

# The Execution of Judgments of the European Court of Human Rights

Limits and Ways Ahead

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*Abstract:* This thesis deals with the execution of judgments of the European Court of Human Rights ('the Court') by states, and its supervision by the main institutions of the Council of Europe, particularly after the entry into force of Protocol No. 14.

After an analysis of the existing system of execution of the Court's judgments, through the examination of the obligations and practices of states, and the study of the current system of supervision by the institutions of the Council of Europe, this thesis discusses proposals made both at national and European levels to ensure state's compliance with the judgments of the Court.

Thus, the aim of the thesis will be to contribute to the reflection on the reform of the Convention mechanism with a particular focus on the implementation of judgments, because it is assumed that non- or partial-compliance with the Court's judgments prevents individuals from enjoying their Convention's rights, and threatens the sustainability of the Convention system.

*Keywords:* European Court of Human Rights, Execution of judgments, Protocol No. 14, Reform.

## I. Introduction

Under the mechanism of the European Convention on Human Rights (ECHR), Article 46-1 expresses that states have the obligation to execute the judgments of the European Court of Human Rights ('the ECtHR', or 'the Court' in the following). To implement this general obligation, sub-divided into specific ones, namely the obligation to execute the violated obligation, put an end to the international wrongful act, repair the prejudice and prevent future similar violations<sup>1</sup>, states are required to adopt individual and general measures. The adoption of these measures is of paramount importance for the protection of human rights in Europe for two main reasons. Firstly, it ensures that individuals' Convention's rights are actually protected. Secondly, it prevents repetitive cases from being lodged in Strasbourg.

However, the execution of judgments by states has proved to be unsatisfactory, either because the adopted measures are not adequate, or because some states are openly unwilling to abide by the Court's judgments. Thus, on 31 December 2011, among the more than 10 000 cases pending before the Committee of Ministers for the supervision of the execution<sup>2</sup>, 278 were leading cases, i.e. cases which have been identified as revealing a new systemic/general problem in a respondent state, which had been pending for more than five years<sup>3</sup>. Moreover, 1354 of the 1696 new cases which became final between 1 January and 31 December 2011, were repetitive ones<sup>4</sup>.

To address this issue, the states party to the Convention adopted Protocol No. 14 in June 2010, which established new mechanisms to facilitate the supervision of the execution of the Court's judgments. Noting that

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<sup>1</sup> Jörg Polakiewicz, 'The execution of judgments of the European Court of Human Rights', in Robert Blackburn, Jörg Polakiewicz, *Fundamental rights in Europe: the European Convention on Human Rights and its member states, 1950-2000* (Oxford University Press 2001) 56.

<sup>2</sup> Committee of Ministers of the Council of Europe, *Supervision of the execution of judgments and decisions of the European Court of Human Rights, Annual Report 2011* (Council of Europe 2012) available at [http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2011\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2011_en.pdf) (last consultation on 3 July 2012) 34.

<sup>3</sup> Ibid 48.

<sup>4</sup> Ibid 35.

this reform would nevertheless be insufficient to tackle the problem of the non- or partial-compliance with the Court's judgments, they launched the 'Interlaken Process' in 2010 to discuss proposals for reform to ensure the effectiveness of the Convention mechanism in the long-run. Under this process, representatives of states met once a year, in Interlaken in 2010, Izmir in 2011, and in Brighton in 2012. As a result negotiations on two draft protocols (No. 15<sup>5</sup> and No. 16<sup>6</sup>) are ongoing within the Council of Europe's Steering Committee on Human Rights. In addition, observers of the Court have advocated for other possible solutions to improve the Convention's system.

These various proposals reflect the underlying conception of the role that the Court should play. On the one hand, some claim that the Court should focus on its adjudicatory role, namely to provide justice to individuals each time that a state failed to secure the Convention's rights. On the other hand, those in favour of a constitutional role of the Court emphasise that the place of the individual, while important, is secondary to the primary aim of establishing common minimum standards of human rights protection<sup>7</sup>. Thus, they state that the Court should adjudicate fewer cases, but emphasise those which should be executed by all member states of the Council of Europe. Throughout this thesis, the analysis of the existing and possibly new mechanisms of execution and supervision of judgments will reflect the idea that the role of the Court is to raise the standards of protection of human rights in Europe, through the interpretation of the Convention beyond the specific cases. However, the fundamental principle that individuals are entitled to receive reparation for the violation of the rights enshrined in the Convention will also be kept in mind.

## A. Research questions and hypothesis

Two major questions will be asked throughout the thesis:

- What are the actual limits to the current system of execution of the judgments of the ECtHR?
- What changes could be adopted to improve the existing mechanism?

The hypotheses proposed in the thesis will be the following:

- The reform of the execution of judgments, started with the adoption of Protocol No. 14, has proved to be insufficient.
- Further reforms should be adopted to facilitate the execution by states and enhance the supervision by the institutions of the Council of Europe.

## B. Aim of the thesis

The aim of the thesis will be to contribute to the reflection on the future of the Convention mechanism in the context of the Interlaken process. More particularly, the thesis will focus on both the capacity of states to execute the judgments of the Court, and the supervision of the execution by the Council of Europe. Therefore, the thesis will define the limits of the current system of execution of judgments, and analyse proposals to improve it.

## C. Methodology

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<sup>5</sup> Committee of Ministers of the Council of Europe, Steering Committee for Human Rights, Committee of experts on the reform of the Court, 'Draft Protocol No. 15 to the Convention', DH-GDR(2012)R2 Addendum III 31 october 2012, available at [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-B\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-B_en.asp) (last consultation on 20 February 2013).

<sup>6</sup> Council of Europe, Steering Committee for Human Rights, Committee of experts on the reform of the Court, 'Draft Protocol No. 16 to the Convention', DH-GDR(2012)R2 Addendum V, 31 october 2012, available at [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-B\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-B_en.asp) (last consultation on 20 February 2013).

<sup>7</sup> Luzius Wildhaber, 'A constitutional future for the European Court of Human Rights?', *Human Rights Law Journal* (2002) 163. See also Steven Greer, Luzius Wildhaber, 'Revisiting the debate about "constitutionalising" the European Court of Human Rights', *12 Human Rights Law Review* 4 (2012) 686.

There already exists a consistent body of academic literature on the execution of the Court's judgments, which describes the existing mechanisms. This literature will be used to analyse the obligation of states to execute the judgments, show the limits of the current system and explore possible perspectives.

Throughout the thesis, national and international legal texts, the case-law of the ECtHR, decisions and draft proposals of the institutions of the Council of Europe, official statements from member States, academic literature and contributions of the civil society will be the main sources.

## D. Structure of the thesis

The thesis will be divided in two main parts. The first part will present the existing system of execution of the Court's judgments (II). In the first chapter, attention will be paid to the obligation of states to execute the judgments and their practices with regard to the implementation of individual and general measures (A). In a second chapter, the existing system of supervision, by the main institutions of the Council of Europe, will be studied. (B)

The second part of the thesis will deal with proposals to reform the Convention system in the context of the Interlaken process (III). While the first chapter will analyse the possible reforms to be taken at national level (A), the second chapter will focus on the European level (B).

## II. General framework on the existing system of execution of judgments of the Europeans Court of Human Rights

### A. The execution of judgments by states

According to Article 46-1 of the Convention, states have a legal obligation to abide by the judgments when the Court found a violation. After explaining this general obligation (1), the specific obligations to take individual (2) and general (3) measures and the state practices will be examined.

#### 1. General principles on the obligation of states to execute the judgments

In order to understand the principles governing the general obligation of states to implement the judgments of the Court, light should be shed on its legal basis, its nature and its scope.

The legal basis of the general obligation to execute the final judgments of the Court is laid down in Article 46 of the Convention, which states:

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.

The conditions under which the judgments become final are defined in Article 44, which reads:

1. The judgment of the Grand Chamber shall be final.

2. The judgment of a Chamber shall become final

(a) When the parties declare that they will not request that the case be referred to the Grand Chamber; or

(b) Three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

(c) When the panel of the Grand Chamber rejects the request to refer under Article 43.

Therefore, the final judgments of the ECtHR are legally binding to the respondent state<sup>8</sup>. Article 46-1 expresses a general obligation to execute them with good faith<sup>9</sup>. Thus, the general principles of state responsibility

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<sup>8</sup> David Harris, et al, *Law of the European Convention on Human Rights*. (2<sup>nd</sup> ed., Oxford University Press, 2009) 30.

ity under public international law for an international wrongful act apply to violations of the Convention. This means that the respondent state has to execute the violated obligation, put an end to the international wrongful act, repair the prejudice and prevent future violations<sup>10</sup>.

Besides, under Article 39-1 of the Convention, the Court may issue a decision on a friendly settlement reached between the parties at any stage of the proceedings. This decision, which frequently involves the offer of a sum of money by the respondent state to the applicant, is also binding and subject to the supervision of the Committee of Ministers under Article 39-4<sup>11</sup>.

In the judgment *Marckx v Belgium*<sup>12</sup>, the Court made it clear that its judgments are essentially declaratory<sup>13</sup>. This means that states are free to choose the means to execute them. However, this freedom is not absolute insofar as it is subject to the supervision of the Committee of Ministers under Article 46-2<sup>14</sup>. The foundation of this obligation of result is that the Court is in principle not empowered to suggest which specific individual or collective measures states should take to implement the judgments<sup>15</sup> (with the exception of the just satisfaction), nor to annul, repeal or modify statutory provisions or individual decisions taken by administrative, judicial or other authorities<sup>16</sup>.

The scope of the obligation to execute the judgment is threefold. First of all, according to Article 46-1, the obligation to execute the Court's judgments is restricted to the parties to the procedure. Therefore, neither third states, nor states which may participate in the proceedings through a third party intervention under Article 36 are in principle bound by the judgment<sup>17</sup>. However, it may be deducted from Article 1 that states have to take into account the interpretation of the Convention by the Court when they "secure" the Convention's rights, giving an *erga omnes* effect to the judgments of the Court. Secondly, the binding part of the judgment is in principle composed of the dispositive. However, insofar as the declaration of violation may be succinct, the inclusion of the motives may be indispensable, particularly when the object of the dispute is a structural problem identified by the Court<sup>18</sup>. Finally, the Court expressed in the judgment *Vermeire v Belgium*<sup>19</sup> that the obligation to implement the judgment is immediate. In other words, no transitory period to adopt individual or general measures is granted to the respondent state. Nevertheless, as it will be explained below, the Court sometimes sets a time limit for the adoption of individual or general measures. The obligation terminates when the Committee of Ministers takes a final resolution which closes the case.

## 2. Individual measures

The first kind of measures that states should take following the finding of a violation of the Convention by the Court, the individual ones, have three aspects: to put an end to the continuing violation, to provide a *restitutio in integrum*, and to pay a just satisfaction when awarded by the Court. After an analysis of these specific obligations, an overview of the State practice will be presented.

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<sup>9</sup> Xavier-Baptiste Ruedin, *L'exécution des arrêts de la Cour Européenne des Droits de l'Homme: procédure, obligations des Etats, pratique et réforme* (Bruylant 2009) 122.

<sup>10</sup> Polakiewicz (n 1) 56.

<sup>11</sup> Elisabeth Lambert-Abdelgawad, *L'exécution des arrêts de la Cour Européenne des Droits de l'Homme* (Council of Europe 2005) 82.

<sup>12</sup> *Marckx v Belgium*, App No. 6833/74 (13 June 1979), Series A no 31, para 58.

<sup>13</sup> Harris et al. (n 8) 862.

<sup>14</sup> Vitaliano Esposito, 'La liberté des Etats dans le choix des moyens de mise en oeuvre des arrêts de la Cour Européenne des Droits de l'Homme', *Revue Trimestrielle des Droits de l'Homme* (2003) 834.

<sup>15</sup> Robin C. A. White, Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) 44; Elisabeth Lambert, *Les effets des arrêts de la Cour Européenne des Droits de l'Homme, contribution à une approche pluraliste du droit européen des droits de l'Homme* (Bruylant 1999) 115.

<sup>16</sup> Tom Barkhuysen, Michiel Van Emmerik, 'A comparative view on the execution of the judgments of the European Court of Human Rights', in Theodora A. Christou, Juan Pablo Raymond (ed.), *European Court of Human Rights, remedies and execution of judgments* (British Institute of International and Comparative Law 2005) 3; Harris et al (n 8) 862; Lambert, 1999, *Les effets des arrêts de la Cour Européenne des Droits de l'Homme* (n 15) 115; Polakiewicz (n 1) 66; Ruedin (n 9) 97.

<sup>17</sup> Ruedin (n 9) 109-110.

<sup>18</sup> Ruedin (n 9) 118; Lambert, 1999, *Les effets des arrêts de la Cour Européenne des Droits de l'Homme* (n 15) 73.

<sup>19</sup> *Vermeire v Belgium*, App No. 12849/87 (29 November 1991), Series A no 214-C.

a. Obligations of states

*aa. Termination of the continuing violation*

Where a continuing violation of provisions of the ECHR is found, states have the duty to bring the violation to an immediate end<sup>20</sup>, on the basis on two provisions of the Convention<sup>21</sup>: Article 46-1 (the obligation to abide by the judgments) and Article 1 (the general obligation to respect human rights)<sup>22</sup>. This obligation, binding immediately following a condemnation by the Court, also exists when the Court has not issued a judgment<sup>23</sup>.

*ba. Restitutio in integrum*

The second specific obligation is the *restitutio in integrum*, based upon Article 46-1 of the Convention<sup>24</sup>. It is an application, at the European level, of the obligation of states to remedy to the international wrongful act under public international law<sup>25</sup>. The Court explained in the case *Pampamichalopoulos v Greece* that the reparation should be done "in such a way as to restore as far as possible the situation existing before the breach"<sup>26</sup>, and then specified in the judgment *Brumarescu v Romania* that "the reparation should aim at putting the applicant in the position in which he would have found himself had the violation not occurred"<sup>27</sup>. However, when it appears impossible to proceed to the *restitutio in integrum*, for instance, because of the very nature of the lesion<sup>28</sup>, states are not freed from their obligation, but have to award a sum of money, the just satisfaction, which corresponds to the hypothetical value of the *restitutio in integrum*<sup>29</sup>.

*ca. Just satisfaction*

The third obligation of states with regard to the individual measures is to pay a just satisfaction as it is expressed in Article 41 of the Convention:

"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 itself shall, if necessary, afford just satisfaction to the injured party."

Under Article 46-1, states have the obligation to pay a just satisfaction when the Court awarded damages on the ground of Article 41, generally within three months<sup>30</sup>. Nevertheless, the award of a just satisfaction is subsidiary to the *restitutio in integrum*<sup>31</sup>, and does not constitute a right for the applicant<sup>32</sup>, since the Court may hold that the finding of the violation constitutes in itself a sufficient just satisfaction. In other words, the award of a just satisfaction under three possible headings, i.e. costs and expenses, pecuniary and non-pecuniary damages<sup>33</sup>, is left at the discretion of the Court<sup>34</sup>. Additionally, to receive the sum of money, the applicant has to

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<sup>20</sup> Georg Ress, 'The effects of decisions and judgments of the European Court of Human Rights in the domestic legal order', *Texas International Law Journal* (2005) 380.

<sup>21</sup> Ruedin (n 9) 125.

<sup>22</sup> *Maestri v Italy*, App No. 39748/98 (17 February 2004), ECHR 2004-I, para 47.

<sup>23</sup> Lambert, 1999, *Les effets des arrêts de la Cour Européenne des Droits de l'Homme* (n 15) 107.

<sup>24</sup> Ruedin (n 9) 145.

<sup>25</sup> Costas Paraskeva, *The relationship between the domestic implementation of the European Convention on Human Rights and the ongoing reforms of the European Court of Human Rights (with a case study on Cyprus and Turkey)* (Intersentia 2010) 85; *Case concerning the Factory at Chorzow*, (1927) PICJ Serie A No. 9.

<sup>26</sup> *Papamichalopoulos v Greece*, App No. 14556/89 (31 November 1995), Series A no 330-B, paras 37-39.

<sup>27</sup> *Brumarescu v Romania*, App No. 28342/95 (23 January 2001), ECHR 2001-I, para 19.

<sup>28</sup> Polakiewicz (n 1) 62.

<sup>29</sup> Ruedin (n 9) 153.

<sup>30</sup> Barkhuysen, Van Emmerik (n 16) 4.

<sup>31</sup> Luzius Wildhaber, *The European Court of Human Rights, 1998-2006: history, achievements, reform* (Engel 2006) 138.

<sup>32</sup> Harris et al. (n 8) 857.

<sup>33</sup> Wildhaber, *The European Court of Human Rights, 1998-2006* (n 31) 6.

<sup>34</sup> Ruedin (n 9) 174; Wildhaber, *The European Court of Human Rights, 1998-2006* (n 31) 5.

prove on the one hand that there is a causal link between the violation and the damage<sup>35</sup>, and on the other hand to make a claim on due time<sup>36</sup>.

A recent development of the jurisprudence of the Court is to consider that states do not entirely fulfil their obligation under Article 46-1 when they pay the just satisfaction under Article 41. For instance, in the case *Scozzari and Giunta (No. 1) v Italy*<sup>37</sup>, confirmed in later cases such as *Hirsi Jamaa and others v Italy*<sup>38</sup>, the Court stated that:

"A judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision of the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects".

Thus, the Court insists on the obligation of states to take the appropriate measures to make sure that their domestic legal orders comply with the Convention. This change in the function of the award of a just satisfaction has been accompanied by a new practice by the Court, according to which the just satisfaction does not appear to be anymore an alternative to the individual and general measures, but turns into a form of punitive sanction. As it will be examined below, this new trend has consequences on the ability of the Court to supervise the execution of judgments.

## b. State practices

With regard to the obligation to put an end to the violation of the Convention, several types of measures have been implemented by states. One common practice is the revocation of a national administrative order found to be in violation with the Convention<sup>39</sup>, such as the revocation of an order of deportation<sup>40</sup> in the case *Omojudi and A.W. Khan v the UK*<sup>41</sup>. Another kind of measures is the speeding-up or conclusion of pending proceedings in cases finding a violation of Article 6<sup>42</sup>. For instance in the case *Ceteroni and other similar cases v Italy*<sup>43</sup>, the Italian authorities notified to the national courts the judgment of the ECtHR in order to expedite the pending proceedings. Finally, the release of a prisoner unlawfully detained is also a common practice to terminate the violation<sup>44</sup>. For example in the case *Selçuk v Turkey*<sup>45</sup>, the prisoner was released after that the Court found an excessive length of pre-trial detention.

With respect to the obligation of *restitutio in integrum*, a whole range of possible actions have been identified<sup>46</sup>. First of all, states are incited to establish a procedure allowing the reopening of criminal proceedings consequently to a judgment of the ECtHR, especially when a violation of Article 6 has been found<sup>47</sup>. The Court

<sup>35</sup> Ruedin (n 9) 173.

<sup>36</sup> Harris et al. (n 8) 857.

<sup>37</sup> *Scozzari and Giunta v Italy*, Appl No. 39221/98 and 41963/98 (13 July 2000), ECHR 2000-VIII, para 249.

<sup>38</sup> *Hirsi Jamaa and others v Italy*, Appl No. 27765/09 (ECtHR 23 February 2012), para 208.

<sup>39</sup> Barkhuysen, Van Emmerik (n 16) 5.

<sup>40</sup> Council of Europe, Department of the Execution of Judgments, 'List of individual measures' H/Exec (2006)2 April 2006 available at [http://www.coe.int/t/dghl/monitoring/execution/Documents/MIindex\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Documents/MIindex_en.asp) (last consultation on 3 July 2012) 43.

<sup>41</sup> *Omojudi and A.W. Khan v the UK*, Appl No. 1820/08 (ECtHR 24 November 2009), and Committee of Ministers, 'Resolution CM/ResDH(2011)82', 8 August 2011.

<sup>42</sup> Committee of Ministers of the Council of Europe, *Supervision of the execution of judgments of the European Court of Human Rights, 4th Annual Report 2010* (Council of Europe 2011) available at [http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2010\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2010_en.pdf) (last consultation on 3 July 2012) 134.

<sup>43</sup> *Ceteroni and other similar cases v Italy*, Appl No. 22461/9 (15 November 1996), ECHR 1996-V and Committee of Ministers, 'Resolution CM/InfDH(2008)42', 28 November 2008.

<sup>44</sup> Committee of Ministers, *Annual Report 2010* (n 42) 122.

<sup>45</sup> *Selçuk v Turkey*, Appl No. 21768/02 (ECtHR 10 January 2006), and Committee of Ministers, 'Resolution CM/ResDH(2010)115', 15 September 2010.

<sup>46</sup> Council of Europe, Department of the Execution of Judgments, 'List of individual measures' (n 40).

<sup>47</sup> Committee of Ministers of the Council of Europe, 'Recommendation on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights' Rec(2000)2, 19 January 2000, available at

has frequently stated for instance in the case *Eder v Germany*<sup>48</sup>, that there is no right for the victim to the reopening of the proceedings<sup>49</sup>. However, in the case *Öcalan v Turkey*, where a violation of Article 6 was found because of the lack of independence and impartiality of the domestic tribunal, the Court expressed that “the retrial or reopening of the case, if requested, represents in principle an appropriate way of redressing the violation”<sup>50</sup>. Therefore, even if the Court did not order the reopening of the proceedings, it voiced that this would be an appropriate measure to fulfil the *restitutio in integrum* insofar as the domestic law provides for it<sup>51</sup>. The Committee of Ministers concurs with the Court and calls states either to implement the procedure of reopening of proceedings when the conditions of the Recommendation Rec(2000)2 are fulfilled<sup>52</sup>, or to adopt legislative actions to make it possible, as expressed in the case *Dorigo v Italy*<sup>53</sup>.

