complex nature of violations at issue, there is no argument to deal in favour of another model at the present time. The fact that the procedure of the implementation of the judgments of the European Court of Human Rights has become more judicial has not questioned the effective role played by the Committee of Ministers yet. However, Philippe Boillat, Director General of Human Rights and Legal Affairs of the Council of Europe, wonders whether we should not "confer this task on a body with more judicial

¹⁴⁷ Final Resolution CM/ResDH (2007) 83 of 20 June 2007.

¹⁴⁸ Interim Resolution CM/ResDH (2007) 106 of 12 July 2007.

¹⁴⁹ Interim Resolution CM/ResDH (2007) 4 of 14 February 2007.

character, separate from the Committee of Ministers or under its delegated authority".¹⁵⁰

From now on the most serious concern will probably be another topic, that is to say the urgent need to adopt more suitable measures of redress for serious and/or structural violations the Court is now faced with.¹⁵¹

¹⁵⁰ P. Boillat, Summary Conclusions, in: Towards Stronger Implementation of the European Convention on Human Rights at the National Level, Colloquy organised in Stockholm (June 2008), 132, 136.

¹⁵¹ For instance, the ECtHR has been seized of more than 3000 requests following the war between Russia and Georgia.