Secondly, states may be required to revise, revoke or issue administrative orders, like in the case *Rodrigues Da Silva and Hoogkamer v Netherlands*<sup>54</sup> where the state granted a residence permit after a violation of Article 8 had been found. This solution is the most relevant in situations where no third parties are directly involved, such as immigration cases<sup>55</sup>.

Thirdly, individual measures may consist in the restitution of sums of money or properties, such as in the case *Brumarescu and other cases v Romania*<sup>56</sup>, where the state had either to return the properties at issues to the applicants or to pay an amount of money corresponding to the value of the properties.

Fourthly, the state may undertake to modify criminal records or other official registers. For instance, such a measure was adopted in the case *Mamère v France*<sup>57</sup>. Finally, special measures of various natures may be necessary to abide by the judgment. For example, the United Kingdom issued a Gender Recognition Certificate to the transsexual applicant and paid her a pension to comply with the judgment *Grant v the UK*<sup>58</sup>.

Eventually, with regard to the payment of just satisfaction, it appears that state practices are globally satisfactory since it is only in exceptional cases that they pass the deadlines (11% of the cases in 2009 and 13% in 2010)<sup>59</sup>.

### 3. General measures to prevent future violations

The second sort of measures, the general ones, relates mainly to the obligation to prevent similar violations of the Convention in the future<sup>60</sup>. After an examination of this obligation, some examples of state practices will be given.

#### a. Obligations of states

The obligation to adopt general measures to prevent similar violations of the Convention in the future is relatively new<sup>61</sup>, and justified by the fact that the judgments of the Court are deprived of direct effect<sup>62</sup>. It is based

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<https://wcd.coe.int/ViewDoc.jsp?id=334147&Sector=secCM&Language=lanEnglish&Ver=original> (last consultation on 3 July 2012).

<sup>48</sup> *Eder v Germany*, Appl No. 11816/02 (ECtHR, 13 October 2005).

<sup>49</sup> Jonas Christoffersen, *Fair balance: proportionality, subsidiarity and primarity in the European Convention of Human Rights* (Martinus Nijhoff Publishers 2009) 449.

<sup>50</sup> *Öcalan v Turkey*, Application No. 46221/99 (12 May 2005), ECHR 2005-IV, para 210.

<sup>51</sup> Ruedin (n 9) 159.

<sup>52</sup> Ibid 171.

<sup>53</sup> *Dorigo v Italy*, Appl No. 33286/96 (ECtHR 16 November 2000), and Committee of Ministers, ‘Resolution CM/ResDH(2007)83’, 20 April 2007.

<sup>54</sup> *Rodrigues Da Silva and Hoogkamer v Netherlands*, Appl No. 50435/99 (31 January 2006), ECHR 2006-I and Committee of Ministers, ‘Resolution CM/ResDH(2010)60’, 3 June 2010.

<sup>55</sup> Barkhuysen, Van Emmerik (n 16) 5.

<sup>56</sup> *Brumarescu and other cases v Romania* (n 27) and Committee of Ministers, ‘Resolution CM/ResDH(2007)90’, 20 June 2007.

<sup>57</sup> *Mamère v France*, Appl No. 12679/03 (7 November 2006), ECHR 2006-XIII and Committee of Ministers, ‘Resolution CM/ResDH(2011)104’, 14 September 2011.

<sup>58</sup> *Grant v the UK*, Appl No. 32570/03 (23 May 2006), ECHR 2006-VII and Committee of Ministers, ‘Resolution CM/ResDH(2011)173’, 14 September 2011.

<sup>59</sup> Committee of Ministers, *Annual Report 2010* (n 42) 48.

<sup>60</sup> Ruedin (n 9) 200.

<sup>61</sup> Bates, Ed, *The evolution of the European Convention of Human Rights* (Oxford University Press 2010) 419.

upon distinct obligations following from Articles 46-1 and 1 of the Convention, and originates from public international law<sup>63</sup>. It implies for the state an obligation to remedy the structural problems identified by the Court<sup>64</sup>, in order to comply with these obligations in good faith<sup>65</sup>. In other words, this obligation is of paramount importance in cases where the Court identified structural or systemic violations of the Convention. To comply with the obligation to take general measures, states have to analyse if the violation originates in a norm, a decision, the jurisprudence or a national practice, and to find to which authority the violation is attributable<sup>66</sup>. As expressed in the case *Marckx v Belgium*<sup>67</sup>, States are not required to remedy the situation existing prior to the judgment<sup>68</sup>, but they cannot apply the provision which violates the Convention anymore, and should take transitional measures until their legal order is rendered compatible with the Convention. Transitional provisions may thus appear to be necessary<sup>69</sup>. However, the Court considered that transitional provisions should not create or maintain discriminatory situations, and therefore, that domestic judges should ensure the full effect of the convention standards, as interpreted by the court, even after the adoption of the new legislation<sup>70</sup>. Sometimes, the Court indicates a deadline in the judgment for the adoption of the required general measure. For instance, in the case *M.T. and Greens v The UK*, the Court indicated that the respondent state had the obligation to bring forward legislative proposals intended to amend the litigious legislation within six months<sup>71</sup>. Moreover, in cases where a structural problem has been identified, especially when the Court issued a pilot-judgment, states have to ensure an effective internal remedy for the similar pending cases<sup>72</sup>.

Normally, only the respondent state to the case is bound by the judgment, and therefore has an obligation to take general measures<sup>73</sup>. However, state practices show that some of them have amended their laws or practices following judgments of the ECtHR against other states<sup>74</sup>, and domestic courts take into account the interpretation of the Convention as expressed in the Court's case-law. Thus, the judgments of the ECtHR enjoy a persuasive authority<sup>75</sup> for the legislators and domestic courts, and a preventive effect, because states are aware that they risk a condemnation<sup>76</sup>. This relates to the *erga omnes* effect of the judgments, which may be deducted from the obligation to "secure" the rights of the Convention under Article 1. In other words, states should take into account the interpretation of the Convention by the Court in its case-law<sup>77</sup> when they "secure" the Convention's rights.

The three main institutions of the Council of Europe have agreed with this doctrine. In the judgment *Maestri v Italy*<sup>78</sup>, the Court expressed that "it follows from the Convention and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it". The Committee of Ministers also encourages<sup>79</sup> states to verify the compatibility of draft laws, existing laws and administrative practices with the Convention. On the one hand, they should ensure that there are appropriate and effective mechanisms for systematically verifying draft laws with the Convention in the light of the

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<sup>62</sup> Paraskeva (n 25) 90.

<sup>63</sup> Ruedin (n 9) 203; Harris et al. (n 8) 31.

<sup>64</sup> Ruedin (n 9) 204.

<sup>65</sup> Lambert, 1999, *Les effets des arrêts de la Cour Européenne des Droits de l'Homme* (n 15) 112.

<sup>66</sup> Ruedin (n 9) 220.

<sup>67</sup> *Marckx v Belgium* (n 12), para 58.

<sup>68</sup> Ruedin (n 9) 215.

<sup>69</sup> Paraskeva (n 25) 90.

<sup>70</sup> *Fabris v France*, Appl No. 16574/08 (7 February 2013), para 75.

<sup>71</sup> *Greens and M.T. v the UK*, Appl No. 60041/08 and 60054/08 (23 November 2010), ECHR 2010, para 6)a) of the operative part.

<sup>72</sup> Ruedin (n 9) 219.

<sup>73</sup> Harris et al. (n 8) 31; Ress (n 20) 374.

<sup>74</sup> Harris et al. (n 8) 31.

<sup>75</sup> Polakiewicz (n 1) 73.

<sup>76</sup> Paraskeva (n 25) 87.

<sup>77</sup> Barkhuysen, Van Emmerik (n 16) 19; Gérard Cohen-Jonathan, 'Quelques considerations sur l'autorité des arrêts de la Cour Européenne des Droits de l'Homme', in Gérard Cohen-Jonathan, et al., *Liber Amicorum Marc-André Eissen* (Bruylant 1995) 53.

<sup>78</sup> *Maestri v Italy* (n 22) para. 47.

<sup>79</sup> See Committee of Ministers of the Council of Europe, 'Recommendation to the member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR', Rec(2004)5, 12 May 2004, available at <https://wcd.coe.int/ViewDoc.jsp?id=743297> (last consultation on 3 July 2012).



Court's case-law, and on the other hand, they should ensure the adaptation as quickly as possible of laws and administrative practices in order to prevent violations of the Convention. Finally, the Parliamentary Assembly of the Council of Europe has recently emphasised on the importance of this doctrine in a resolution adopted in 2012<sup>80</sup> which endorsed a report of the Committee of Legal Affairs and Human Rights of the Parliamentary Assembly, which affirmed that the Court's case law creates a body of law by which all the authorities of the state are bound<sup>81</sup>. In other words, the Parliamentary Assembly recommends states to take into account the well-established case law of the Court when they draft new legislations, and to actively prevent future violations by drawing conclusions from judgments against other states when it appears that they are likely to face similar issues. Such a development is coherent with the constitutional role of the Court, which consists in interpreting the minimum standards for the application of the Convention by states<sup>82</sup>.

## b. State practices

### *aa. Measures taken by the respondent state*

Various types of measures may be implemented by states to fulfil the obligation to prevent future violations of the Convention<sup>83</sup>. First of all, half of the general measures consist in legislative changes<sup>84</sup>. Normally, the Court does not examine the compatibility of legislative provisions with the Convention, since it deals with individual cases and consequently rules *in concreto*. However, the cause of the violation is sometimes rooted in inconsistencies in the legislation<sup>85</sup>, either because of a legislative provision directly violating the Convention, or because there was a loophole in the domestic legal order. On the one hand, states are required to no longer apply the contentious provision, and in criminal matters to modify the legislation<sup>86</sup>. For instance, following the case *Dudgeon v the UK*<sup>87</sup>, the provisions of the Homosexual Offences Order in Northern Ireland were amended in 1982 by causing homosexual acts between two consenting male adults in private to cease to be a criminal offence. On the other hand, states may be required to introduce legislative amendments to secure the Convention's rights. For example, France introduced a legislative amendment providing for a possibility to appeal against orders authorising searches before the president of the Court of appeal, following a violation of Article 6-1 found in the judgment *Ravon and others v France*<sup>88</sup>.

Secondly, when the violation results from the practice of national courts which interpreted legislative provisions in a way that violated the Convention, a modification in the jurisprudence may be an appropriate means to comply with the judgment. For instance, after having been condemned in the case *Aka v Turkey*<sup>89</sup>, Turkey granted a direct effect to the judgments of the ECtHR which had the result to align the domestic jurisprudence on it.

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<sup>80</sup> Parliamentary Assembly of the Council of Europe, 'Guaranteeing the authority and effectiveness of the European Convention on Human Rights', Resolution 1856(2012), 24 January 2012, available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=18060&Language=EN> (last consultation on 3 July 2012).

<sup>81</sup> Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Marie-Louise Bemelmans-Videc, 'Guaranteeing the authority and effectiveness of the European Convention on Human Rights', doc 12811, 3 January 2012, available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc12/EDOC12811.htm> (last consultation on 3 July 2012), paras 35-37.

<sup>82</sup> Wildhaber, 'A constitutional future for the European Court of Human Rights?' (n 7) 162.

<sup>83</sup> Council of Europe, Department of the Execution of Judgments, 'List of general measures', H/Exe(2006)1, May 2006, available at [http://www.coe.int/t/dghl/monitoring/execution/Documents/MGindex\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Documents/MGindex_en.asp) (last consultation on 3 July 2012).

<sup>84</sup> White, Ovey, (n 15) 58.

<sup>85</sup> Polakiewicz (n 1) 63.

<sup>86</sup> *Ibid* 59.

<sup>87</sup> *Dudgeon v the UK*, Appl No. 7525/76 (22 October 1981), Series A no 45, and Committee of Ministers, 'Resolution CM/ResDH(83)13', 27 October 1983.

<sup>88</sup> *Ravon and others v France*, Appl No. 18497/03 (ECtHR, 21 February 2008), and Committee of Ministers, 'Resolution CM/ResDH(2012)28', 8 March 2012.

<sup>89</sup> *Aka v Turkey*, Appl No. 19639/92 (23 September 1998), ECHR 1998-VI and Committee of Ministers, 'Resolution CM/ResDH(2001)70', 26 June 2001.

Thirdly, measures related to the information of the concerned authorities and the public in general are widespread and proved to be efficient to prevent future violations. Following a recommendation<sup>90</sup> and a resolution<sup>91</sup> of the Committee of Ministers on the publication and dissemination of the Court's judgments, states are encouraged to ensure that the relevant case-law of the Court is rapidly and widely published in the language of the country in appropriate materials and disseminated to the public bodies, with explanatory notes if necessary. Furthermore, the Committee of Ministers encourages states to include training on the Convention and case-law of the ECtHR in law and political science studies, as well as for legal and law enforcement professions<sup>92</sup>. In order to do so, states have for instance generalised training seminars on the Convention<sup>93</sup>.

Finally, practical measures may include the appointment of additional judges<sup>94</sup>, the building of new prisons<sup>95</sup>, budgetary arrangements<sup>96</sup>, or political dialogue between two states parties to a same judgment<sup>97</sup>.

### *ba. Measures adopted by states not party to the judgment*

Normally, the Court takes a casuistic approach to the Convention and thereby gives little guidance as to how implement the judgments. Thus, it is often difficult for third states to draw general conclusions<sup>98</sup>. However, and even if it is not a strict obligation under the Convention, since under Article 46-1 the judgments are formally binding upon the respondent state only, third states have sometimes drawn conclusions from the important judgments of the Court to secure the Convention's rights under Article 1. They therefore amended their own legislation, and thereby gave an *erga omnes* effect to the case-law of the Court<sup>99</sup>. For instance, France recently amended its criminal code<sup>100</sup> concerning the rights guaranteed to the defendant in police custody and more especially to his or her access to a lawyer, to comply with the requirements of Article 6 as interpreted in the Court's case-law. Indeed, the ECtHR expressed in the judgment *Salduz v Turkey*<sup>101</sup> that access to a lawyer should be provided from the first interrogation of a suspect by the police, unless there are reasons which justify such a restriction. In the subsequent case *Dayanan v Turkey*<sup>102</sup>, the Court broadened the rights of the defence, securing the access to a lawyer not only during the interrogation, but as soon as he or she is taken into custody. The Constitutional Council of the French Republic drew the conclusions from these judgments when it af-

<sup>90</sup> Committee of Ministers of the Council of Europe, 'Recommendation on the publication and dissemination in the member states of the text of the ECHR and of the case-law of the ECtHR', Recommendation Rec(2002)13, 18 December 2002, available at <https://wcd.coe.int/ViewDoc.jsp?id=331657&Sector=secCM&Language=lanEnglish&Ver=original> (last consultation on 3 July 2012).

<sup>91</sup> Committee of Ministers of the Council of Europe, 'Resolution on the publication and dissemination of the case-law of the ECtHR', Res(2002)58, 18 December 2002, available at <https://wcd.coe.int/ViewDoc.jsp?id=331589&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> (last consultation on 3 July 2012).

<sup>92</sup> Committee of Ministers of the Council of Europe, 'Recommendation on the ECHR in university education and professional training', Rec(2004)4, 12 May 2004, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2004\)4&Sector=secCM&Language=lanEnglish&Ver=original](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2004)4&Sector=secCM&Language=lanEnglish&Ver=original) (last consultation on 3 July 2012).

<sup>93</sup> Elisabeth Lambert-Abdelgawad, 'L'exécution des arrêts de la Cour Européenne des Droits de l'Homme (2010)', *Revue Trimestrielle des Droits de l'Homme*, (2011) 945.

<sup>94</sup> See for instance Committee of Ministers, 'Resolution CM/ResDH(2011)189', 2 December 2011 in 21 cases against Belgium concerning the length of certain civil proceedings, in particular before the Brussels Court of Appeal.

<sup>95</sup> For instance *Alver v Estonia*, Appl No. 64812/01 (ECtHR, 8 November 2005), and Committee of Ministers 'Resolution CM/ResDH(2007)32', 20 April 2007.

<sup>96</sup> See the case *Burdov (No. 2) v the Russian Federation*, Appl No. 33509/04 (15 January 2009), ECHR 2009 and Committee of Ministers, 'Resolution CM/ResDH(2011)189', 2 December 2011.

<sup>97</sup> See the friendly settlement ECtHR, *Denmark v Turkey*, Appl No. 34382/97 (ECtHR 8 June 1999) and Committee of Ministers, 'Resolution CM/ResDH(2004)87', 9 December 2004.

<sup>98</sup> Barkhuysen, Van Emmerik (n 16) 17-18.

<sup>99</sup> Bemelmans-Videc, 'Guaranteeing the authority and effectiveness of the European Convention on Human Rights' (n 81) para 37.

<sup>100</sup> 'Loi No. 2011-392 du 14 avril 2011 relative à la garde à vue', *Journal Officiel de la République Française*, No. 0089 p. 6610.

<sup>101</sup> *Salduz v Turkey*, Appl No. 36391/02 (27 November 2008) ECHR 2008, para 55.

<sup>102</sup> *Dayanan v Turkey*, Appl No. 7377/03 (ECtHR 13 October 2009), para 32.

firmed in a decision of July 2010<sup>103</sup> that the procedure of police custody in France did not comply with the Constitution because it disregarded the rights of the defence, and urged the legislator to amend the law. In October 2010, the ECtHR gave some guidance to the legislator as how to modify the law in the judgment *Brusco v France*<sup>104</sup>, and a new legislation was then adopted in April 2011. In some states, legislative provisions requires national courts and parliaments to take into account the Court's case-law when they judge or adopt new legal texts<sup>105</sup>.

Nevertheless, the *erga omnes* effect of the Court's judgments is limited by the fact that the Court ruled against one particular country taking into account a specific situation. Thus, it may be difficult for states to foresee if the practical details of a reform fully comply with the principles found by the judges of Strasbourg. For instance, the new provisions of the criminal code in France discussed above enable the suspect to be assisted by a lawyer during the interview with the magistrate, but the lawyer has no access to the documents gathered by the police. Thus, it is only in a possible subsequent case against France that the ECtHR could declare whether or not the new procedure complies with the requirements of the Convention.

### *ca. Institutional arrangements within states to execute the judgments*

The domestic capacity of states to execute the judgments of the Court is a key element to secure the Convention's rights. Therefore, the Committee of Ministers incites states to identify an authority to coordinate the process of execution of judgments<sup>106 107</sup>. In practice, states have adopted various solutions: while some of them assigned this role of a high-level governmental body or official (Italy, Austria), others devoted this task to the Ministry of Justice or its constituent body (the UK, Germany), or to the Ministry of Foreign Affairs (Romania, Turkey, France)<sup>108</sup>. Often, this task is devoted to the office of the Government Agent before the Court<sup>109</sup>, who also follows the Court's case-law and disseminate judgments against other states to the judiciary and the legislative power in order to draw conclusions from these judgments<sup>110</sup>.

The legislature is also required to respect and secure the Convention's rights. Actually, it has been demonstrated that a strong implication of national parliaments in the process of execution facilitates the implementation of adverse judgments<sup>111</sup>, and a pro-active approach of states to prevent potential violations of the Convention. In its report to the Parliamentary Assembly in 2010, the Rapporteur of the Committee for Legal Affairs and Human Rights, M. Pourgourides, described the UK's Joint Committee on Human Rights as a good practice of such a parliamentary mechanism, since it produces an annual and detailed report which assesses the adequacy of the measures adopted by the UK and underlines in specific reports cases where the UK has not taken sufficient

<sup>103</sup> Conseil Constitutionnel, *M. Daniel W et autres*, decision No. 2010-14/22 QPC (30 July 2010), *Journal Officiel* 31 juillet 2010, p. 14198.

<sup>104</sup> *Brusco v. France*, Appl No. 1466/07 (ECtHR 14 October 2010).

<sup>105</sup> Committee of Ministers of the Council of Europe, Steering Committee for Human Rights, Committee of experts on the reform of the Court, 'Draft CDDH report on measures taken by the member states to implement relevant parts of the Interlaken and Izmir declarations', DH-GDR(2012)R2 Addendum I, 31 October 2012, available at [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DHGDR\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DHGDR_en.asp) (last consultation on 24 February 2013) para 75.

<sup>106</sup> Committee of Ministers of the Council of Europe, 'Recommendation on efficient domestic capacity for rapid execution of judgments of the ECtHR', CM/Rec(2008)2, 6 February 2008, available at <https://wcd.coe.int/ViewDoc.jsp?id=1246081&Site=COE> (last consultation on 3 July 2012).

<sup>107</sup> Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Serhii Kovalov, 'Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties', doc. 13087, 7 January 2013, available at [http://assembly.coe.int/Communication/pressajdoc29\\_2012rev.pdf](http://assembly.coe.int/Communication/pressajdoc29_2012rev.pdf) (last consultation on 20 February 2013).

<sup>108</sup> Maria Suchkova, 'An analysis of the institutional arrangements within the Council of Europe and within certain Member States for securing the enforcement of judgments', *European Human Rights Law Review* (2011) 454.

<sup>109</sup> 'Draft CDDH report on measures taken by the member states to implement relevant parts of the Interlaken and Izmir declarations', DH-GDR(2012)R2 Addendum I (n 105) para 49.

<sup>110</sup> *Ibid* para 71.

<sup>111</sup> Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Christos Pourgourides, 'Report on the implementation of judgments of the European Court of Human Rights', doc. 12455, 20 December 2010, available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=12589&Language=EN> (last consultation on 3 July 2012), p. 39

measures of execution<sup>112</sup>. This oversight has also been exercised by National Human Rights Institutions (NHRIs)<sup>113</sup>. Some of them cooperate more closely with the Committee of Ministers, by sending opinions on whether or not the state had properly implemented judgments requiring the adoption of general measures, in the context of a pilot project<sup>114</sup>. For instance, the French National Consultative Commission for Human Rights together with the French Ombudsman (*Le Médiateur de la République*) sent an opinion to the Committee of Ministers claiming that the general measures adopted to implement the judgment *Frérot v France*<sup>115</sup> were not sufficient to comply with the judgment of the Court and suggested what measures should be therefore adopted<sup>116</sup>.

To finish with, domestic courts play also an important part. In this respect, some constitutional courts publish regularly newsletters to domestic courts with summaries of cases concerning both their own states and other ones<sup>117</sup>.

The finding of a violation of the Convention by the Court gives rise to an obligation to execute the judgment – or the friendly settlement, according to Article 46-1, through the adoption of individual and/or general measures. The principle is that states remain free to choose the adequate means to comply with the judgment under the supervision of the Committee of Ministers.

In the context of the individual measures, states have to put an end to the continuing violation, provide for a *restitutio in integrum* and pay a just satisfaction when awarded by the Court. This reflects the adjudicatory role of the Court, since it aims at restoring the position of the applicant to as it was before the breach.

In addition, states may be required to adopt general measures to put an end to the violation and prevent future ones. Formally, only the condemned state is bound by the obligation. However, other states have sometimes drawn conclusions from a judgment issued against another state because they face a similar problem, giving an *erga omnes* effect to the judgment of the Court, and illustrating the constitutional role of the Court.

## B. The supervision of the execution of judgments within the Council of Europe

Article 46-2 of the Convention states that the Committee of Ministers is responsible for the supervision of the execution of the Court's judgments. In the context of the adoption of Protocol No. 14, new Working Methods<sup>118</sup> were adopted and have been implemented since January 2011, and new tools empower the Committee to speed up the execution when problems have arisen. Moreover, while the Committee keeps the prominent role in the supervision of the execution, the other institutions of the Council of Europe take also an active part. After a short presentation of the new procedure before the Committee of Ministers (1), the tools that the institutions of the Council of Europe may use to speed up the process of execution will be discussed in more detail (2).

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<sup>112</sup> Ibid.

<sup>113</sup> Draft CDDH report on measures taken by the member states to implement relevant parts of the Interlaken and Izmir declarations', DH-GDR(2012)R2 Addendum I (n 105) para 24.

<sup>114</sup> Commissioner for Human Rights of the Council of Europe, 'Enhancing the role of National Human Rights Structures in the execution of the European Court of Human Rights' Judgments, debriefing and follow-up of the pilot project meeting', CommDH/NHRS(2008)7, 7 February 2008, available at <https://wcd.coe.int/ViewDoc.jsp?id=1282117&Site=CommDH> (last consultation on 3 July 2012).

<sup>115</sup> *Frérot v France*, Appl No. 70204/01 (ECtHR 12 June 2007).

<sup>116</sup> Commission nationale consultative des droits de l'Homme (CNCDH) and Médiateur de la République, 'Communication de la Commission nationale consultative des droits de l'Homme et du Médiateur de la République au titre de la Règle 9§2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables', *Arrêt Frérot c/. France, CEDH, 12 juin 2007*, Octobre 2008, available at [http://www.cncdh.fr/article368d.html?id\\_article=876](http://www.cncdh.fr/article368d.html?id_article=876) (last consultation on 3 July 2012).

<sup>117</sup> Draft CDDH report on measures taken by the member states to implement relevant parts of the Interlaken and Izmir declarations', DH-GDR(2012)R2 Addendum I, (n 105) para 72.

<sup>118</sup> Committee of Ministers of the Council of Europe, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Modalities for a twin-track supervision system', CM/Inf/DH(2010)37, 6 September 2010, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH\(2010\)37&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH(2010)37&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383) (last consultation on 3 July 2012).

## 1. The new procedure before the Committee of Ministers

The Committee of Ministers is the main body responsible for the supervision of the execution of the Court's judgments, which means that the control is political and collective<sup>119</sup>, like in the other regional systems<sup>120</sup>. This peer pressure aims at creating the feeling among states that they belong to a community of "like-minded" who accept the obligation to remedy the violations of the Convention<sup>121</sup>. The Rules of the Committee of Ministers adopted in 2001, and revised in 2006<sup>122</sup>, set the procedures to control the payment of the just satisfaction and the adoption of individual and general measures<sup>123</sup> during the "Human Rights" meetings<sup>124</sup>. At the end of the process, the Committee closes the supervision with a final resolution<sup>125</sup>.

In 2010, the Committee of Ministers replaced its Working Methods of 2004 by a twin-track procedure, in order to create a more transparent and efficient system of supervision. On the one hand, cases are in principle classified under the first track, the "standard procedure", under which the Committee of Ministers limits its control to verifying whether or not the respondent state has presented an action plan or report<sup>126</sup>. Under this "standard procedure", the Secretariat makes a conclusive assessment of the action report and proposes that the Committee adopts a final resolution closing the examination of the case<sup>127</sup>. On the other hand, the Committee of Minister may exceptionally decide to supervise cases requiring urgent individual measures, pilot judgments, cases raising major structural or complex problems, and interstate cases under the second track, namely the "enhanced procedure"<sup>128</sup>. The supervision of these cases are given priority over the cases under the "standard procedure"<sup>129</sup>, and the Secretariat is entrusted with a more active role in order to assist the states to adopt and implement the action plans<sup>130</sup>. Under the "enhanced procedure", the largest part (21,61%) of the cases concerns the excessive length of judicial proceedings, and the Federation of Russia (12% of the cases) and Turkey (13% of the cases) are the two main countries examined<sup>131</sup>.

The main idea of the twin-track procedure is to lighten the work of the Committee of Ministers in cases where no particular difficulty is foreseen. In the same time, it emphasises the freedom of states to choose the most appropriate means to comply with the judgments, since it is only under the "enhanced procedure" that the Committee may give indications on the individual or general measures required<sup>132</sup>. Moreover, the twin-track procedure standardises the supervision of friendly settlements by the Committee of Ministers, whose competence have been broadened to all the decisions of the Court, with the entry into force of Protocol No. 14 which modified Article 39-4 of the Convention. In its annual report published in 2012, the Committee of Ministers mentioned that the supervision of execution has become more efficient and transparent with the adoption of the twin-track procedure<sup>133</sup>. Indeed, the amount of repetitive cases has decreased in 2011 for the first time in

<sup>119</sup> Ruedin (n 9) 8.

<sup>120</sup> Hao Duy Phan, 'A blueprint for a Southeast Asian Court of Human Rights', *Asian-Pacific Law and Policy Journal* (2009) 428.

<sup>121</sup> Robert Harmsen, 'The reform of the Convention system: institutional restructuring and the (geo-) politics of human rights', in Jonas Christoffersen, Michael Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011) 135.

<sup>122</sup> Committee of Ministers of the Council of Europe, 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements', 10 May 2006, available at [http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Docs\\_a\\_propos/CMrules2006\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Docs_a_propos/CMrules2006_en.pdf) (last consultation on 3 July 2012).

<sup>123</sup> Ibid Rule No. 6.

<sup>124</sup> Ibid Rule No. 2.

<sup>125</sup> Ibid Rule No. 17.

<sup>126</sup> Committee of Ministers, 'Modalities for a twin-track supervision system' (n 118) para. 12. An action report is a report presenting the measures taken by a respondent state to implement a judgment of the Court and explaining why no measures or no further measures are necessary. An action plan is a plan presenting the measures a respondent state intends to take to implement a judgment of the Court.

<sup>127</sup> Ibid para 18.

<sup>128</sup> Ibid para 8.

<sup>129</sup> Committee of Ministers, 'Rules of the Committee of Ministers' (n 122) Rule No. 4.

<sup>130</sup> Committee of Ministers, 'Modalities for a twin-track supervision system', (n 118) para 20.

<sup>131</sup> Committee of Ministers, *Annual Report 2011* (n 2) 49.

<sup>132</sup> Elisabeth Lambert-Abdelgawad, 'L'exécution des arrêts de la Cour Européenne des Droits de l'Homme (2010)' (n 93) 948.

<sup>133</sup> Committee of Ministers, *Annual Report 2011* (n 2) 7.

ten years<sup>134</sup>, the number of pending cases has increased less rapidly in 2011 than the previous years<sup>135</sup>, and the Committee has increased by 80% the number of cases closed by a final resolution in 2011 as compared to 2010<sup>136</sup>. Therefore, the reforms already adopted have contributed to solve the issue of repetitive cases.

More generally, according to certain authors, the practice of the Committee of Ministers shows that it has undertaken a closer scrutiny of the individual and general measures adopted or proposed by the states. Indeed, it sometimes actively contributes to their identification, requires proofs showing how they have actually been implemented<sup>137</sup>, and considers whether or not states fulfil the obligation to prevent future violations through the adoption of adequate general measures<sup>138</sup>. Moreover, the reform of the procedures before the Committee has shown that attention is paid to the requirement of transparency. For instance, the Committee may now receive communications from civil society, NHRIs, the Commissioner for Human Rights of the Council of Europe, or the victim<sup>139</sup>, and publishes an annual report<sup>140</sup> and documents related to the execution of cases pending before it, such as the actions plans provided by the states<sup>141</sup>. Nevertheless and despite this evolution, concerns are still expressed about the lack of transparency during the procedure<sup>142</sup>.

## 2. Tools of the organs of the Council of Europe to speed up the execution of judgments

The usual method to supervise the execution of judgments is the twin-track procedure applied by the Committee of Ministers. However, when difficulties arise, the Committee of Ministers may use other tools to put pressure on states to comply with the judgments of the Court. Meanwhile, the Court, and to a lesser extent the Parliamentary Assembly and the Commissioner for Human Rights have started playing a more active role in the process of supervision of the execution of judgments.

### a. The Committee of Ministers

Before the entry into force of Protocol No. 14, the Committee of Ministers could only use four sets of measures to incite a state to execute the judgment of the Court. Afterwards, two new procedures were enshrined in the text of the Convention.

#### *aa. Existing measures before Protocol No. 14*

First of all, the Committee of Ministers can exercise diplomatic pressures on the reluctant state during the Human Rights meetings and through special contacts between the presidency of the Committee and the state authorities<sup>143</sup>. Within the twin-track procedure, this pressure has been enhanced since pending cases for execution are systematically put on the agenda of the Committee for the next "human rights" meeting. Nevertheless, the efficiency of this procedure depends on the political will of the members of the Committee of Ministers. In a more constructive way, the Committee of Ministers may also develop synergies with national authorities in order to assist them in the process of execution. For instance, in 2011, the Service of Execution of Judgments organised two round tables on specific topics related to the general theme of execution of the Court's judgments under the umbrella of the Human Rights Trust Fund<sup>144</sup>.

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<sup>134</sup> Ibid 9.

<sup>135</sup> Ibid 34.

<sup>136</sup> Ibid 35.

<sup>137</sup> Elisabeth Lambert-Abdelgawad, *L'exécution des arrêts de la Cour Européenne des Droits de l'Homme* (2<sup>nd</sup> edition, Council of Europe 2008) 33.

<sup>138</sup> Jean-François Flauss, 'L'effectivité des arrêts de la Cour Européenne des Droits de l'Homme: du politique au juridique ou vice-versa', *Revue Trimestrielle des Droits de l'Homme* (2009) 32.

<sup>139</sup> Committee of Ministers, 'Rules of the Committee of Ministers' (n 122) Rule No. 9.

<sup>140</sup> Ibid Rule No. 5.

<sup>141</sup> Committee of Ministers, *Annual Report 2011* (n 2) 19.

<sup>142</sup> Suchkova (n 108) 453.

<sup>143</sup> Ruedin (n 9) 30.

<sup>144</sup> Committee of Ministers, *Annual Report 2011* (n 2) 99.

Secondly, since 1987, the Committee has used Rule No. 16 to issue interim resolutions against states<sup>145</sup> when no measure has been adopted yet, or to encourage the state to continue taking active steps to execute the judgment. For instance, noting that no just satisfaction had been paid yet, the Committee of Ministers urged Turkey to proceed to the payment of the sums without delays<sup>146</sup> to the applicant who was found to be victim of a violation of the Convention in the *Xenides-Arestis v Turkey*<sup>147</sup>. Interim resolutions have also been used by the Committee to threaten a state openly reluctant to implement the judgment<sup>148</sup>. For example, the Committee of Ministers stated that it was “resolved to take all adequate measures against Turkey if Turkey failed once more to pay the just satisfaction awarded by the Court to the applicant”<sup>149</sup>, following the failure of Turkey to take measures to implement the judgment *Loizidou*<sup>150</sup>. These resolutions introduce more transparency in the process of supervision<sup>151</sup>, but are dependent on the political process<sup>152</sup>.

A third means, is the adoption of decisions and press releases to raise awareness of the public when problems of execution are less serious<sup>153</sup>. For instance, the Committee of Ministers adopted a press release concerning the execution of judgments about the problems relating to the functioning of justice in Albania, and encouraged the authorities to pursue their efforts<sup>154</sup>. Just as the interim resolutions, they publicise the difficulties, but may be more detailed and easier to adopt<sup>155</sup>.

Finally and in last resort, the Committee of Ministers is empowered under Article 3 of the Statute of the Council of Europe to suspend the rights of representation of a state or request it to withdraw from the organisation. The non-execution of a judgment could be interpreted as a violation serious enough to justify such a measure<sup>156</sup>. Nevertheless, it is an extreme option, which could turn out to be counterproductive insofar as it prevents from further cooperation with the state<sup>157</sup>. Indeed, it has only been partially put into practice once against Greece. However, in this case, the main issue was not the non-execution of a judgment of the Court, but the very specific situation after the military putsch in 1967<sup>158</sup>. Implicitly, the Committee threatened Turkey to apply this procedure in an interim resolution following the refusal to implement the judgment *Loizidou*<sup>159</sup>, but did not put it into practice<sup>160</sup>.

#### *ba. Procedures introduced by Protocol No. 14*

The first procedure is the possibility under Article 46-3 for the Committee of Ministers to make a referral to the Court for the interpretation of a final judgment. More precisely, the aim of this procedure is to end the deadlock when the jurisprudence of the Court is not clear, not to examine the measures taken to implement the judgment<sup>161</sup>. Its main advantages are the absence of delays and its possible deterrent effect, since the Court

<sup>145</sup> Ruedin (n 9) 31.

<sup>146</sup> Committee of Ministers, ‘Interim Resolution CM/ResDH(2010)33’, 4 March 2010.

<sup>147</sup> *Xenides-Arestis v Turkey*, Appl No. 46347/99 (ECtHR 7 December 2006).

<sup>148</sup> Lambert-Abdelgawad, 2008, *L’exécution des arrêts de la Cour Européenne des Droits de l’Homme* (n 137) 43.

<sup>149</sup> Committee of Ministers, Interim resolution ‘CM/ResDH(2003)174’, 12 November 2003.

<sup>150</sup> *Loizidou v Turkey*, Appl No. 15318/89 (18 December 1996), ECHR 1996-VI.

<sup>151</sup> Ruedin (n 9) 33.

<sup>152</sup> Lambert-Abdelgawad, 2008, *L’exécution des arrêts de la Cour Européenne des Droits de l’Homme* (n 137) 43.

<sup>153</sup> Ruedin (n 9) 35.

<sup>154</sup> Committee of Ministers of the Council of Europe, Press Release ‘Albania : Progress in the execution of judgments of the European Court of Human Rights concerning problems relating to the functioning of justice’, 934(2009), 8 December 2009, available at <https://wcd.coe.int/ViewDoc.jsp?id=1555757&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> (last consultation on 3 July 2012).

<sup>155</sup> Lambert-Abdelgawad, 2008, *L’exécution des arrêts de la Cour Européenne des Droits de l’Homme* (n 137) 43.

<sup>156</sup> Ibid 45.

<sup>157</sup> Ruedin (n 9) 37.

<sup>158</sup> Ibid 36.

<sup>159</sup> *Loizidou v. Turkey* (n 150), and Committee of Ministers, ‘Interim Resolution CM/ResDH(2001)80’, 28 July 1998.

<sup>160</sup> Ruedin (n 9) 37.

<sup>161</sup> Harris, David, et al (n 8) 836.

should be encouraged to issue clearer judgements on merits with regards to the general principles and their application to the particular case<sup>162</sup>. However, this referral should not be overestimated, since it was elaborated to be only exceptionally applied.

The second means introduced by Protocol No. 14 to speed-up the execution of judgments is the infringement procedure under Article 46-4 of the Convention. It is to be applied in exceptional circumstances, when the respondent state and the Committee of Ministers have failed to reach an agreement on the adequate measures to comply with the judgment, or when the state is unwilling or unable to take such measures. At the end of the procedure, the Court should issue a new judgment declaring whether or not the respondent state fulfilled its obligation under Article 46-1<sup>163</sup>. The purpose of this new procedure is therefore to fill the gap between the soft (interim resolutions) and nuclear (the expulsion from the Council of Europe) means at the disposal of the Committee of Ministers when a state is unwilling to comply with a judgment, and to enable the Court to assist the Committee of Ministers when the situation is blocked<sup>164</sup>. Moreover, it should create a deterrent effect both for the states, through the threat of its use, and the Court, which should issue more detailed judgments with regards to the general and individual measures that the state should adopt<sup>165</sup>. Finally, it should give a greater legitimacy at the national level to the government to take unpopular measures which are necessary to implement the judgment, such as budgetary allocations, or when it faces the opposition from the public opinion<sup>166</sup>.

However, many shortcomings have been identified in the procedure under Article 46-4. First of all, some technical issues limit its effectiveness. Indeed, the Committee of Ministers has the duty to close the supervision of the case when the Court does not find a violation, even if only one aspect of the obligation under Article 46-1 was assessed by the Court. To prevent that the Court examines only partially whether or not the state fulfilled its obligations under Article 46-1, the Committee should make sure that all the aspects of the obligation to execute the judgments are controlled by the Court<sup>167</sup>. Moreover, it is not self-evident that the interests of the victim would be defended properly, because its participation is not formally allowed during the proceeding. Nevertheless, the victim could use the procedure of the third party intervention laid down in Article 36-2 of the Convention to express its views<sup>168</sup>. Secondly, it is not sure if this procedure would be very effective because it may only apply when the non-execution results from the lack of political will of the state<sup>169</sup>, while the difficulties of execution are in general mainly due to technical problems. So far, the procedure has never been applied despite the existence of situations which could fall within the scope of Article 46-4. For instance, the UK has refused to implement the judgment *Hirst (No.2)*<sup>170</sup> since 2005 on the voting rights of prisoners, and the pilot-judgment *M.T. and Greens*<sup>171</sup> since 2010 on the same issue, and has justified its inaction by the role of the public opinion opposed to an amendment to the legislation. In this case, it appears that the Committee of Ministers has been reluctant to apply the infringement procedure, despite the calls from NGOs<sup>172</sup>.

Finally the consequences of the finding of a violation of Article 46 by the Court after an infringement procedure seem limited, because the case is only sent back to the Committee of Ministers for the supervision. Actually, the possibility of financial sanctions was discussed during the drafting process of Protocol No. 14, but it was

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<sup>162</sup> Lambert-Abdelgawad, 2005, *L'exécution des arrêts de la Cour Européenne des Droits de l'Homme* (n 11) 88.

<sup>163</sup> Ruedin (n 9) 402.

<sup>164</sup> Lambert-Abdelgawad, 2005, *L'exécution des arrêts de la Cour Européenne des Droits de l'Homme* (n 11) 90.

<sup>165</sup> Lambert-Abdelgawad, 2008, *L'exécution des arrêts de la Cour Européenne des Droits de l'Homme* (n 137) 59.

<sup>166</sup> Ruedin (n 9) 416.

<sup>167</sup> Ibid 411.

<sup>168</sup> Ibid 404.

<sup>169</sup> Lambert-Abdelgawad, 2005, *L'exécution des arrêts de la Cour Européenne des Droits de l'Homme* (n 11) 89.

<sup>170</sup> *Hirst (No. 2) v the UK*, Appl No. 74025/01 (6 October 2005), ECHR 2005-IX.

<sup>171</sup> *Greens and M.T. v the UK* (n 71).

<sup>172</sup> Secretariat of the Committee of Ministers of the Council of Europe, 'Communications from different NGOs (AIRE, UNLOK, PRI, PRT) in the case of Hirst No. 2 against the United Kingdom', DH - DD(2010)609E, 1 December 2010, available at <https://wcd.coe.int/ViewDoc.jsp?id=1714637&Site=CM> (last consultation on 3 July 2012).



finally rejected for the reason that the finding of a breach of the obligation to execute the judgment by the Court would itself represent a sufficient pressure on states<sup>173</sup>.

## b. The European Court of Human Rights

Under Article 46-2 of the Convention, the Committee of Minister is the organ of the Council of Europe responsible for the supervision of the execution of the Court's judgments. Nevertheless, the Court has used four main means to be active in this field: the control of the payment of a just satisfaction, the indications of the possible measures to execute the judgements, the pilot-judgment procedure, and the adoption of a second judgment of violation following the non-execution of a previous one.

### *aa. Practice of just satisfaction*

First of all, the Court indirectly supervises the execution of its own judgments through the practice of the award of a just satisfaction under Article 41. On the one hand, the Court may decide to dissociate the examination of the merits from the award of a just satisfaction in two different judgments. Thus, it waits for the state to take measures to realise the *restitutio in integrum* to comply with the first judgment, and subsequently analyses them in a second judgment. On the other hand, the Court may analyse in one judgment both the merits and the just satisfaction<sup>174</sup>. Until the mid-nineties, the Court applied the first option, dissociating the examination of the merits from the award of a just satisfaction, following the letter of Article 41<sup>175</sup>. Therefore, it proceeded *de facto* to the supervision of the execution of measures taken to fulfil the *restitutio in integrum*<sup>176</sup>. Afterwards, the second option, of examining the merits and the just satisfaction in the same judgment contrarily to the letter of Article 41, has been more frequently applied<sup>177</sup>. This practice, which enable the Court to deal more quickly with the cases, may however be criticised because it prevents it from controlling whether or not the general and individual measures would fulfil the obligation to provide for a *reparatio in intergrum*. Moreover, the recent practice of the Court to take decisions on the basis of Article 46-1 and Article 41 together shows that the payment of a just satisfaction cannot be the sole remedy to the violation<sup>178</sup>, and turns the award of money into a form of punitive sanction. This development, which secures that the applicant will receive a sum of money, may however be criticised because it obliges the Court to examine in detail the possibility to award a just satisfaction.

### *ba. Indication of possible measures of execution in the judgments*

Traditionally, and as expressed in the case *Ireland v the UK*<sup>179</sup>, the Court has been reluctant to propose indications or make injunctions to states to adopt general or individual measures to execute a judgment. The Court held the view that it was only empowered to order an award for compensation<sup>180</sup>.

However, the Court has become progressively more active and in some specific situations has given indications under Article 46 on individual and general measures. For instance, the Court pointed out in the case *Sejdovic v Italy*<sup>181</sup> that the reopening of the domestic proceedings could be an adequate individual measure to fulfil the obligation under Article 46. This activism of the Court with regard to the detailed indication of the measures that states may take to comply with the judgment is well illustrated when a systemic violation of the

<sup>173</sup> Wouter Vandenhole, 'Execution of judgments', in Paul Lemmens and Wouter Vandenhole, *Protocol No. 14 and the reform of the European Court of Human Rights* (Intersentia 2005) 105.

<sup>174</sup> Ruedin (n 9) 177.

<sup>175</sup> Frederik Sundberg, 'Le principe de l'octroi subsidiaire des dommages-intérêts - Coté Comité des Ministres', in Jean-François Flauss, Elisabeth Lambert-Abdelgawad, *La pratique d'indemnisation par la Cour Européenne des Droits de l'Homme* (Bruylant 2011) 30.

<sup>176</sup> Ruedin (n 9) 49.

<sup>177</sup> Ibid 178.

<sup>178</sup> Ibid 181.

<sup>179</sup> *Ireland v The UK*, Appl No. 5310/71 (18 January 1978) Series A no 25.

<sup>180</sup> Harris et al. (n 8) 862.

<sup>181</sup> *Sejdovic v Italy*, Appl No. 56581/00 (1 March 2006), ECHR 2006-II, para 119.

Convention is at stake. For instance in the case *Driza v Albania*<sup>182</sup> concerning land issues<sup>183</sup>, the Court identified the source of the systemic violation in a shortcoming in the Albanian legal order<sup>184</sup>, and then indicated the types of measures that the Albanian state could take, namely removing all the obstacles to the award of compensation and ensuring that the appropriate statutory, administrative and budgetary measures are adopted as a matter of urgency. Then, the Court detailed that the measures should include the adoption of the site plans for the property evaluation, and the designation of an adequate fund<sup>185</sup>.

Moreover, the Court has not only indicated the possible remedial measures, it has gone so far as ordering them in some cases. The ECtHR used this power of injunction initially in property cases, such as the case *Papamichalopoulos v Greece*<sup>186</sup>, so that the respondent state could either proceed to the restitution of the property, or, if it proved to be impossible, could pay the just satisfaction to the applicant in order to fulfil the *restitutio in integrum*<sup>187</sup>. Then, the Court has cumulatively ordered individual and general measures in addition to the payment of the just satisfaction<sup>188</sup>. Nevertheless, this practice to order the general and individual measures has been restricted to cases when the nature of the violation was such as to leave no real choice as to the measures required to remedy it. For instance, it ordered, the release of prisoners following an arbitrary detention in the cases *Assanidze and others v Georgia*<sup>189</sup> and *Ilascu and others v Moldova and Russia*<sup>190</sup>, or the financing of a gender reassignment surgery abroad following a violation of Article 8 in the case *L. v Lithuania*<sup>191</sup>, because in these cases, they were the only possibility to remedy the violations of the Convention.

For the moment, the Court has indicated and/or ordered individual and general measures in a rather restricted number of cases, when the identified measures constitute the only means to obtain the *restitutio in integrum* or to put an end to the continuing or systemic violation, and takes into account the right violated, the urgency of the situation and the seriousness of the violation<sup>192</sup>. Conversely, it may be inferred that when multiple solutions are foreseeable, there is no room for the Court to order specific measures<sup>193</sup>.

This activism of the Court, encouraged by the other institutions of the Council of Europe<sup>194</sup>, has been justified with several arguments, such as the constitutional role of the Court or the requirement under international human rights law to provide an access to individuals to an effective remedy following a violation of human rights<sup>195</sup>. For Steven Greer, the Court should go on being specific in its judgments, because it limits the political negotiations within the Committee of Ministers, and makes the execution process easier to monitor by the Committee of Ministers<sup>196</sup>. However, the activism of the Court in this field was also criticised, not only because of the fear that the competences of the Court and the Committee of Ministers would become unclear<sup>197</sup>, but also because the Court may not be equipped to determine the appropriate measures. Thus, the judgment would be more likely to be executed in a minimalist way, since the state would limit the examination of the possible indi-

<sup>182</sup> *Driza v Albania*, Appl No. 33771/02 (13 November 2007), ECHR 2007-V, para 126.

<sup>183</sup> Harris et al. (n 8) 863.

<sup>184</sup> *Driza v Albania* (n 182), para 122.

<sup>185</sup> Ibid. 126.

<sup>186</sup> *Papamichalopoulos and others v Greece* (n 26) para 38.

<sup>187</sup> Ruedin (n 9) 92.

<sup>188</sup> Vandenhole (n 173) 110.

<sup>189</sup> *Assanidze v Georgia*, Appl No. 71503/01 (8 April 2004), ECHR 2004-II, para 202-203.

<sup>190</sup> *Ilascu and others v Moldova and Russia*, Appl No. 48787/99 (8 July 2004), ECHR 2004-VII, para 490.

<sup>191</sup> See the case *L. v Lithuania*, Appl No. 27527/03 (11 September 2007), ECHR 2007-IV, para 74.

<sup>192</sup> Ingrid Nifosi-Sutton, 'The power of the European Court of Human Rights to order specific non-monetary relief: a critical appraisal from a right to health perspective', *Harvard Human Rights Journal* (2010) 67.

<sup>193</sup> Valerio Colandrea, 'On the power of the European Court of Human Rights to order specific non-monetary measures: some remarks in light of the *Assanidze*, *Broniowski* and *Sejdovic* cases', *7 Human Rights Law Review* 2 (2007) 402.

<sup>194</sup> See Parliamentary Assembly of the Council of Europe, 'Execution of judgments of the European Court of Human Rights', Resolution 1226(2000), 28 September 2000, available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta00/eres1226.htm> (last consultation on 3 July 2012); Committee of Ministers of the Council of Europe, 'Report of the evaluation group to the Committee of Ministers on the European Court of Human Rights', EG Court(2001)1, 27 September 2001, available at <https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr> (last consultation on 3 July 2012).

<sup>195</sup> Nifosi-Sutton (n 192) 68-69.

<sup>196</sup> Steven Greer, *The European Convention on Human Rights: achievements, problems and prospects* (Cambridge University Press 2006) 160-161.

<sup>197</sup> Jean-François Renucci, 'Mesures générales et/ou individuelles: l'ingérence de la Cour européenne des droits de l'Homme (année 2010)', *Recueil Dalloz* (2011) 193.

vidual and general measures to those identified by the Court, without assessing whether deeper reforms could be undertaken<sup>198</sup>. Moreover, it may be argued that the Court exceeds its power when it orders positive measures with budgetary consequences for the state. For instance, in the case *Cocchiarella v. Italy* dealing with the issue of excessive length of domestic proceedings, the Court stressed that the remedy should be accompanied by “adequate budgetary provisions”<sup>199</sup>.

### *ca. Pilot judgment procedure*

Thirdly, the Court participates in the execution of its own judgments in the most active way when it applies the “pilot-judgments procedure”. The creation of this procedure originates in the fact that the number of repetitive cases brought before the Court increased in the late eighties, for instance concerning the excessive length of domestic procedures in Italy<sup>200</sup>, and in the failure of some states to implement properly the Court’s judgments following the enlargement of the Council of Europe in the nineties. So that, the Committee of Ministers adopted on 12 May 2004 a resolution<sup>201</sup> calling the Court to identify in its own judgments any underlying systemic problems, and the sources of these problems<sup>202</sup>. Therefore, the Court itself introduced the so-called pilot-judgment procedure in the famous case *Broniowski v Poland*<sup>203</sup>. The procedure was then incorporated under Rule 61 of the Rules of the Court in 2011<sup>204</sup>, but not in the text of the Convention.

The main features of the pilot-judgment procedure are that the Court suspends the examination of all repetitive cases during the supervision of the pilot judgment by the Committee of Ministers, whose supervision is given priority under the “enhanced procedure”. Moreover, the general measures that states should take to implement the pilot case include the setting up of retroactive domestic remedies to deal with all similar cases<sup>205</sup>. In other words, the repetitive cases are in fact sent back to the national level, according to the principle of subsidiarity. The aim of the procedure is thus “to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the Convention right in question in the national legal order”<sup>206</sup>. Consequently, the Court works in the same way as a constitutional court, whose role would be to control the compatibility of the domestic legal order with the Constitution<sup>207</sup>.

Under the pilot-judgment procedure, the role of the Court in the supervision is twofold. Firstly, the Court identifies the causes of the systemic violation and orders general measures. However, the respondent state remains responsible for the identification of the practical and detailed measures to implement the judgment<sup>208</sup>. Secondly, the Court indirectly controls how the state has implemented the pilot judgment through the threat to reopen the frozen cases<sup>209</sup>.

Globally, the pilot-judgment procedure has appeared to be satisfactory insofar as systemic violations of the Convention, caused by legislative disposition or administrative practices, were put to an end. For instance,

<sup>198</sup> Béatrice Delzangles, *Activisme et autolimitation de la Cour Européenne des Droits de l’Homme* (LGDJ 2009) 406.

<sup>199</sup> *Cocchiarella v. Italy*, Appl No. 64886/01 (29 March 2006) ECHR 2006-V, para. 101.

<sup>200</sup> Harris et al (n 8) 851.

<sup>201</sup> Committee of Ministers, ‘Resolution on judgments revealing an underlying systemic problem’, Res(2004)3, 12 May 2004, available at <https://wcd.coe.int/ViewDoc.jsp?id=743257&Lang=en> (last consultation on 3 July 2012).

<sup>202</sup> Philip Leach, et al, *Responding to systematic human rights violations: an analysis of ‘pilot judgments’ of the European Court of Human Rights and their impact at national level* (Intersentia 2010) 10.

<sup>203</sup> *Broniowski v Poland*, Appl No. 31443/96 (22 June 2004), ECHR 2006-V.

<sup>204</sup> European Court of Human Rights, *Rules of the Court*, 1 May 2012, available at [http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT\\_EN\\_2012.pdf](http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_2012.pdf) (last consultation on 3 July 2012), Article 61.

<sup>205</sup> Ruedin (n 9) 391.

<sup>206</sup> *Hutten-Czapska v Poland*, Appl No. 35014/97 (19 June 2006), ECHR 2006-V, para 234.

<sup>207</sup> Markus Fyrnys, ‘Expanding competences by the judicial lawmaking: the pilot-judgment procedure of the European Court of Human Rights’, 12 *German Law Journal* 10 (2011) 1254; Colandrea (n 193) 403.

<sup>208</sup> Frederik Sundberg, ‘L’effectivité des recours internes suite à des arrêts pilotes’, in Gérard Cohen-Jonathan, et al, *De l’effectivité des recours internes dans l’application de la Convention Européenne des Droits de l’Homme*, (Bruyant 2006) 265.

<sup>209</sup> Ruedin (n 9) 50.

following the judgment *Scordino (No. 1) v Italy*<sup>210</sup>, in which the Court found that a legislative provision regulating compensation for expropriation by the state was insufficient to secure the rights protected under Article 6 and Article 1 of Protocol No. 1, the Constitutional Court of Italy declared that the law in question was unconstitutional. It shows how the cooperation of the Court with the national authorities can lead to changes in the legislation and national practices. The pilot-judgment procedure also contributed to the decrease of repetitive cases pending before the Court in 2011<sup>211</sup>.

However, this system has also been criticised for various reasons. First of all, the lack of legal basis and transparency of the procedure has been pointed out<sup>212</sup>, particularly because the procedure was not enshrined in the Convention itself<sup>213</sup>, but only included in Rule 61 of the Rules of the Court. Then, the Court has adopted a careful and inconsistent approach to the application of this procedure. For instance, in 2011, the Court formally applied the pilot judgment procedure in five cases<sup>214</sup>. However, there are numbers of 'quasi' pilot judgments, also called 'Article 46 judgments', such as the case *Manole and others v Moldova*<sup>215</sup>, where the Court identified the systemic violation, but did not prescribe general measures, and did not freeze all the other repetitive cases<sup>216</sup>. Sometimes, the Court expressly refers to the pilot judgment procedure, and invites the state to take general measures but does not freeze the repetitive cases, such in the judgment *Lukenda v Slovenia*<sup>217</sup>. As a result, it creates a sort of confusion regarding the nature and the procedure of the pilot judgment. Moreover, the choice to apply or not the procedure remains unclear, since it seems that the Court takes into account political considerations when it decides to apply it or not, such as the likeliness of the respondent state to implement the general measures<sup>218</sup>.

Furthermore, the Court has been criticised for being too active in the identification of the general measures, because it would interfere both with the latitude let to the state to decide how to implement the judgment<sup>219</sup>, and with the competences of the Committee of Ministers<sup>220</sup>. In practice, the Court has adopted a pragmatic approach with regard to the identification of the general measures. For instance, in the pilot judgment *Yuriy Nikolayevich Ivanov v Ukraine* the Court, after identifying the causes of the repetitive violations of Article 6 and Article 1 of Protocol No. 1, noted that "the structural problems are large-scale and complex in nature"<sup>221</sup> and let to the Committee of Ministers the task to indicate the general measures to be taken by the respondent state<sup>222</sup>, because the Committee is "better placed and equipped to monitor the measures to be adopted by Ukraine". However, the fact that the procedure was introduced by the Court following the Resolution of the Committee of Ministers of 12 May 2004<sup>223</sup> legitimises its activism. Nevertheless, the Court may lack the technical competences to identify the general measures, especially in complex cases<sup>224</sup>. Moreover, it appears that the pilot judgment procedure does not fit to all cases revealing a structural problem. Indeed, the problem has to be clearly identified, and the pilot judgment must exemplify all the other cases<sup>225</sup>.

It was also argued that the freezing of the repetitive cases is at the expense of individuals, creating an inequality between the one chosen for the pilot judgment and all the others waiting for the establishment of domestic remedies. There is a risk of denial of their rights if the judgment is finally not implemented<sup>226</sup>. Therefore,

<sup>210</sup> *Scordino (No. 1) v Italy*, Appl No. 36813/97 (26 March 2006), ECHR 2006-V.

<sup>211</sup> Committee of Ministers, *Annual Report 2011* (n 2) 10.

<sup>212</sup> Leach, *Responding to systematic human rights violations* (n 202) 29.

<sup>213</sup> Fyrnys (n 207) 1252.

<sup>214</sup> Committee of Ministers, *Annual Report 2011* (n 2) 10.

<sup>215</sup> *Manole and others v Moldova*, Appl No. 13936/02 (17 September 2009), ECHR 2009.

<sup>216</sup> Leach, *Responding to systematic human rights violations* (n 202) 24.

<sup>217</sup> *Lukenda v Slovenia*, Appl No. 23032/02 (6 October 2005), ECHR 2005-X.

<sup>218</sup> Leach, *Responding to systematic human rights violations* (n 202) 35.

<sup>219</sup> Fyrnys (n 207) 1249.

<sup>220</sup> Ibid 1251.

<sup>221</sup> *Yuriy Nikolayevich Ivanov v. Ukraine*, Appl No. 40450/04 (ECtHR 15 October 2009), para 90.

<sup>222</sup> Ibid para 92.

<sup>223</sup> Committee of Ministers, 'Resolution on judgments revealing an underlying systemic problem', 12 May 2004, (n 201).

<sup>224</sup> Sundberg (n 208) 266.

<sup>225</sup> Ibid 270.

<sup>226</sup> Fyrnys (n 207) 1258.

the Court and the Committee of Ministers should be strict enough to make sure that the domestic retroactive remedies are genuinely effective when they supervise the execution of a pilot-judgment.

Finally, no system of specific sanctions for the non-implementation of the pilot judgment has been adopted. The only means for the Court to add pressure on a reluctant state is to reopen the frozen cases<sup>227</sup>, particularly if the deadline mentioned in the judgment to take the general measures is exceeded. However, it appears on the contrary that the Court is willing to admit extensions of the time allowed to states in exceptional circumstances<sup>228</sup>.

#### *da. Second judgment on the same issue*

In addition to the application of the pilot judgment procedure in cases revealing a structural problem, the Court has also started to be active in the supervision of its own judgments when it exceptionally controls in a second judgment the measures adopted in a previous one related to the same issue.

The Court stated in the case *Mehemi (No. 2) v France*<sup>229</sup> that it refuses to control in a second judgment how a state had implemented a first one under Article 46-1<sup>230</sup>. However, in the case *Vermeire v Belgium*<sup>231</sup>, the Court controlled indirectly the execution of an earlier judgment in a subsequent case. In this judgment the Court found fresh violations of Article 8 and 14 of the Convention because the applicant was denied the status of heir of her grand-parents. The Court noted that Belgium had not taken sufficient measures to execute the earlier judgment *Marckx v Belgium*<sup>232</sup>, which stated the Belgian law concerning children born out of wedlock and unmarried mothers violated Article 8 in conjunction with Article 14 because the member of an "illegitimate" family should enjoy the guarantees of Article 8 on an equal footing with the members of a traditional family<sup>233</sup>.

Moreover, the fact that the Court refused to condemn states for the failure to correctly implement a previous judgment on the sole basis of Article 46 did not prevent it from examining a case raising a new issue undecided in the first judgment<sup>234</sup>. For instance, in the case *Mehemi v France*<sup>235</sup>, the Court found that a permanent exclusion of the applicant from the French territory which would separate him from his minor children and his wife was disproportionate to the aims pursued by the French government, and thus violated his right to family life (Article 8). To implement the judgment, the French government converted the permanent exclusion order into a ten-year exclusion order. Consequently, the applicant lodged a new application to Strasbourg to contest the legality of this order. In the second judgment *Mehemi v France (No. 2)*<sup>236</sup>, the Court stated that a new issue laid in the fact that the situation of the applicant and the restrictions to his private life had changed since the first judgment, and declared that it was competent to examine the merits. Therefore, the definition of the concept of "new issue" is of paramount importance to justify the attitude of the Court. For instance in the case *Lyons and others v the UK*<sup>237</sup>, the Court refused to consider the refusal of the national authorities to reopen a domestic proceeding following a judgement in Strasbourg as a new fact. It changed its jurisprudence in the judgment *Verein Gegen Tierfabriken Schweiz (VGT) (No. 2) v Switzerland*, where it stated that the refusal from the Federal Court to reopen the proceedings of the applicants following the first Court's judgment was a new fact which has not been examined by the Committee of Ministers during its supervision, and that therefore the

<sup>227</sup> Georg Ress, 'Les arrêts pilotes de la Cour Européenne des Droits de l'Homme: mesures générales et effectivité des recours internes', in Gérard Cohen-Jonathan, et al, *De l'effectivité des recours internes dans l'application de la Convention Européenne des Droits de l'Homme*, (Bruyant 2006) 283.

<sup>228</sup> European Court of Human Rights, 'Press release: "Romania: extension of time allowed"', 25 June 2012, available at [http://www.echr.coe.int/ECHR/homepage\\_en](http://www.echr.coe.int/ECHR/homepage_en) (last consultation on 10 July 2012).

<sup>229</sup> *Mehemi v France (No. 2)*, Appl No. 5370/99 (10 April 2003), ECHR 2003-IV, para 43.

<sup>230</sup> Lambert-Abdelgawad, 2008 *L'exécution des arrêts de la Cour Européenne des Droits de l'Homme* (n 137) 55.

<sup>231</sup> *Vermeire v Belgium* (n 19) para 25-26.

<sup>232</sup> *Marckx v Belgium* (n 12).

<sup>233</sup> Ruedin (n 9) 51.

<sup>234</sup> Maya Hertig Randall, Xavier-Baptiste Ruedin, , 'L'exécution des arrêts de la Court Européenne des Droits de l'Homme à la lumière de l'arrêt *Verein gegen Tierfabriken Schweiz (VGT) c Suisse* du 4 octobre 2007', 6 *Pratique Juridique Actuelle* (2008) 655.

<sup>235</sup> *Mehemi (No. 2) v France* (n 229), para 37

<sup>236</sup> *Ibid* 47.

<sup>237</sup> *Lyons and others v the UK*, Appl No. 15227/03 (8 July 2003), ECHR 2003-IX; Hertig, Ruedin, (n 234) 656.

Court could examine the merits of the case<sup>238</sup>. Nevertheless, if the Court explicitly mentioned that this second judgment was to be analysed in the light of the obligation to execute the previous one under Article 46-1, it did not go so far as sanctioning the violation under the heading of Article 46-1<sup>239</sup>.

The most recent practice of the Court may be interpreted as a demonstration of its willingness to be more active, when a new violation results from the failure by a state to properly implement a previous judgment. For instance, in the judgment *Greens and M.T. v the UK*<sup>240</sup>, the Court clearly stated in the operative part that the new violation had originated in the failure of the respondent state to execute the judgment *Hirst (No. 2) v UK*<sup>241</sup> on the same issue. In the case *Abuyeva v Russia*<sup>242</sup>, the Court condemned Russia for the failure to investigate an indiscriminate bombardment of a Chechen village. When it examined the obligations of Russia under Article 46, the Court expressed that the case *Abuyeva* was related to the judgment *Isayeva*<sup>243</sup>, and stated that the measures adopted for the execution of the judgment *Isayeva* were insufficient since no effective investigations had been carried out. Thus, it mentioned that a new independent investigation should be undertaken under the supervision of the Committee of Ministers. Finally, in the case *Emre v Switzerland (No. 2)*<sup>244</sup>, the Court combined for the first time in the operative part of the decision a finding of the violation of the rights of the Convention and of the violation of Article 46, after having considered that the measures adopted in the first judgment were not adequate<sup>245</sup>.

Interestingly, the Court also controls how domestic judges take into account its jurisprudence when they apply a new legislation adopted after a condemnation and endorsed by the Committee of Ministers. Thus, in the case *Fabris v France*, the Grand Chamber made it clear that 'whilst the essentially declaratory nature of the Court's judgments leaves it up to the State to choose the means by which to erase the consequences of the violation, it should at the same time be pointed out that the adoption of general measures requires the state concerned to prevent, with diligence, further violations similar to those found in the Court's judgments. This imposes an obligation on the domestic courts to ensure, in conformity with their constitutional order and having regard to the principle of legal certainty, the full effect of the Convention standards, as interpreted by the Court'<sup>246</sup>. In other words, the Court intervenes after the Committee of Ministers to make sure that domestic judges execute correctly a previous judgment.

This activism of the Court shows its willingness to be involved in the supervision of the execution of its own judgments. This was criticised for the reason that it runs the risk to create a sort of private proceeding at the disposal of individuals, parallel to the one introduced by Protocol No. 14 for the Committee of Ministers, i.e. the infringement procedure under Article 46-4 of the Convention when the same person comes twice to the Court<sup>247</sup>. However, these criticisms do not seem well-founded, because in cases where the Committee of Ministers had already closed the supervision of the case, such as in the judgment *Abuyeva v Russia*, no procedure under 46-4 could possibly be started. The only potential remedy for the applicant was to be found before the Court. Moreover, in cases where the Court found fresh violation of the Convention because of the non-execution of a judgment still pending before the Committee of Ministers, such as in the case *M.T. and Greens v the UK*, the fact that the Court adopted the pilot judgment procedure to address a systemic problem justified such a decision.

### c. The other institutions of the Council of Europe: the Parliamentary Assembly and the Commissioner for Human Rights

<sup>238</sup> *Verein Gegen Tierfabriken Schweiz (VGT) (No. 2) v Switzerland*, Appl No. 32772/02 (30 June 2009), ECHR 2009, para 67; Hertig, Ruedin (n 234) 658.

<sup>239</sup> Delzangles (n 198) 142.

<sup>240</sup> *Greens and M.T. v the UK* (n 71) para 5 of the operative part.

<sup>241</sup> *Hirst v the UK (No. 2)* (n 170).

<sup>242</sup> *Abuyeva and others v Russia*, Appl No. 27065/05 (ECtHR 2 December 2010).

<sup>243</sup> *Isayeva, Yusupova and Bazayeva v Russia*, Appl No. 57950/00 (ECtHR 27 February 2005).

<sup>244</sup> *Emre v Switzerland (No. 2)*, Appln No. 5056/10 (ECtHR 11 October 2011), para. 2 of the operative part.

<sup>245</sup> Nicolas Hervieu, 'Contrôle juridictionnel de la bonne exécution d'un arrêt et incertitudes sur l'étendue de la pratique', *Lettre 'Actualités Droits-Libertés' du CREDOF* (16 October 2011) 2.

<sup>246</sup> *Fabris v France* (n 70) para 75.

<sup>247</sup> Ruedin (n 9) 45.

Since 2000 the Parliamentary Assembly has engaged in a monitoring procedure of the execution of judgments<sup>248</sup> to contribute to the transparency and visibility of the process, and to shed light on the role that national parliaments may play in the execution of the Court's judgments. The idea is that national delegations to the Parliamentary Assembly should put pressure on the legislative and executive national powers when they are "back home"<sup>249</sup>.

Through the work of the Commission for Legal Affairs and Human Rights (CLAHR), the Parliamentary Assembly adopted reports, resolutions to the attention of the member states of the Council of Europe<sup>250</sup>, recommendations to the Committee of Ministers<sup>251</sup> and asked written and oral questions to the Committee of Ministers<sup>252</sup>. Since 2006, the Parliamentary Assembly has focused its work on judgments which have not been implemented for more than five years<sup>253</sup>. To fulfil this task, the Rapporteur of the CLAHR may undertake *in situ* visits in states where the judgments of the Court have not been properly executed<sup>254</sup>. However, the actual effects of such visits on the willingness of a state to implement the Court's judgments may be limited in reality. For instance, during an *in situ* visit in Bulgaria, the Rapporteur of the CLAHR, M. Pourgourides met the Justice Ministry and discussed the need to give practical effect to a "Concept Paper" on overcoming significant problems which had arisen with respect to the implementation of the Court's judgments<sup>255</sup>. Nevertheless, M. Pourgourides noted in his 7<sup>th</sup> Report that the Bulgarian authorities still had to provide information on progress achieved in putting this "Concept Paper" into practice<sup>256</sup>, which showed that the discussion had a limited effect. Nonetheless, it could be argued that the involvement of the Parliamentary Assembly in the process of supervision of the execution of the Court's judgments may at least put the question of the execution of the judgments on the agenda of national authorities.

Finally, identifying and promoting general measures, the Commissioner for Human Rights participates to a lesser extent to the supervision of the execution of the Court's judgments through its reports, recommendations and opinions on the execution of judgments to the Committee of Ministers and the Parliamentary Assembly<sup>257</sup>. Moreover, he may also shed light on the need to adopt individual measures in specific cases. For instance, in a report published in February 2012<sup>258</sup> following a visit to Ukraine in 2011, the Commissioner for Human Rights pointed out that the Court condemned Ukraine in several judgments for ill-treatment and torture exercised by police forces, and the lack of effective investigations in this respect<sup>259</sup>, and identified the key factors preventing effective investigations<sup>260</sup>, in order to facilitate the identification of the adequate general measures to comply with the requirements of the Court's judgments. He also stressed that the Court con-

<sup>248</sup> Vandenhole (n 173) 111.

<sup>249</sup> Lambert-Abdelgawad, 2008, *L'exécution des arrêts de la Cour Européenne des Droits de l'Homme* (n 137) 63.

<sup>250</sup> See for instance Parliamentary Assembly of the Council of Europe, 'Resolution on the implementation of judgments of the European Court of Human Rights', PACE/Res(2011)1787, 26 January 2011, available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17953&Language=EN> (last consultation on 3 July 2012).

<sup>251</sup> Ruedin, (n 9) 80; and see for instance Parliamentary Assembly of the Council of Europe, 'Recommendation to the Committee of Ministers on the Implementation of judgments of the European Court of Human Rights', PACE/Rec(2011)1955, 26 January 2011, available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17954&Language=EN> (last consultation on 3 July 2012).

<sup>252</sup> Lambert-Abdelgawad, 2008, *L'exécution des arrêts de la Cour Européenne des Droits de l'Homme* (n 137) 60.

<sup>253</sup> Andrew Drzemczewski, 'The Parliamentary Assembly's involvement in the supervision of the judgments of the Strasbourg Court', 28 *Netherlands Quarterly of Human Rights* 2 (2010) 171.

<sup>254</sup> Suchkova (n 108) 457.

<sup>255</sup> Pourgourides (n 111).

<sup>256</sup> Ibid. 10; Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 'Press release: Bulgaria promises better implementation of the European Human Right Court judgments', 29 May 2009, available at [http://assembly.coe.int/ASP/NewsManager/EMB\\_NewsManagerView.asp?ID=4679](http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4679) (last consultation on 3 July 2012).

<sup>257</sup> Ruedin (n 9) 82.

<sup>258</sup> Commissioner for Human Rights of the Council of Europe, Hammarberg, Thomas, 'Report following its visit to Ukraine from 19 to 26 November 2011', ComDH(2012)6, 23 February 2012, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2075485&SecMode=1&DocId=1883332&Usage=2> (last consultation on 3 July 2012).

<sup>259</sup> Ibid para 93.

<sup>260</sup> Ibid para 95.

demned Ukraine for the failure to conduct an effective investigation into the case of the journalist Gongadze in 2005<sup>261</sup>, and that the criminals had still not been brought to justice<sup>262</sup>.

The Commissioner for Human Rights can also intervene before the Committee of Ministers<sup>263</sup> to give some insights when difficulties arise with regard to the execution of the Court's judgment, and since the adoption of Protocol No. 14 he can intervene as a third party before the Court under Article 36-3. For instance, he submitted observations on the main features of refugee protection in Greece and give its conclusions to the Court based on two visits to Greece in 2008 and 2010<sup>264</sup> in the proceedings of the case *M.S.S. v Belgium and Greece*<sup>265</sup> related to the transfer of an asylum seeker from Greece to Belgium. Nevertheless, it should be borne in mind that these third party interventions are actually quite rare. So far, the Commissioner intervened only four times before the Court as a third party<sup>266</sup>. Moreover, the scope of the expertise that he could share with the Court is limited to cases where the question at stake is related to one issue that he studied in one particular country.

In principle, according to Article 46-2, the supervision of the execution of the Court's judgments is the task of the Committee of Ministers. It is submitted that while the adoption of the new Working Methods has facilitated this process of supervision, the procedures under Article 46-3 and 46-4 created by Protocol No. 14 proved to be insufficient to speed up the execution by states, and to establish intermediate means between the peer pressure and the extreme option of expulsion from the Council of Europe.

In addition, the other main institutions of the Council of Europe have also started playing a role in the process of supervision. With regard to the Court, the award of a just satisfaction, the indication of the possible measures of execution, the establishment of the pilot judgment procedure and the adoption of second judgments following the non-execution of a previous one, strengthen both its adjudicative and constitutional role.

Further, the Parliamentary Assembly and the Commissioner for Human Rights play, to a lesser extent a role in the process of execution. Nevertheless, the actual impact of their involvement in the process of execution does not appear to be decisive.

### III. Enhancing the implementation of the judgments of the European Court of Human Rights – Proposals for the reform of the system of execution

Generally speaking, states comply with the judgments of the European Court of Human Rights<sup>267</sup>. However, the system of supervision of the execution is threatened by three elements: the exceptional refusal of some states to implement the judgments, which may undermine the authority of the Court; the important amount of repetitive cases lodged to the ECtHR resulting from the failure of states to properly implement previous judgments, which overloads the Court<sup>268</sup>; and the existence of structural and systemic violations of the Convention within the member states.

Within the Council of Europe, a reflection of the reform of the Court to deal with these issues started after the entry into force of Protocol No. 11. A landmark in this process was the publication in 2006 of the Final Re-

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<sup>261</sup> *Gongadze v Ukraine*, Appl No. 34056/02 (28 November 2005), ECHR 2005-XI.

<sup>262</sup> Hammarberg, 'Report following its visit to Ukraine', (n 258) para 99.

<sup>263</sup> Committee of Ministers, 'Rules of the Committee of Ministers' (n 122) Rule 9.

<sup>264</sup> Commissioner for Human Rights of the Council of Europe, 'Third party intervention in the case *M.S.S. v Belgium and Greece*', CommDH(2010)22, 31 May 2010, available at <https://wcd.coe.int/ViewDoc.jsp?id=1661397> (last consultation on 3 July 2012), paras 4-5.

<sup>265</sup> *M.S.S. v Belgium and Greece*, Application No. 30696/09 (21 January 2011), ECHR 2011.

<sup>266</sup> Commissioner for Human Rights of the Council of Europe, 'List of third party intervention', available at [http://www.coe.int/t/commissioner/Activities/3PIntervention\\_en.asp](http://www.coe.int/t/commissioner/Activities/3PIntervention_en.asp) (last consultation on 3 July 2012).

<sup>267</sup> In 2011, 278 leading cases have been pending before the Committee of Ministers for more than five years. Committee of Ministers *Annual Report 2011* (n 2) 48.

<sup>268</sup> Repetitive complaints account for up to 70% of the Court's judgments. Michael O'Boyle, 'The future of the European Court of Human Rights', 12 *German Law Journal* 10 (2011) 1873.



port of the Group of Wise Persons<sup>269</sup>, which had been set up by the Heads of States and governments of the Council of Europe to make proposals of reform to ensure the long-term effectiveness of the control mechanism of the Convention. After the adoption of Protocol 14, the "Interlaken process" was launched in 2010, which aims at examining proposals of reform to ensure the effectiveness of the Convention mechanism in the long-run<sup>270</sup>. The first step was the adoption of the Interlaken Declaration, following the conference of high-level state representatives in 2010, which expressed that reforms were needed to achieve, *inter alia*, "the full and rapid execution of judgments of the Court and the effectiveness of its supervision by the Committee of Ministers"<sup>271</sup>. The Conference then met each year since the beginning of the "Interlaken process", in Izmir in 2011, and in Brighton in 2012.

The enhancement of the system of execution of judgments has two aspects. The first one concerns measures which could be taken at the national level to increase the capacity of national actors to apply the ECHR and the Court's judgments (A). The second aspect is related to the ability of the Council of Europe to foster state compliance with the judgments of the Court (B).

## A. Measures to be taken at national level

The first category of proposals encompasses a wide range of measures which could be taken at national level to enhance the "embeddedness" of the Convention in the national legal order and therefore remedy the violations of the Convention "at home"<sup>272</sup>. The idea is to influence the behaviour of the executive, the judiciary and the legislature to provide for remedies to individuals when the Convention's rights have been violated<sup>273</sup>, and to adopt a pro-active approach to the issue of the enforcement of the Court's judgments<sup>274</sup>. Therefore, this concept complements the principle of "subsidiarity" because it does not seek to enlarge the power of the institutions of the Council of Europe, but focuses on the role of national actors.

Proposals with regard to this issue have been put forward during the Interlaken process. The most innovative proposals are related to the role that national judges (2) and parliaments (3) could play in the process of execution. Therefore, they will be discussed in more detail than those related to the improvement of the mechanisms to monitor the execution of judgments of the Court (1).

### 1. Facilitating the monitoring of the execution of judgments

The Brighton Declaration made it clear that states should improve the monitoring of the execution of judgments of the Court in two possible directions<sup>275</sup>. Firstly, they should develop domestic capacities and mechanisms to ensure the rapid execution of the Court's judgments and share good practices in this respect. Secondly, they should set up action plans for the execution of the judgments as widely accessible as possible.

One possible means to achieve this goal would be to enhance the role of NHRIs in the process of execution of the judgments, because they constitute a national actors which could actively promote the implementation of the Convention at the national level<sup>276</sup>. Indeed, the Declaration of Interlaken highlighted their possible contribu-

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<sup>269</sup> Council of Europe, 'Report of the Group of Wise Persons to the Committee of Ministers', CM(2006)203, 15 November 2006, available at <https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM> (last consultation on 3 July 2012).

<sup>270</sup> High Level Conference on the Future of the European Court of Human Rights, *Interlaken Declaration*, 19 February 2010, available at [http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final\\_en.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf) (last consultation on 3 July 2012).

<sup>271</sup> Ibid para PP 9 iii).

<sup>272</sup> Laurence Helfer, R. 'Redesigning the European Court of Human Rights: Embeddedness as a deep structural principle of the European human rights regime', 19 *European Journal of International Law* 1 (2008) 149.

<sup>273</sup> Ibid 130

<sup>274</sup> Ibid 149.

<sup>275</sup> High Level Conference on the Future of the European Court of Human Rights, *Brighton Declaration*, 20 April 2012, available at <http://www.coe.int/en/20120419-brighton-declaration> (last consultation on 3 July 2012), para 29.

<sup>276</sup> Helfer (n 272) 156.

tion to this process, calling states to establish such a mechanism<sup>277</sup>. At the European level, the practice of communicating opinions to the Committee of Ministers on whether or not the state took the adequate measures to execute the judgment, already implemented by some of them in the pilot project with the Commissioner for Human Rights<sup>278</sup>, could be generalised to all the states party to the ECHR<sup>279</sup>. This could be systematic when the Committee supervises a pilot judgment<sup>280</sup>. At the national level, they could suggest which measures the state should adopt to implement the judgment, and control how they are implemented<sup>281</sup>. The existence of a network of NHRIs at the European level enables them to share good practices, and to foresee the possible consequences of a judgment delivered against another states for their own state, and therefore promote the *erga omnes* effect of the judgments of the Court.

## 2. Developing the role of domestic courts

A second way to foster the embeddedness of the Convention at the national level is to develop the role that national courts could play in remedying the violations of the Convention, and to promote a “dialogue between national judges and the Court in Strasbourg”. This would reinforce the idea that national judges have the primary responsibility for the enforcement of the Convention, according to the principle of subsidiarity. Besides the obligation to provide domestic remedies for Convention violations according to Article 13, which has apparently still not been implemented in all the member states of the Council of Europe<sup>282</sup>, proposals were made in many areas to increase the involvement of domestic judges in the execution of the ECtHR’s judgments. Two proposals will be examined in more detail: the transfer at the national level of the competence to award the just satisfaction, and the possibility for national judges to ask for an advisory opinion from Strasbourg.

### a. The transfer to the national level of the competence to award a just satisfaction

A first proposal made by the Group of Wise Persons the transfer of the competence to award a just satisfaction to national courts, in fact primarily in order to reduce the workload of the ECtHR<sup>283</sup>. The idea is also that national authorities are better placed than the Court to deal with this issue, because they have a better knowledge of the local conditions, which is particularly important when the case is complex<sup>284</sup>. For instance, in cases dealing with issues of property, the Court had to investigate the local conditions enabling reparation, which is time consuming. In the case *Gubiyev v Russia*, the Court found a violation of Article 1 Protocol 1 because of the destruction by federal servicemen of the property of the applicant. To decide the amount of money to be awarded to the applicant, the Court had to examine reports from experts which estimated the costs of the restoration and take into account the inflation rate<sup>285</sup>, which constituted a consequent work.

The reformed system of just satisfaction proposed by the Group of Wise Persons consists in the designation of a national judicial body<sup>286</sup>, which would be responsible for the determination of the amount of compensation

<sup>277</sup> *Brighton Declaration* (n 275) para 9.

<sup>278</sup> Commissioner for Human Rights of the Council of Europe, ‘Enhancing the role of National Human Rights Structures’ (n 114).

<sup>279</sup> Antoine Buyse, ‘The Court’s ears and arms: national human rights institutions and the European Court of Human Rights’, in Katrien Meuwissen, Jan Wouters (eds), *National Human Rights Institutions in Europe: Comparative, European and International Perspectives* (Intersentia forthcoming 2013) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2102496](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102496) (last consultation on 24 February 2013) 10.

<sup>280</sup> Gauthier De Beco, ‘La contribution des institutions nationales des droits de l’homme au renforcement de l’efficacité de la Cour Européenne des Droits de l’Homme’, 77 *Revue Trimestrielle des Droits de l’Homme* (2009) 190.

<sup>281</sup> *Ibid* 192.

<sup>282</sup> Bemelmans-Videc, ‘Guaranteeing the authority and effectiveness of the European Convention on Human Rights’ (n 81) 12.

<sup>283</sup> ‘Report of the Group of Wise Persons to the Committee of Ministers’ (n 269).

<sup>284</sup> Yves Haeck, Johan Vande Lanotte, ‘Desperately trying to keep the Titanic afloat – The reform proposals concerning the European Convention on Human Rights after Protocol 14: the report of the Group of Wise Persons... and some further proposals’, 1 *Inter-American and European Human Rights Journal* 1 (2008) 105.

<sup>285</sup> *Gubiyev v Russia*, Appl No. 29309/03 (ECtHR 8 March 2012), para 98.

<sup>286</sup> ‘Report of the Group of Wise Persons to the Committee of Ministers’ (n 269) para 98.

in accordance with the Court's case law<sup>287</sup>. To avoid the worsening of the situation of the applicant, safeguards were foreseen. In the first place, the Court could exceptionally decide to award itself a just satisfaction if this is necessary to ensure an effective protection of the victim<sup>288</sup>. Moreover, the applicant could contest the amount awarded by the domestic court if it appears that the sums are not awarded in due time or not sufficient<sup>289</sup>.

This proposal, which seems promising to reduce the workload of the Court, has been criticised for three main reasons. First of all, practical obstacles may limit its possible implementation: a well-functioning judiciary is necessary to ensure that the applicant would receive the adequate amount of money in due time<sup>290</sup>, and national legal systems may be ill-equipped to deal with the new procedure. National reforms may therefore be required, which could take a long time<sup>291</sup>. Secondly, it is not definitive whether the reform would improve the situation of the applicant, because, the claimant would be forced to go back to the national level to receive the award of money while he already exhausted the domestic remedies to lodge a complaint in Strasbourg<sup>292</sup>. As a result, the reform could ultimately have the negative effect of lengthening the procedure for the applicant. Moreover, there is a risk that national courts apply different standards when they grant a just satisfaction, particularly because the jurisprudence of the Court itself is not very coherent<sup>293</sup>. For instance, in the cases *Karakas and Yesilirmak v Turkey*<sup>294</sup> and *Colak and Filizer v Turkey*<sup>295</sup>, the Court found that the applicants had been subjected to ill-treatment in police custody. However, while the Court awarded 5,000 Euro in the first case, 12,000 Euro were awarded in the second one. Finally, the gains foreseen may be limited if the applicants systematically contest the sums allowed at the national level to the Court<sup>296</sup>.

Nevertheless, the transfer of the competence to award a just satisfaction at national level could be a solution to lighten the work of the Court if safeguards are established to make sure that the applicant receives an adequate amount of money in due time. The Court could issue guidelines on the award of a just satisfaction to the national bodies in charge of the payment to ensure the equal treatment of victims. Moreover, unsatisfied applicants could appeal the decision of the national body to the ECtHR, which could decide to review the award if it clearly departs from the guidelines. Eventually, to make sure that the award is paid in due time by the state, the Committee of Ministers could continue to supervise the execution of the payment.

## b. Request of an advisory opinion from Strasbourg

The second proposal to enhance the embeddedness of the Convention at the national level is to grant to domestic courts the right to request an advisory opinion from the ECtHR<sup>297</sup>. The aim of such a procedure would be to facilitate the implementation of the Convention by national courts when the case-law of the ECtHR is not coherent, or when the issue has never reached Strasbourg yet. In the first deliberations, the Group of Wise Persons examined the idea of a preliminary ruling, such as the existing mechanism within the EU, which enables domestic courts to request to the European Court of Justice (ECJ) to issue a preliminary ruling on the interpretation of the EU law<sup>298</sup>. This interpretation by the ECJ is considered part of the EU norm itself and the domestic is required to apply it to the particular case. The Group of Wise Persons rejected this system because

<sup>287</sup> Ibid para 99.

<sup>288</sup> Ibid para 96.

<sup>289</sup> Ibid para 99.

<sup>290</sup> Ellen Keller, Andreas Fischer, Daniela Kühne, 'Debating the future of the European Court of Human Rights after the Interlaken Conference: two proposals', 21 *The European Journal of International Law* 4 (2010) 1040

<sup>291</sup> Wilhelmina Thomassen, 'The relations between the Court and states parties to the Convention', in 'The future of the European Court of Human Rights – San Marino Colloquy', 28 *Human Rights Law Journal* (2007) 23.

<sup>292</sup> Ibid 23.

<sup>293</sup> Alastair Mowbray, 'Faltering steps on the path to reform the Strasbourg enforcement system', 7 *Human Rights Law Journal* 3 (2007) 616.

<sup>294</sup> *Karakas and Yesilirmak v Turkey*, Appl No. 43925/98 (ECtHR 28 June 2005).

<sup>295</sup> *Colak and Filizer v Turkey*, Appl No. 32578/96 and 32579/96 (ECtHR 8 January 2004).

<sup>296</sup> Jean-Paul Costa, 'Comments on the Wise Person's report from the perspective of the European Court of Human Rights', in 'The future of the European Court of Human Rights – San Marino Colloquy', 28 *Human Rights Law Journal* (2007) 15.

<sup>297</sup> *Brighton Declaration* (n 275) para 12 d).

<sup>298</sup> *Treaty on the Functioning of the European Union*, 2009, Article 267.

it was perceived as not being compatible with the existing system of the Convention<sup>299</sup>, based on the principle of exhaustion of domestic remedies<sup>300</sup>, or because it would increase the Court's workload and lengthen the proceedings<sup>301</sup>. Instead, the Group of Wise Persons proposed to establish a system of advisory opinions, to allow the ECtHR to interpret the Convention at the request of a domestic court, but without a binding force<sup>302</sup>.

In January 2009, the Norwegian and Dutch experts to the Reflection Group for the follow-up of the reform of the Court set up within the Committee of Ministers<sup>303</sup>, suggested a proposal in this respect. The mechanism proposed by the Norwegian and Dutch experts built on those of the Group of Wise Persons, since it was still characterised by a high degree of flexibility allowed to the Court, and strict conditions of submission by the national courts: only the highest or constitutional courts would be entitled to submit a request to the ECtHR<sup>304</sup>, the opinion would not bind domestic courts<sup>305</sup>, and the ECtHR would enjoy full discretion to refuse to deal with a request<sup>306</sup>. However, while the Group of Wise Persons mentioned that the Court would only examine questions of principle or of general interest<sup>307</sup>, the Norwegian and Dutch proposal narrowed down the scope of the mechanism to cases of potential systemic or structural problems<sup>308</sup>. Both proposals secured the possibility for all states to submit written submission to the Court<sup>309</sup>, and the Norwegian and Dutch proposal specified that the existence of an advisory opinion should not restrict the right of individuals to bring the same question before the Court under Article 34 of the Convention<sup>310</sup>.

The Brighton Conference endorsed the possibility of establishing an optional system of advisory opinions in a separate Protocol to the Convention and invited the Committee of Ministers to draft an optional protocol to the Convention by the end of 2013<sup>311</sup>. Consequently, member states of the Council of Europe have negotiated a Protocol no. 16 in 2013<sup>312</sup>. The Court and the Committee of Ministers expressed their support to the establishment of such a mechanism, because it would institutionalise the dialogue between the national jurisdictions and the Court of Strasbourg<sup>313</sup>, and reinforce the authority of the ECtHR towards the national Courts<sup>314</sup>. Moreover, it would enable the Court to rule on a point of law in a more general way than when it issues a judgment in a given case, and therefore to systematise and rationalise its case law<sup>315</sup>. The mechanism under the draft Protocol No. 16 is very similar to the other proposals. The advisory opinion would not have the purpose to allow the Court to review the legislation in abstract but would be based on a particular case and deal with a question of

<sup>299</sup> Haeck, Vande Lanotte (n 284) 116.

<sup>300</sup> 'Report of the Group of Wise Persons to the Committee of Ministers' (n 269) para 80.

<sup>301</sup> Thomassen (n 291) 22.

<sup>302</sup> 'Report of the Group of Wise Persons to the Committee of Ministers' (n 269) para 81.

<sup>303</sup> Committee of Ministers of the Council of Europe, Steering Committee for Human Rights, Committee of experts on the reform of the Court, 'Report on the proposal to extend the Court's jurisdiction to give advisory opinions', DH-GDR(2011), R8 Appendix VII, 2-4 November 2011, available at [http://www.coe.int/t/dghl/standardsetting/cddh/DH\\_GDR/DH-GDR\\_8th\\_Appendix%20VII.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/DH_GDR/DH-GDR_8th_Appendix%20VII.pdf) (last consultation on 3 July 2012).

<sup>304</sup> 'Report of the Group of Wise Persons to the Committee of Ministers' (n 269) para. 86; Committee of Ministers of the Council of Europe, Steering Committee for Human Rights, 'Final Report on measures requiring amendments of the European Convention on Human Rights', CDDH(2012)R74 Addendum I, 15 February 2012, available at [http://www.coe.int/t/dghl/standardsetting/cddh/Meeting%20reports%20committee/74\\_Final\\_Report\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/Meeting%20reports%20committee/74_Final_Report_en.pdf) (last consultation on 3 July 2012), Appendix V, para 2 b).

<sup>305</sup> 'Report of the Group of Wise Persons to the Committee of Ministers' (n 269) para 82; Steering Committee for Human Rights, 'Final Report on measures requiring amendments of the European Convention on Human Rights' (n 304) Appendix V, para 2 c) and 2g).

<sup>306</sup> 'Report of the Group of Wise Persons to the Committee of Ministers' (n 269) para 86; Steering Committee for Human Rights, 'Final Report on measures requiring amendments of the European Convention on Human Rights' (n 304) Appendix V, para 2 d).

<sup>307</sup> 'Report of the Group of Wise Persons to the Committee of Ministers' (n 269) para 86.

<sup>308</sup> Steering Committee for Human Rights, 'Final Report on measures requiring amendments of the European Convention on Human Rights' (n 304) Appendix V, para 2 a).

<sup>309</sup> Ibid Appendix V, para 2 e).

<sup>310</sup> Ibid Appendix V, para 2 i).

<sup>311</sup> *Brighton Declaration* (n 275) para 12 d).

<sup>312</sup> 'Draft Protocol No. 16 to the Convention', DH-GDR(2012)R2 Addendum V (n 6).

<sup>313</sup> O'Boyle (n 268) 1874.

<sup>314</sup> Ibid 1875.

<sup>315</sup> Nicholas A. J. Croquet, 'The European Court of Human Rights' norm-creation and norm-limiting processes: resolving a normative tension', 17 *Columbia Journal of European Law* 2 (2011) 370.

principle relating to the interpretation or application of the rights and freedom defined in the Convention<sup>316</sup>. The Commissioner for Human Rights would be allowed to intervene to the proceedings, as well as any other member state or person similarly to the system of third party intervention<sup>317</sup>. However, the Court would have to give reasons if it refuses an advisory opinion from a national court. This is supposed to reinforce the dialogue between the Court and domestic judicial systems<sup>318</sup>. The advisory opinion would not be binding<sup>319</sup>, but it is expected that, insofar as the opinion would form part of the jurisprudence of the Court, the opinion would have the *res interpretata* authority<sup>320</sup>.

If the adoption of this Protocol No. 16 is desirable, some aspects of the proposed mechanism remain controversial. First of all, it is not certain whether or not the workload of the Court would actually decrease, especially if national courts eventually decide not to follow the Court's opinions<sup>321</sup>. From the point of view of the applicant, the proceedings could be unnecessarily lengthened, if the national court departs from the decision of Strasbourg<sup>322</sup>. Moreover, if the right of individual petition is maintained when the domestic court departed from the advisory opinion<sup>323</sup>, attention should be paid to defining how the Court would have to deal with the case subsequently when the domestic Court partially followed the advisory opinion.

From the perspective of the Court, the non-binding nature of the advisory opinion is also problematic. On the one hand, a refusal by national courts to follow the advisory opinion could undermine the authority of the rulings of the Court<sup>324</sup>. Moreover, it does not seem coherent, considering the purpose of the system not to grant binding effect to the opinions, since national courts would take the initiative to request the view from Strasbourg only in cases where it appears that they cannot decide themselves. On the other hand, some have argued that the recognition of a formal binding effect would be unnecessary<sup>325</sup>, because advisory opinions of international courts, such as the International Court of Justice and the Inter-American Court of Human Rights (IACHR), enjoy an "undeniable legal effect"<sup>326</sup>. However, one may object that these mechanisms are not comparable with the proposal for the ECtHR. While the IACHR for instance, may interpret the American Convention at the request of a state, or another body of the Organisation of American States<sup>327</sup>, the ECtHR would have jurisdiction to interpret the Convention on the basis of disputes. Indeed, it appears that the proposed system of advisory opinion under the ECtHR would be very similar to the system of preliminary ruling under the ECJ, because the nature of the opinion would not be different from the rest of the case-law. Since the distinction between the two forms of decision seem artificial, and it would be more coherent to grant a binding force to the advisory opinions from Strasbourg, just as those from Luxembourg.

<sup>316</sup> 'Draft Protocol No. 16 to the Convention', DH-GDR(2012)R2 Addendum V (n 6) Article 1.

<sup>317</sup> Ibid Article 3.

<sup>318</sup> Committee of Ministers of the Council of Europe, Steering Committee for Human Rights, Committee of experts on the reform of the Court, 'Draft explanatory report to Protocol No. 16', DH-GDR(2013)R3 Addendum I, 15 February 2013, available at [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DHGDR\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DHGDR_en.asp) (last consultation on 24 February 2013) para 15.

<sup>319</sup> 'Draft Protocol No. 16 to the Convention', DH-GDR(2012)R2 Addendum V (n 6) Article 5.

<sup>320</sup> 'Draft explanatory report to Protocol No. 16', DH-GDR(2013)R3 Addendum I (n 318), para 27.

<sup>321</sup> Steering Committee for Human Rights, 'Final Report on measures requiring amendments of the European Convention on Human Rights' (n 304) Appendix V, para 4; O'Boyle (n 268) 1875.

<sup>322</sup> European Court of Human Rights, 'Reflection paper on the proposal to extend the Court's advisory jurisdiction', 2012, available at [http://www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions\\_en.pdf](http://www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions_en.pdf) (last consultation on 3 July 2012), para 11;

<sup>323</sup> 'Draft explanatory report to Protocol No. 16', DH-GDR(2013)R3 Addendum I (n 318), para 25.

<sup>324</sup> Steering Committee for Human Rights, 'Final Report on measures requiring amendments of the European Convention on Human Rights' (n 304) Appendix V, para 4.

<sup>325</sup> European Law Institute, 'Statement on case-overload at the European Court of Human Rights', 6 July 2012, available at <http://www.europeanlawinstitute.eu/projects/publications/> (last consultation on 24 February 2013) para 61.

<sup>326</sup> European Court of Human Rights, 'Reflection paper' (n 322) para 44.

<sup>327</sup> Under Article 64 of the American Convention of Human Rights, the IACHR may issue an advisory opinion on the interpretation of the American Convention or of another treaty concerning the protection of human rights in the American states, or on the compatibility of a domestic law with these instruments at the request of states and organs of the Organisation of American States or on its own initiative. Julie Calidonio Schmid, 'Advisory opinions on human rights: moving beyond a pyrrhic victory', 16 *Duke Journal of Comparative and International Law*, (2006) 425

Following this point of view, some NGOs proposed to extend the binding force of the advisory opinions, not only to the respondent state, but to all states party to the Convention<sup>328</sup>. This mechanism, seen as unrealistic by some authors, would nevertheless reflect the most recent position of the Parliamentary Assembly on the authority of the Court's judgments<sup>329</sup>, insofar as it would only extend the *res interpretata* authority of the Court's judgments to the advisory opinions. In other words, this would only reflect the idea that the advisory opinions of the Court are part of its case-law and are to be taken into account when states 'secure' the Convention's rights under Article 1.

Finally, a restriction of the scope of the advisory opinions to structural problems does not seem justified. On the contrary, the possibility for the Court to rule on any dispute would enable it to interpret the Convention in a way which sets the minimum standards that states should respect.

### 3. Enhancing the role of national parliaments

A third means put forward to improve states' compliance with the Court's judgments, is the enhancement of the role of domestic parliaments in the process of execution. According to Philip Leach, "the involvement of national parliaments in the implementation of the European Court judgments is certainly underutilised"<sup>330</sup>. National parliaments may intervene in two ways in the execution of the Court's judgments: they can hold governments accountable for the fulfilment of their obligations to execute the Court's judgments<sup>331</sup> and make sure that domestic legislation complies with the case-law of the Court.

#### a. Control by national parliaments of the execution by the governments

First of all, besides the fact that parliaments may have to implement remedial measures to comply with the Court's judgments through the adoption or revision of the legislation, they may also exercise a pressure on their governments to ensure that the appropriate measures are adopted. They may fulfil this task through two main procedures: the oversight of the implementation of appropriate measures by the competent authorities and the scrutiny of the content of the proposed measures<sup>332</sup>. Acknowledging the proposition of the Steering Committee for Human Rights<sup>333</sup>, the Brighton Declaration insists on these roles and "encourages states to facilitate the important role of national parliaments in scrutinising the effectiveness of implementation measures taken"<sup>334</sup>.

Several means may be put into practice to enable parliaments to fulfil these tasks. Firstly, they could be more involved in the identification of the required measures through the formulation and review of the "action plans" that the governments have to establish<sup>335</sup>. Secondly, they could pay more attention to how the measures are actually implemented through the publication of reports, and the possibility to ask questions to their gov-

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<sup>328</sup> NGOs, 'Ensuring the long-term effectiveness of the European Court of Human Rights: NGOs comments on the Group of Wise Person's Report', in 'The future of the European Court of Human Rights – San Marino Colloquy', 28 *Human Rights Law Journal* (2007) 31; NGOs, 'Joint NGO comments on the drafting of Protocols 15 and 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms', 16 November 2012, available at <http://www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/EHRAC/Advocacy/Draft%20Protocols%2015%20and%2016%20to%20the%20ECHR%20-%20Joint%20NGO%20submission%20-%2004%20October%202012.pdf> (last consultation on 24 February 2013).

<sup>329</sup> Bemelmans-Videc, 'Guaranteeing the authority and effectiveness of the European Convention on Human Rights' (n 81).

<sup>330</sup> Philip Leach, 'On reform of the European Court of Human Rights', 6 *European Human Rights Law Journal* (2009) 734.

<sup>331</sup> Drzemczewski (n 253) 178.

<sup>332</sup> Pourgourides (n 111) 39.

<sup>333</sup> Council of Europe, Steering Committee for Human Rights, 'Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers', CDDH(2012)R74 Addendum III, 15 February 2012, available at [http://www.coe.int/t/dghl/standardsetting/cddh/Meeting%20reports%20committee/74\\_Contribution\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/Meeting%20reports%20committee/74_Contribution_en.pdf) (last consultation on 3 July 2012), para 14 i).

<sup>334</sup> Brighton Declaration (n 275) para 29 a) iii).

<sup>335</sup> Leach, 'On reform of the European Court of Human Rights' (n 330) 734.

ernment and hold regular debates on this issue<sup>336</sup>. According to the Rapporteur of the Committee for Legal Affairs and Human Rights, parliaments could establish a specific structure dealing with human rights issues to control the execution of judgments by governments. For instance, the establishment of the Joint Committee on Human Rights (JCHR) within the Parliament of the United Kingdom has been shown as a good example of how parliaments may hold their governments accountable for their international obligations, because it publishes an annual report on the adequacy of the measures adopted by the UK and specific reports on cases where the measures of execution are considered insufficient<sup>337</sup>. However, this form of control is workable only in countries where there is a pre-existing culture of accountability of the executive to the legislative body<sup>338</sup>.

## b. Inclusion of the Court's case-law into the domestic legislation

The second proposal made to enhance the execution of the Court's judgments through the involvement of national parliaments is the inclusion of the Court's case-law into the domestic legislation<sup>339</sup>. Indeed, since the violation of the Convention sometimes precisely consists in the existence or in the lack of a domestic law, parliaments may have to amend or enact laws to implement the Court's judgments<sup>340</sup>. Moreover, national parliaments may adopt a more pro-active approach with regard to the judgments of the ECtHR, and seek to identify inconsistencies in the existing legislation with the Convention as interpreted by the Court. Thus, to avoid future violations of the Convention, they would give an *erga omnes* effect to the case-law of the Court by taking into account judgments issued against other states when they face similar problems. Such an approach has notably been encouraged by the Committee for Legal Affairs and Human Rights of the Parliamentary Assembly<sup>341</sup>, and endorsed by the Parliamentary Assembly, which proposes that the parliamentary structure dealing with human rights scrutinize systematically the compatibility of the draft legislation with the case-law of the ECtHR<sup>342</sup>.

Nevertheless, it may be argued that parliaments can put their government under pressure only if parliamentarians are already sensitive to human rights issues<sup>343</sup>. Thus, some promote the idea that it is necessary to create a culture of human rights among them, through the regular organization of seminars for instance. However, it should be kept in mind that even parliamentarians familiar with the Convention may be hostile to the adoption of legislative amendments to execute the Court's judgments. For instance, following the judgment *M.T. and Greens*<sup>344</sup>, two consultations within the British Parliament were organised in January and February 2011, which resulted in the refusal to modify the legislation by the majority of the parliamentarians<sup>345</sup>. Thus, raising awareness of parliamentarians may not be a sufficient measure to foster state compliance with the judgments of the Court. Actually, the focus on parliamentarians to promote compliance with the judgments of the Court may be too narrow a perspective. While it constitutes an important dimension for the inclusion of the Court's case-law into the domestic legislation, a more comprehensive approach to the law-making process should be adopted. Indeed, in many states, other bodies than parliamentary ones may scrutinise the compatibility of the existing and draft-law with the Convention, such as constitutional courts, councils of state, NHRIs and other advisory bodies. Thus, it could be suggested that each state identifies which internal mechanisms should systematically scrutinise the compatibility of the draft legislation and regularly the compatibility of the existing laws with the Convention, without requiring that it emanates from the parliament and regularly review

<sup>336</sup> Committee of Ministers, *Annual Report 2011* (n 2) 101.

<sup>337</sup> Pourgourides (n 111) 39.

<sup>338</sup> Ibid 461.

<sup>339</sup> *Brighton Declaration* (n 275) para. 9) d) ii).

<sup>340</sup> For the modification of an existing law, see for instance the case *Dudgeon v the UK* (n 87), and for the adoption of a new legislation, see the case *Ravon and others v France* (n 88).

<sup>341</sup> Bemelmans-Videc, 'Guaranteeing the authority and effectiveness of the European Convention on Human Rights' (n 81) p. 15.

<sup>342</sup> Parliamentary Assembly of the Council of Europe, 'Guaranteeing the authority and effectiveness of the European Convention on Human Rights' (n 80) para 4.

<sup>343</sup> Suchkova (n 108) 461.

<sup>344</sup> *Greens and M.T. v the UK* (n 71).

<sup>345</sup> House of Commons of the United Kingdom, Isobel White, *Library standard note: prisoners' voting rights*, SN/PC/01764, 7 September 2011, available at <http://www.parliament.uk/business/news/2011/february/mps-debate-voting-by-prisoners> (last consultation on 3 July 2012).

the existing law with the ECtHR's case-law. Moreover, when parliaments refuse to adopt a legislative reform while the Court expressed that it would constitute the appropriate measure to comply with a judgment, states should establish appropriate mechanisms to make sure that the law which violates the Convention would at least not be applied in the future by domestic courts and administrations.

At the national level, several measures have been suggested to improve the execution of the judgments. The monitoring of the execution could be facilitated through the involvement of the NHRIs and the parliaments in the process, and the reinforcement of their control over the governments.

The proposals with regard to the role of domestic courts, namely the transfer at national level of the award of a just satisfaction, and the possibility to request an advisory opinion from Strasbourg, appear to be promising to lighten the workload of the Court, and develop its constitutional role. Therefore, it is suggested that the opinions from Strasbourg should be considered as part of its case-law of the Court, and thus enjoy a binding force. However, safeguards would have to be established to make sure that individuals will actually receive reparation for a violation of the Convention's rights.

Eventually, the inclusion of the case-law of the Court into the domestic legislations by national parliaments could also contribute to the reinforcement of the constitutional role of the Court. However, the focus on parliamentarians could be too narrow a perspective. Thus, a more comprehensive approach to the law-making process should be adopted in each state to scrutinize the compatibility of the laws and the draft-laws with the case-law of the Court.

## B. Measures to be taken within the Council of Europe

The second set of measures proposed during the Interlaken process aims at improving the supervision of the execution at the European level, either to enhance the pressure on states to persuade them to implement the judgments when they refuse to do so, or to improve the capacity of the Council of Europe's machinery to deal with the important caseload of the Court. This chapter will examine successively the main proposals which have been formulated to facilitate the supervision of the Court's judgments by the Committee of Ministers (1), the Court (2), the Parliamentary Assembly and the Commissioner for Human Rights (3).

### 1. The Committee of Ministers

Bearing in mind that the full and rapid execution of the Court's judgments and the effective supervision by the Committee of Ministers constitute one of the three objectives of the Interlaken Declaration<sup>346</sup>, the Brighton Conference invited states to consider whether there could be more effective measures to foster states' compliance<sup>347</sup>. As pointed out by the Steering Committee for Human Rights, which is a body composed of state representatives to start a reflection on the reform of the long term efficiency of the Convention's system, proposals should aim at developing a greater pressure on states which do not execute judgments of the Court, particularly those relating to repetitive cases and serious violations of the Convention<sup>348</sup>. In the following paragraphs, three proposals will be discussed: the increase of "soft pressure" on states, the reform of the infringement procedure, and the adoption of sanctions.

#### a. The increase of the "soft pressure" on states

A first means to enhance the supervision by the Committee of Ministers could be to reinforce the "soft pressure" on states, to persuade them to perceive the implementation of the judgments as obligatory<sup>349 350</sup>. To

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<sup>346</sup> *Interlaken Declaration* (n 270) para PP. 9 iii).

<sup>347</sup> *Brighton Declaration* (n 275) para 29 d).

<sup>348</sup> Steering Committee for Human Rights, 'Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers' (n 333) para 13 iv).

<sup>349</sup> Amnesty International, the Aire Centre, European Human Rights Advocacy Centre, Human Rights Watch, Interights, the International Commission of Jurists, Justice, Liberty and Redress, 'Joint NGO Appeal (7 Decem-



achieve this result, the role and visibility of the Committee of Ministers in the supervision process could be strengthened<sup>351</sup>. Some measures have already been applied, such as the adoption of interim resolutions, decisions and press releases, but they have proved not to be completely satisfactory<sup>352</sup>. Thus, new kinds of measures could be adopted by the Committee of Ministers, to intensify the "soft pressure" on states.

One proposal put forward at the Wilton Park Conference, which preceded the Brighton Conference, is the establishment of an annual peer review mechanism, such as the Universal Periodic Review existing within the Human Rights Council<sup>353</sup>. The aim of such a procedure would be to give more visibility to the obligation to implement the judgments, through the presentation of an annual report to the Committee, explaining how they have implemented the Court's judgments, and therefore convince states of the gravity of this issue<sup>354</sup>. It is hoped that the publication of good practices would encourage the standardisation of states' behaviour regarding the execution of judgments and introduce the idea of a constructive dialogue between peers to overcome difficulties with respect to the implementation of judgments<sup>355</sup>. Moreover, since national authorities and the civil society could be allowed to participate in the process, through the submission of their own views, the possible contribution of these actors in the process of execution would be institutionalised. This could be welcomed insofar as their public support for the judgments of regional courts increases the likeliness that governments will seek to implement them<sup>356 357</sup>.

However, it may be objected that this proposal would constitute an additional burden for states which are already submitted to the regular scrutiny of the Committee of Ministers in all individual cases when the Court issued a judgment finding a violation of the Convention. Moreover, the Committee of Ministers has published since 2007 annual reports on the execution of the Court's judgments, which present in detail statistics by states revealing the degree of compliance with the Court's judgments, and identify the main issues which have remained unsolved. Thus, since the Committee of Ministers already reviews annually how each state seeks to execute the Court's judgments, the establishment of a peer review mechanism could be superfluous. Nevertheless, it could be proposed that a debate would be held following the publication of the annual report by the Committee of Ministers, during which the other institutions of the Council of Europe, as well as national authorities and civil society could intervene.

## b. The improvement of the infringement procedure

Secondly, proposals have been formulated to reform the infringement procedure under Article 46-4 of the Convention. Actually, this procedure has proved to be insufficient, since it has still not been applied, despite the existence of situations where states refuse to enforce Court's judgment. For instance, despite the refusal from the United Kingdom to execute the judgments *Hirst (No. 2)*<sup>358</sup> and *M.T. and Greens*<sup>359</sup> concerning the voting rights of prisoners, no infringement procedure has been started, which may constitute a threat to legitimacy and

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ber 2009)', in Directorate General of Human Rights and Legal Affairs of the Council of Europe, *Preparatory contributions to the High-Level Conference on the future of the European Court of Human Rights, organised in Interlaken* (Council of Europe 2010) 34.

<sup>350</sup> Kanstantsi Dzehtsiarou, Alan Greene, 'Legitimacy and the future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners', 12 *German Law Journal* 10 (2011) 1709.

<sup>351</sup> *Brighton Declaration* (n 275) para 29 d).

<sup>352</sup> Constantin Cojocariu, 'Improving the effectiveness of the implementation of Strasbourg Court judgments in light of ongoing reform discussions', *Roma Rights* (2010) 13.

<sup>353</sup> Wilton Park Conference, 'Conference report 2020 Vision for the European Court of Human Rights', WP1139, 17-19 November 2011, available at <http://www.wiltonpark.org.uk/resources/en/pdf/22290903/2011/wp1139-report> (last consultation on 3 July 2012), 3.

<sup>354</sup> Ryan Goodman, Derek Jinks, 'How to influence states: socialisation and international human rights law', 54 *Duke Law Journal* 3 (2004) 699.

<sup>355</sup> *Ibid.* 699.

<sup>356</sup> Cavallaro, James L., Brewer, Stephanie Erin, 'Reevaluating regional human rights litigation in the twenty-first century: the case of the Inter-American Court', *Harvard Law School Public Law and Legal Theory Working Paper Series, Paper No. 09-31*, 2008, available at <http://ssrn.com/abstract=1404608> (last consultation on 3 July 2012) 788.

<sup>357</sup> Laurence Helfer, Anne-Marie Slaughter, 'Toward a theory of effective supranational adjudication', 107 *Yale Law Journal* (1998) 331.

<sup>358</sup> *Hirst v the UK (No. 2)* (n 170).

<sup>359</sup> *Greens and M.T. v the UK* (n 71).

to the credibility of the system of supervision. Therefore, proposals have been formulated to reform the procedure, and make it more likely to be applied.

At the stage of the decision to start the procedure, a proposal was thus suggested to enable the other institutions of the Council of Europe, such as the Parliamentary Assembly and the Commissioner for Human Rights, to grant the request the Court. On the one hand, it has been argued that in cases where the initiative to implement the infringement procedure would emanate from the Parliamentary Assembly, the finding of a violation of Article 46 by the Court would have a greater legitimacy, because it would have the support of the elected body of the Council of Europe. It would also enhance the pressure on the national delegations at the Parliamentary Assembly to urge their government to implement the judgment. On the other hand, the Commissioner for Human Rights could overcome the inaction from the Committee of Ministers or the Parliamentary Assembly. However, insofar as he does not enjoy a democratic legitimacy, he could be empowered to propose to the Parliamentary Assembly or the Committee of Ministers to start the procedure, rather to initiate it himself.

Moreover, under the existing system, there is no obligation for the Committee of Ministers to start the procedure when it appears that a state is unwilling to implement a judgment. Thus, a disposal could state that the procedure shall be started after a determined period of time during which the state failed to implement the judgment, or when the deadline to execute the judgment imposed by the Court has been exceeded. It would have the double effect of avoiding a possible arbitrariness or double standard in the decision to implement the procedure, and of reinforcing the pressure on states to respect the deadlines decided by the Court or the Committee of Ministers. Nevertheless, the establishment of a determined period of time during which the state proved unwilling to implement the judgment would probably meet resistance from member states, and risks to increase the workload of the Court.

During the proceedings, greater attention could be paid to the opportunity given to all actors having an interest in the case to intervene. Since the procedure has never been applied yet, the procedures to be applied during the proceedings are not clear, and for instance, the possibility of a third party intervention<sup>360</sup> is left open. Thus, it could be included in Article 46-4 that a systematic intervention of the victim and the Commissioner for Human Rights, as well as others actors with the relevant expertise would be allowed.

Finally, it has been argued that the procedure would not be effective without the threat of material sanctions, which could be imposed by the Court of the Committee on states as the result of non-compliance with the Court's judgments<sup>361</sup>. This question will be addressed in the next section.

### c. The adoption of sanctions

A last proposal to enhance the pressure put on states would be to identify sanctions that the Committee of Ministers or the Court, could impose against a state that fails to enforce the Court's judgments<sup>362</sup>. They would constitute an intermediate means between the political measures already applied by the Committee (communications between the chair of the Committee and the official authorities of the state, systematic inscription on the agendas of the "Human Rights" meetings of pending cases under the "enhanced" procedure, interim resolutions, press releases, decisions), and the extreme measures of suspension or expulsion from the Council of Europe, which are not likely to be put into practice and could be counter-productive<sup>363</sup>. These sanctions could more particularly be adopted as a consequence of the infringement procedure<sup>364</sup>, or when a state failed to implement properly a pilot-judgment, for instance if the domestic retroactive remedies are not effective. The ex-

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<sup>360</sup> European Convention on Human Rights, Article 36

<sup>361</sup> Patricia Egli, 'Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: towards a more effective control mechanism', 17 *Journal of Transnational Law and Policy* 1 (2007) 21.

<sup>362</sup> Steering Committee for Human Rights, 'Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers' (n 333) para 13 iv); *Brighton Declaration* (n 275) para 29 d).

<sup>363</sup> See II. B. of the thesis.

<sup>364</sup> Leach, 'On reform of the European Court of Human Rights', (n 330) 733.

pected result is to enhance the pressure on states to implement the judgments, when the non-execution results clearly from a lack of political will or the opposition of the public opinion<sup>365</sup>.

The material sanctions could be either pecuniary or non-pecuniary. The latter sort of sanctions could include the suspension of voting rights of the state during the sessions of the Committee of Ministers for example. With regard to the pecuniary sanctions, the idea of imposing daily fines or lump sums on states after an infringement procedure has been discussed for several years. Actually, a proposal of a financial penalty was included in the early reflections on the reform of the Court, and supported by the Parliamentary Assembly<sup>366</sup>, but it was finally rejected for the reason that the finding of a breach of the obligation to execute the judgment by the Court would have great symbolic value and would itself represent a sufficient pressure on states<sup>367</sup>. For the Venice Commission, the idea of financial sanctions was to be rejected because it was not suitable in the framework of the Council of Europe, since the legal order is not integrated as it is in the European Union<sup>368</sup>. Moreover, according to the Venice Commission, the notion of "punishment" appears at odds with the system of the Council of Europe<sup>369</sup>.

The adoption of a system of material sanctions would indeed shift the system of supervision to coercion. According to this mechanism of social influence, states would change their behaviour towards compliance because they perceive that it is in their material interest to do so<sup>370</sup>. One may doubt that this sort of reasoning is valid under the system of protection of human rights within the Council of Europe. According to Laurence Helfer and Anne-Marie Slaughter for instance, there are several factors which contribute to state compliance with the judgments of transnational tribunals, but the fear of material sanctions is not one of them<sup>371</sup>. For Shai Dothan states generally comply with the Court's judgments despite the absence of material sanctions because they fear the reputational effects resulting from non-compliance<sup>372</sup>. However, while these theories explain that states generally comply with the Court's judgments because they fear the reputational consequences of non-compliance, state practice demonstrates that in some cases, they refuse to implement the judgment despite the reputational cost. The cases *Hirst (No. 2)*<sup>373</sup> and *Greens and M.T.*<sup>374</sup> against the United Kingdom for instance illustrate such a resistance to the Court's decisions. Thus, when the "naming and shaming" actions are not sufficient to persuade states to implement the Court's judgments, it may be argued that the adoption of financial sanctions could persuade them to comply with the Court's decision. However, before deciding whether or not a system of financial sanctions should be adopted, it could be preferable to wait and see how the infringement procedure works in practice.

## 2. The Court

At the European level, state compliance with the judgments of the Court could be fostered by reforms of the Court itself. Three proposals have been put forward in this respect: the enhancement of the clarity, consistency and authority of its rulings (a), the reform of the pilot judgment procedure (b), and the improvement of the means to deal with repetitive cases (c).

<sup>365</sup> Cojocariu (n 352) 13.

<sup>366</sup> Parliamentary Assembly of the Council of Europe, 'Opinion on Draft Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system of the Convention', No. 251 (2004), 28 April 2004, available at <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/EOP1251.htm> (last consultation on 3 July 2012).

<sup>367</sup> Vandenhole (n 173) 105.

<sup>368</sup> Alexandre Silinacos, 'La "réforme de la réforme" du système de protection de la CEDH', 49 *Annuaire Français de Droit International* (2003) 637.

<sup>369</sup> European Commission for Democracy through Law (Venice Commission) of the Council of Europe, 'Opinion on the implementation of the judgments of the European Court of Human Rights No. 209/2002', CDL-AD(2002)34, 18 December 2002, available at [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)034-e.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)034-e.pdf) (last consultation on 3 July 2012), para 80.

<sup>370</sup> Goodman (n 354) 633.

<sup>371</sup> Helfer (n 357).

<sup>372</sup> Shai Dothan, 'Judicial tactics in the European Court of Human Rights', 12 *Chicago Journal of International Law* 1 (2011) 119.

<sup>373</sup> *Hirst v the UK (No. 2)* (n 170).

<sup>374</sup> *Greens and M.T. v the UK* (n 71).

### a. The enhancement of the clarity, consistency, and authority of its case-law

Despite the adoption by the Court of institutional measures to avoid inconsistencies in the judgments issued by its different sections, such as the establishment of a conflict resolution committee composed of the presidents of each court's section and the creation of the post of Jurisconsult<sup>375</sup>, states have regularly recalled, since the very beginning of the Interlaken Process, that the Court should pay more attention to the clarity and consistency of its judgments, in order to facilitate their implementation<sup>376</sup>. Indeed, the quality of the reasoning of a transnational court plays an important role to persuade states to comply with the judgments, and national courts to follow the interpretation of the Convention<sup>377</sup>. This means that the case-law of the Court should be coherent<sup>378</sup> and reasoned<sup>379</sup> to provide guidance to states on the common minimum standards underlying the Convention.

However, states have failed to prove that the Court does not issue clear, coherent and reasoned judgments. On the contrary, it seems that the Court seeks to clarify its previous interpretation of the Convention in subsequent judgments when it examines new cases. For instance, the representative of Greece<sup>380</sup> during the Interlaken proceedings referred to the case *Vilho Eskelinen and others v Finland*<sup>381</sup> concerning the interpretation of the scope of application of Article 6 of the Convention to civil servants, as an example of good practice of Court to clarify the interpretation of the Convention. In this case, the Court noted that the principles of interpretation of the Convention expressed in the previous judgment *Pellegrin v France*<sup>382</sup>, related to the same issue, led to anomalous results. It explained that the jurisprudence *Pellegrin* was a first step to establish a functional criterion intended to decide whether or not Article 6 could apply to individuals who exercise public powers<sup>383</sup>, and then concluded that this criterion should be further developed<sup>384</sup>. To facilitate the implementation of this new interpretation of the Convention the Court then recapitulated concisely the general principles at the end of its reasoning<sup>385</sup>. This recapitulation constitutes *de facto* of judgment of principle clarifying the scope of application of the Convention's rights, and was intended to have an *erga omnes* effect. In many other cases, the Court has adopted such an approach, through the distinction in its reasoning between the general principle of interpretation of the Convention and its application in the specific case. For instance, in the case *Skibinscy v Poland*, the Court expressed the general principle of interpretation of the Convention, and then applied it to the specific case<sup>386</sup>.

The development of this practice of clearly stating a general principle intended to have an *erga omnes* effect, and then applying it to the specific case, reflects the constitutional role of the Court. According to this point of view, the Court should seek to establish common minimum standards beyond the particular cases which are adjudicated<sup>387</sup>. This constitutes a *de facto* application of a proposal from the Group of Wise Persons to empower the Court to issue judgments of principle, which would have an *erga omnes* effect, when the issue at stake is likely to involve all member-states<sup>388</sup>. Nevertheless, this proposal was finally not included in their Final

<sup>375</sup> Robin C.A.White, Iris Boussiajou, 'Voices from the European Court of Human Rights', 27 *Netherlands Quarterly of Human Rights* 2 (2011) 180-181.

<sup>376</sup> *Interlaken Declaration* (n 270) para. 4; Steering Committee for Human Rights, 'Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers', (n 333) para. 23; *Brighton Declaration* (n 275) para. 23.

<sup>377</sup> Helfer, Slaughter (n 357) 318.

<sup>378</sup> Ibid 320

<sup>379</sup> Ibid 322.

<sup>380</sup> Council of Europe, Directorate General of Human Rights and Legal Affairs, 'Proceedings of the High Level Conference on the Future of the European Court of Human Rights, Interlaken, 18-19 February 2010', H/INF(2010)5, 2010, available at [http://www.ejpd.admin.ch/content/dam/data/staat\\_buerger/menschenrechte/eurokonvention/ber-ministerkonf-fe.pdf](http://www.ejpd.admin.ch/content/dam/data/staat_buerger/menschenrechte/eurokonvention/ber-ministerkonf-fe.pdf) (last consultation on 3 July 2012), p. 57.

<sup>381</sup> *Vilho Eskelinen and others v Finland*, Appl No. 68235/00 (19 April 2007), ECHR 2007-II.

<sup>382</sup> *Pellegrin v France*, Application No. 28541/95 (8 December 1999), ECHR 1999-VIII.

<sup>383</sup> *Vilho Eskelinen v Finland* (n 381), para 50.

<sup>384</sup> Ibid para 56.

<sup>385</sup> Ibid para 56.

<sup>386</sup> *Skibinscy v Poland*, Appl No. 5289/99 (ECTHR14 November 2006), para 73.

<sup>387</sup> Wildhaber, 'A constitutional future for the European Court of Human Rights?' (n 7) 162.

<sup>388</sup> 'Report of the Group of Wise Persons' (n 269) para 66.

Report, because it was argued that the Court would not be able to decide *ex ante* which judgments would have such effect<sup>389</sup>, or they would be difficult to implement at the national level, because the Court would rule with a high degree of generality<sup>390</sup>. The practice of the Court shows on the contrary that the adoption of such judgments is suitable, and even desirable, because it facilitates the application of common minimum standards by all the states party to the Convention.

Another proposal to enhance the clarity of the case law of the Court is related to the application of Article 41. If the award of just satisfaction remains within the competence of the Court and is not transferred to the domestic courts, there is a general agreement that the Court should be more consistent when dealing with this issue. One measure would be to decide which approach the Court finally decides to adopt, namely the dissociation of the merits and the just satisfaction following the letter of Article 41 or the award of the just satisfaction in the same judgment as the merits. Some advocate for a return to the former application of Article 41, namely dissociating the judgment on the merits and the award of just satisfaction<sup>391</sup>. Indeed, this would enable the Court to exercise the application of the principle of subsidiarity<sup>392</sup>, since the state would have time to adopt remedial measures before the examination of the just satisfaction. Another possibility would be to acknowledge the most recent practice of the Court, and to admit that the Court allows a just satisfaction independently of the obligation to adopt individual and general measures<sup>393</sup>. Thus, the award of just satisfaction would turn into a form of punitive sanction, independent from the obligation to provide for reparation. It can be argued that a return to the former application of Article 41 would be more desirable because it is coherent with the application of the principle of subsidiarity, and because it constitutes a tool for the Court supervise the adoption of remedial measures by states.

Furthermore, it has been proposed that the Court should refrain from dealing with the issue of just satisfaction, and lets the Committee of Ministers take a decision on this issue, to avoid confusion between the roles of two institutions<sup>394</sup>. However, this solution does not appear to be satisfactory, because it would undermine the obligation of states to pay the just satisfaction. Indeed, Article 46-1 states that states have to abide by the final judgments of the Court. Thus, if it was for the Committee of Ministers to take a decision on the award of a just satisfaction, questions could arise with respect to the binding nature of the decision.

Finally, as pointed out by the Steering Committee for Human Rights, the Court should also clarify the amount of money awarded to the applicant and publish a guidance to avoid that applicants make claims which are out of proportion<sup>395</sup>.

## b. The improvement of the pilot judgment procedure

A second possible reform relates to the improvement of the pilot judgment procedure. As already said, it is one of the areas in which the Court has been the most involved in the execution of its own judgments. However, if there is a general consensus about the usefulness of this mechanism, shortcomings have been identified with regard to several aspects of the procedure.

First of all, the pilot judgment procedure is not enshrined in the text of the Convention, but in the Rules of the Court<sup>396</sup>. Given the fact that the Court is empowered to order far-reaching measures to the responding

<sup>389</sup> Haeck, Vande Lanotte (n 284) 98.

<sup>390</sup> Jonas Christoffersen, 'Individual and constitutional justice: can the power balance of adjudication be reversed?', in Jonas Christoffersen, Michael Rask Madsen, (eds.), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011) 195.

<sup>391</sup> Flauss (n 138) 47.

<sup>392</sup> De Salvia, Michele, 'Le principe de l'octroi subsidiaire des dommages-intérêts: d'une morale des droits de l'Homme à une morale simplement indemnitaire?', in Jean-François Flauss, Elisabeth Lambert-Abdelgawad, *La pratique d'indemnisation de la Cour Européenne des Droits de l'Homme* (Bruylant 2011) 11.

<sup>393</sup> *Scordino (No. 1) v Italy* (n 210), para 233.

<sup>394</sup> Ruedin (n 9) 198.

<sup>395</sup> Steering Committee for Human Rights, 'Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers' (n 333) Appendix Collective response to the Court's Jurisconsult's notes on the principle of subsidiarity and on the clarity and consistency of the Court's case-law, para 20.

<sup>396</sup> European Court of Human Rights, *Rules of the Court*, (n 204) Article 61.

state, the inclusion of the pilot judgment procedure in the text of the Convention would probably enhance its legitimacy to be so active in the supervision<sup>397</sup>, and reflect the fact that states bound to take the required measures.

Furthermore, the decision to apply the pilot judgment procedure remains unclear. As explained above, the Court has applied a continuum of several procedures to deal with structural or systemic problems, from the "full" application of the pilot judgment procedure, to a more flexible way to address systemic issues<sup>398</sup>. To avoid this uncertainty, which in turn could undermine the legitimacy and authority of the pilot judgments, the Court could decide to apply the procedure when a set of clear criteria would be fulfilled. These criteria could include, for instance, the clear identification of the structural problem, and the pre-existence of a well functioning domestic judicial system to make sure that national remedies will be accessible to the frozen requests<sup>399</sup>. Another criterion, probably more controversial, could be the agreement of the state, since it is a crucial element for the effectiveness of the procedure<sup>400</sup>. The Court could also limit the application of the pilot judgment to situations where its case law is well established. This would facilitate the adoption of measures at the national level, particularly if it is foreseen that they will be difficult to adopt, for instance because of the opposition of the public opinion.

Another issue is related to the choice of the representative case. The procedure has often been criticised for the reason that the selection of one case may not reflect all the legal issues related to the systemic problem<sup>401</sup>. In other words, under the actual pilot judgment procedure, it is alleged that the Court may only deal with identical cases, not similar ones<sup>402</sup>. Thus, a proposal has been presented at the Brighton Conference to empower the Court to select not only one representative case, but "a small number of representative applications from a group of applications that allege the same violation against the same respondent State Party"<sup>403</sup>. This proposal for a 'representative application procedure' would aim at enabling the Court to have a better understanding of the systemic problem, and therefore to propose remedies which encompass all the aspects of the violation. However, the Court has indeed already started to assess the multiple aspects of the structural violation of the Convention beyond the particular case when it applies the pilot judgment procedure. For instance, in the case *Burdov v Russia (No. 2)*<sup>404</sup>, the applicant claimed that the Russian Federation violated Article 6-1 because of the excessive delays of enforcement of domestic judicial decisions. The Court examined the merits under this heading, but decided also to look at whether or not there was a lack of effective domestic remedies required by Article 13 on its own motion because the alleged ineffectiveness of domestic remedies in the Russian Federation had been increasingly complained of before it<sup>405</sup>. It seems therefore that the Court already uses various flexible tools to deal with these similar applications, and that there would be no need to introduce a 'representative application procedure'<sup>406</sup>.

However, one could propose to go further and exceptionally establish a system of collective complaint for structural and systemic violations of the Convention, such as the mechanism under the European Social Charter. According to this mechanism, a restricted number of organisations (accredited NGOs, NHRIs, trade-unions) could be empowered to file a collective complaint to the Court when they identified a systemic violation of the

<sup>397</sup> Haeck, Vande Lanotte (n 284) 108.

<sup>398</sup> Philip Leach, Helen Hardman, Svetlana Stephenson, 'Can the European Court's pilot judgments procedure help resolve systemic human rights violations? *Burdov* and the failure to implement domestic court decisions in Russia', *Human Rights Law Review* (2010) 172.

<sup>399</sup> Keller, Fischer, Kühne (n 290) 1043.

<sup>400</sup> *Ibid* 1043.

<sup>401</sup> Fyrnys (n 207) 1042.

<sup>402</sup> Bemelmans-Videc, 'Comments on the Wise person's Report from the perspective of the Parliamentary Assembly of the Council of Europe', in 'The future of the European Court of Human Rights – San Marino Colloquy', *28 Human Rights Law Journal* (2007) 17.

<sup>403</sup> *Brighton Declaration* (n 275) para 20 d).

<sup>404</sup> *Burdov (No. 2) v Federation of Russia* (n 96).

<sup>405</sup> *Ibid* para 89

<sup>406</sup> Committee of Ministers of the Council of Europe, Steering Committee for Human Rights, Committee of experts on the reform of the Court, 'Draft CDDH report on the advisability and modalities of a "representative application procedure"', DH-GDR(2013)R3 Addendum III, 15 February 2013 available at [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DHGDR\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DHGDR_en.asp) (last consultation on 24 February 2013) para 26.

Convention resulting from a national legislation or practice. This collective mechanism would suit better for systemic violations of the Convention than the usual form of individual adjudication, because the organisation would describe the structural or systemic violation of the Convention through all its aspects beyond the particular situation of one or a small group of representative applicant.

Eventually, the procedure before the Court and the Committee of Ministers could be reformed to increase the authority of the pilot judgments, and improve the situation of the individuals. For instance, it could be decided that pilot judgments would be delivered by the Grand Chamber exclusively, so that the judgment would be more legitimate and more pressure would be put on the national actors to take active steps to execute the judgment<sup>407</sup>. Moreover, the decision to freeze the repetitive cases could be applied in a more rigorous way. For instance, the Court could decide to freeze the repetitive judgments only in cases where a time-limit was imposed to the state to adopt the necessary measures<sup>408</sup>.

### c. The enhancement of the processing of repetitive cases

A third set of measures to enhance the ability of the Court to participate in the execution of its own judgments is the reform of the processing of repetitive cases, which reveal the failure of states to implement properly previous judgments. Protocol No. 14 introduced a new procedure under Article 28 of the Convention to enable the three-judge committees to take joint decisions on both admissibility and merits if the underlying question in the case is already the subject of well-established case-law of the Court. However, this reform proved not to be satisfactory because it still constitutes a heavy burden for the Court<sup>409</sup>, at the expense of the examination of cases raising new issues. Two proposals have therefore been suggested to enhance the processing of repetitive cases: the introduction of a "bounce-back" procedure, and the creation of a new judicial body exclusively in charge of the repetitive cases.

The first proposal, the introduction of a "bounce-back" procedure, consists in the possibility for the Court to return repetitive cases, which only raise an issue consistent with the well-established case-law, to domestic courts which would have to apply its jurisprudence<sup>410</sup>. The expected result of this reform would be to diminish the burden of the Court, and foster the principle of subsidiarity<sup>411</sup>. However, it has been criticised for two main reasons. First of all, it would constitute an impediment to the individual right to petition to the Court. Indeed, if applicants would have already exhausted all the domestic remedies to lodge their application to Strasbourg, it would be unfair to force them to go back to domestic courts to claim their rights. Moreover, since the Court would not issue a judgment, it would prevent the Committee of Ministers from supervising the execution of the judgment. This would be particularly problematic in states where there is no well functioning judiciary. Nevertheless, safeguards could be established to secure the position of the applicant. It could be suggested to introduce an amendment in the Convention, stating that states have to designate a national judicial body to apply the Court's case-law when a repetitive application is sent back from Strasbourg to the national level. It could also be included that the Court could decide to deal itself with the case if it is necessary to secure the rights of the applicant. Finally, a system of appeal could be introduced, which would enable the applicant to contest the decision of the national judicial body to the ECtHR when it departed from the well-established case-law.

The Steering Committee for Human Rights recommended in another proposal that repetitive cases would continue to be examined by the Court to secure the right to individual petition, but by another judicial body than the ordinary judges, composed of a new category of judges whose task would be exclusively to deal with

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<sup>407</sup> Buyse, Antoine, 'The pilot judgment procedure at the European Court of Human Rights: possibilities and challenges', 57 *Greek Law Journal* (2009) 1898.

<sup>408</sup> Ibid.

<sup>409</sup> Even if in 2011, the number of repetitive cases transmitted by the Court to the Committee of Ministers has decreased for the first time, there are still 30 000 repetitive cases pending before the Court. Committee of Ministers *Annual Report 2011* (n 2) 9.

<sup>410</sup> Keller (n 290) 1040.

<sup>411</sup> Ibid 1041.

the repetitive cases<sup>412</sup>. The advantage of this system would be that ordinary judges would have more time to deal with cases raising new issues under the Convention, but at the same time, all repetitive cases would still be examined by judges. Moreover, the cases would then be transmitted to the Committee of Ministers for the supervision of the execution, which would maintain the pressure on states to adopt the necessary measures. However, this system may be criticised for the reason that it would depart from the single-body system of the Court, and create a category of "second class" of judges. It seems thus that this proposal has been suggested as an alternative to the increase of the number of judges who sit in the Court, because this latter suggestion would have too important budgetary consequences. Nevertheless, it is doubtful that the creation of a judicial body devoted to the adjudication of repetitive cases would be a solution, since it would probably not constitute an attractive work for the judges appointed to this position. Actually, three-judges committees have been established since the entry into force of Protocol No. 14 to judge cases where the underlying question is already the subject of the well-established case-law of the Court (repetitive cases)<sup>413</sup>. Since reform increased the efficiency of the Court, further reforms to deal with repetitive cases could be superfluous<sup>414</sup>.

### 3. Other organs of the Council of Europe: the Parliamentary Assembly and the Commissioner for Human Rights

At the European level, the supervision of the execution of the Court's judgments could be facilitated through a greater involvement of the Parliamentary Assembly and the Commissioner for Human Rights.

#### a. The Parliamentary Assembly

In the Interlaken process, the Steering Committee for Human Rights pointed out two possible directions to enhance the role of the Parliamentary Assembly in the execution of judgments: the oversight of the execution and its involvement in calling specific governments to fulfil their responsibilities concerning the execution of judgments<sup>415</sup>.

On the one hand, it has been suggested that the oversight by the Parliamentary Assembly of the execution of the Court's judgments could be improved to complement the political pressure put on states by the Committee of Ministers. The underlying idea is that the Parliamentary Assembly could take actions to speed up the execution of judgments when the Committee of Ministers does not react promptly to the failure of a state to implement a Court's judgment. For instance, the Parliamentary Assembly could request the Court to examine whether or not a state fulfilled its obligations to implement the judgments under the infringement procedure in Article 46-4.

On the other hand, it has been proposed that the Parliamentary Assembly could increase the responsibility of national parliaments by putting additional pressure on the national delegations. Stronger measures than "naming and shaming" have therefore been proposed to persuade national delegations to advocate for an active involvement in their own parliament. For instance, the voting rights of the national delegations to the Parliamentary Assembly could be temporarily suspended when national parliaments do not seriously oversee how the

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<sup>412</sup> Steering Committee for Human Rights, 'Final Report on measures requiring amendments of the European Convention on Human Rights' (n 304) Appendix IV, para 16.

<sup>413</sup> European Convention on Human Rights, Article 28.

<sup>414</sup> 206 Committee judgments were delivered in 2012, European Court of Human Rights, *Annual Report 2012* (Registry of the European Court of Human Rights 2013), available at <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports/> (last consultation on 24 February 2013); Steering Committee for Human Rights, Committee of experts on the reform of the Court, 'Draft CDDH report containing elements to contribute to the evaluation of the effects of Protocol No. 14 to the Convention and the implementation of the Interlaken and Izmir Declarations on the Court's situation', DH-GDR(2012)R2 Addendum II, 31 October 2012, available at [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DHGDR\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DHGDR_en.asp) (last consultation on 24 February 2013), para 25.

<sup>415</sup> Steering Committee for Human Rights, 'Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers' (n 333) para 14.



government implements the Court's judgments<sup>416</sup>. The aim of such a measure would be to give more visibility to the role of national parliaments in scrutinising how governments fulfil their obligations under the Convention. However, one may wonder if the Parliamentary Assembly is likely to implement such sanctions. Moreover, sanctions against a national delegation could possibly have counter-productive effects if double standards are applied. Thus, to avoid arbitrariness in the implementation of the procedure, clear criteria of the "serious oversight of the national parliament on the government" would need to be defined. The national delegation could have to prove that questions are regularly asked to the government on the execution of the contested judgment, or that it is actively engaged in the identification of the general measures for instance.

## b. The Commissioner for Human Rights

In its contribution to the Conference of Brighton, the Steering Committee for Human Rights highlighted that proposals for the improvement of the execution of judgments should include a closer involvement of the Commissioner for Human Rights<sup>417</sup>.

While a right to directly bring a case revealing a structural or systemic problem in a state to the Court for the Commissioner has been rejected<sup>418</sup>, one major proposal which has been suggested after the adoption of Protocol No. 14 is the systematisation of the third party intervention before the Court under Article 36-3. Nicholas Croquet proposed that the Commissioner plays the role of "Advocate General" before the Court based on the EU model<sup>419</sup>. Indeed, the Commissioner could be required to intervene when certain rights are at stake, when the case raises a new question of interpretation of the Convention, or when the case is pending before the Grand Chamber<sup>420</sup>. Particular attention could also be paid to structural violations of the Convention, and he could therefore assist the Court in identifying pilot judgment cases<sup>421</sup>, and suggesting remedies.

The reasons behind these proposals are that the Commissioner is supposed to have a good knowledge on the situation of the country, and constitutes a central actor between the institutions of the Council of Europe, the national authorities, civil society and the NHRIs. This should enable him to shed light on the definition and scope of the issue at stake<sup>422</sup>. Nevertheless, insofar as for the moment, the Commissioner for Human Rights has not used the procedure of the third party intervention very often<sup>423</sup>, one may wonder if he has indeed the capacity to fulfil this task. A separate post of Advocate General would therefore be a better solution.

At the European level, new tools could empower the Committee of Ministers, the Court, the Parliamentary Assembly and the Commissioner for Human Rights to put additional pressure on states to execute the judgments of the Court.

With regard to the Committee of Ministers, if the establishment of an annual peer review mechanism does not seem an effective mechanism to foster states' compliance with the judgments of the Court, the improvement of the infringement procedure, through the enlargement of the Parliamentary Assembly's power to request the Court to start the procedure, the adoption of a time-limit to start the procedure, and the establishment of a system of sanctions, appear to be necessary.

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<sup>416</sup> Lambert-Abdelgawad, 'L'exécution des arrêts de la Cour Européenne des Droits de l'Homme (2010)' (n 93) 956.

<sup>417</sup> Steering Committee for Human Rights, 'Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers' (n 333) para 14 iii).

<sup>418</sup> Haeck, Vande Lanotte (n 284) 113.

<sup>419</sup> *Treaty on the Functioning of the European Union*, Article 252; Croquet (n 315) 368.

<sup>420</sup> *Ibid* 369.

<sup>421</sup> Anne Weber, 'A possible role for the Council of Europe Commissioner for Human Rights in the pilot judgment procedure', *Pilot Judgment seminar responding to systemic human rights violations: an analysis of "pilot judgments" of the European Court of Human Rights and their impact within national systems* – Strasbourg, 14 June 2010, available at <http://www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/Events/Pilot%20Strasbourg/Presentation%20Pilot%20Judgments%20seminar%20Anne%20Weber.pdf> (last consultation on 3 July 2012), p. 2.

<sup>422</sup> *Ibid.* 4.

<sup>423</sup> See II. B. 2. c.

Furthermore, it is proposed to reform the working methods of the Court to facilitate the implementation of its own judgments, and to combine a reinforcement of both its constitutional role and its capacity to adjudicate disputes. On the one hand, the adoption *de facto* of judgments of principle, the dissociation of the judgment on merits and the award of a just satisfaction, the application of the “bounce-back” clause, and the improvement of the pilot judgment procedure, would foster the constitutional role of the Court, since it would concentrate on the development of the interpretation of the Convention and give more weight to the principle of subsidiarity. Indeed, the Court could limit the application of the pilot judgment procedure to cases where a set of criteria would be objectively fulfilled, establish the possibility to lodge a collective complaint, and systematically set a time-limit in the judgment. On the other hand, the increase of the number of judges would enable the Court to deal with the high number of repetitive applications, and therefore promote the “individual justice”.

Finally, the Parliamentary Assembly could enhance the pressure put on the national delegations when national parliaments do not seriously oversee how the government implements the Court’s judgments through the temporary suspension of the voting rights of the national delegation. A closer involvement of the Commissioner for Human Rights would also be welcomed, particularly in states where systemic violations of the Convention have been identified.

#### IV. General conclusion

Under the mechanism of the Convention, states have an obligation to execute the judgments of the Court expressed in Article 46-1. This general obligation gives rise to other specific obligations, namely the obligation to execute the violated obligation, to put an end to the international wrongful act, to repair the prejudice and to prevent future similar violations, and implies the adoption of individual and general measures. While the adoption of individual measures are rather linked to the adjudicative role of the Court, because they aim at restoring the rights to an individual as they were before the breach, general measures reflect the constitutional role of the Court, which is to set the minimum standards of protection of human rights under the Convention beyond the specific case at issue. It is argued that the reform of the Convention’s system should aim at both reinforcing the constitutional and adjudicative roles of the Court to ensure that individuals throughout Europe are equally protected, and that the European standards of human rights are progressively raised. Thus, the Council of Europe could seek to adopt some measures in priority to improve the execution of the Court’s judgments.

At the national level first of all, it could be emphasised that if governments have the primary responsibility to execute the judgments under the supervision of the Committee of Ministers, the other branches of the state may also be required to participate in this process. Thus, parliaments may be requested to adopt or amend domestic legislative acts, and the judiciary may have to modify its jurisprudence. Moreover, a specific body (NHRIs, parliamentarian commission, etc) could systematically control how their governments execute the judgments, to make sure that justice is made to the applicants, and that no similar cases would be subsequently lodged to Strasbourg.

Furthermore, the execution of judgments is to be understood from a broad perspective, which encompasses not only the duty under Article 46-1, but also the obligation to “secure” the rights of the Convention under Article 1, taking into account the case-law of the Court. In other words, it is assumed that the minimum standards of protection of human rights, as interpreted by the Court in its judgments have an *erga omnes* effect. In this respect, states could create internal mechanisms to systematically scrutinize the compliance draft laws with the Convention, and regularly review the existing laws in the light of the Court’s case-law. Eventually, the dialogue between domestic courts and Strasbourg through the transfer to a national judicial body of the competence to award a just satisfaction, and the possibility for domestic judges to request an advisory opinion to the ECtHR, should be established.

At the European level, the infringement procedure should be reformed to make it more likely to be applied through the empowerment of the Parliamentary Assembly to start the procedure, and the inclusion of the possibility of sanctions. It is also stated that the Court should continue to indicate the possible measures execution in its judgments and to condemn states for a second time in a further judgment when an earlier one has not

been executed properly. Moreover, the Court should develop its constitutional role through the practice of awarding a just satisfaction according to the letter of Article 41, the systematic adoption of *de facto* judgments of principle, the application of the “bounce-back” clause, and the inclusion in the Convention of the possibility to lodge collective complaints under the pilot judgment procedure. Finally, given that the amount of repetitive cases remains important, it would be more appropriate to increase the number of ordinary judges rather than to create a second category of judges.

Eventually, the Parliamentary Assembly could increase the pressure put on the national delegations through the adoption of sanctions, such as a temporarily suspension of voting rights, when national parliaments do not seriously oversee how their government have implemented the Court’s judgments.

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