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CONTROL OF EXECUTION OF DECISIONS UNDER THE ECHR[1]

- some remarks on the Committee of Ministers' control of the proper implementation of decisions finding violations of the Convention

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1 The European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950, European Treaties Series No. 5.

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I. INTRODUCTION

The European Convention of Human Rights (the "Convention" below) was, as stated in its preamble, to be the first step for the collective enforcement by the member States of the Council of Europe of some of the rights contained in the Universal Declaration of Human Rights of 1948.

This first step has since been followed by numerous others, in particular the adoption of 11 protocols to the Convention, either extending the list of rights protected or strengthening the judicial character and efficiency of the implementation machinery.

The Convention system protects mainly civil and political rights and may be described as Constitutional order for Europe or as a European "ordre public"[3].

When Protocol No. 11 to the Convention (replacing the old rather complicated three-partite decision making machinery of Commission, Committee of Ministers and Court with a "new" single Court) entered into force on 1 November 1998, this European constitutional order was accepted by 40 States. With the recent accession of Georgia the number of States is now 41[4].

The big challenge confronting the member States of the Council of Europe and the new Court is, today, to be able to achieve the goal set by the Council of Europe's two summits of Heads of State in 1993 and 1997, i.e. to maintain the existing high level of human rights protection also in the new political environment. Whether this will be achieved or not depends on a number of factors.

The main factor, according to many, is the efficiency of domestic remedies to protect against violations (Article 13 of the Convention). Important steps to improve these remedies have been taken over the last years through the generalised incorporation of the Convention into domestic law[5], increased efforts of ensuring that new legislation is in conformity with the Convention, better publication of the European Court's judgments and a generalised willingness on the part of domestic courts, and in particular Supreme Courts and Constitutional Courts, to apply directly the Strasbourg jurisprudence in the interpretation of domestic law.

It is worth recalling that it is only if the domestic remedies fail to provide redress that the individuals affected or other Contracting States[6] may lodge complaints to Strasbourg[7]. The

3 See recently the Loizidou judgment (preliminary objections) of 23.3.95, para. 75.

4 An interesting article on the Council of Europe's admission practice was published by the Austrian ambassador to the organisation, Hans Winkler in 1995 "Democracy and Human Rights in Europe. A survey of the Admission Practice in the Council of Europe", Austrian Journal of Public and International Law 47, pp. 147-172.

5 It would appear that today it is only in Norway and Ireland that the Convention has not been incorporated. In the United Kingdom legislation has been adopted but is not yet in force.

6 So far governments have resorted to their right to bring complaints on 20 occasions resulting in 8 inter-state cases. However, only one such case has so far been decided by the Court. The remaining 19 applications have ended either before the Committee of Ministers or before the Commission in the form of a friendly settlement.

7 Besides this complaint procedure, the Convention also provides for a reporting system. The Secretary General of the Council of Europe also has the power under Article 52 of the "new" Convention to ask States to submit reports on how their internal law ensures effective implementation of any of the provisions of the Convention –

national proceedings may thus facilitate the task of the new Court by establishing the facts and providing an informed opinion on the question of violation, taking thorough account of the specificities of the situation obtaining in the country in question.

The new Court's judgments will, just as the old Court's judgments, declare whether or not the challenged situation violated/violates the Convention and, if a violation is established, make an award of monetary damages to the applicant.

As to the Committee of Ministers, it will henceforth concentrate its efforts on the supervision of the Contracting States' respect of their undertaking to consider the judgments of the Court as final and to abide by them[8]. As will be developed below, this undertaking includes preventing new violations from occurring and effectively redressing the situation of the applicant.

The present article will concentrate on the Committee of Ministers' work when supervising execution and the importance of this work in order to maintain the credibility of the European constitutional order set up by the Convention[9].

It should be pointed at the outset that all judgments and resolutions referred to in the text are available on the Council of Europe's web site "dhdirhr.coe.fr".

II. THE COMMITTEE OF MINISTERS

In the exercise of its functions the Committee of Ministers is today composed of representatives of the governments of the 41 member States of the Council of Europe. In principle these representatives are the ministers of foreign affairs, but the ministers themselves usually only meet twice a year. At the 6-8 meetings a year which the Committee today usually devotes to cases under the Convention (some 500-1.000 cases are examined at each meeting) the Ministers act through their Deputies, their Permanent Representatives (ambassadors) in Strasbourg.

The principles underlying the Convention being firmly rooted in European political and legal thought and tradition, the Committee has only on very rare occasions been called upon to really "enforce" the collective guarantee set up by the Convention[10].

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so far this power has been exercised only on 5 occasions, the last one in 1988. So far this reporting system has proven to be only of limited importance in order to ensure respect for the Convention.

8 Articles 44 and 46 of the "new" Convention and Articles 52 and 53 of the old:

9 Other articles on the subject are notably Rolv Ryssdal "The Enforcement System set up under the European Convention of Human Rights" in "Compliance with judgments of International Courts" symposium in honour of Prof. Henry G. Schermers, Leiden 1994; Georg Ress "Article 54" in "La Convetion européenne des Droits de l'Homme – commentaire article par article", Pettiti, Decaux, Imbert ed. Economica, Paris 1995; Cohen-Jonathan "Quelques considérations sur l'autorité des arrêts de la Cour européenne des Droits de l'Homme" dans "Liber Amicorum Marc-André Eissen", pp. 39-64, Bruyland 1995; Adam Tomkins "The Committee of Ministers: Its Roles under the European Convention on Human Rights" in European Human Rights Law Review, launch issue 1995, pp. 49-62; Andrew Drzemczewski and Paul Tavernier "L'exécution des "décisions" des instances internationales de contrôle dans le domaine des droits de l'homme" dans "La protection des droits de l'homme et l'évolution du droit international", Paris 1998, pp. 197-271.

10 Some rare cases of at least initial resistance have thus been noted. The United Kingdom thus reacted rather strongly after the Court's judgment in the McCann case (27.09.95). This did not prevent the government from eventually fully executing the judgment (see Resolution DH (96) 102. Also the Turkish Government has reacted strongly after some judgments of the Court: notably the Akdivar, Aksoy and Loizidou judgments (all still

It is even quite frequent that adequate execution measures have been adopted already before the violation is formally established by the Court (or under the "old" system also by the Committee of Ministers itself). However, where this is not so, the Committee will call upon the respondent State to inform it of the measures planned to prevent new violations of the same character as the one established.

Whether the measures presented will really prevent new violations and afford adequate redress to the applicant will be examined by the Committee with the assistance of the Directorate of Human Rights. When there is agreement that all execution measures deemed necessary have been effectively adopted, the Committee will adopt a public resolution (which is available notably on the internet)[11], in which it provides information on the measures adopted.

Whether the Committee will manage to continue to impose the common minimum standard also in the future will to a great extent depend on the importance attached by the European governments to the maintenance of a common minimum standard as far as the principles of government are concerned. So far the experience gained in on this point is positive[12] (cf the handling of the problems in the Stran Greek Refinieries case, see below).

One should not forget, however, the case of Greece after the *coup* of the colonels in 1967. Nevertheless, this is still the only clear example of a member country refusing to take the measures required to respect the minimum standard set in the Convention. The consequence was, of course, that Greece had to leave the Council of Europe until the military dictatorship had ended[13].

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pending before the Committee – the two first concerning the absence of effective remedies in case of abuse of power by the security forces, the latter case concerning the right of property of Greek cypriots who had to flee the northern part of the island after the Turkish military intervention in 1974). The solution to the first two cases appear to be under way, see Interim Resolution DH (99) 434. So far, the Committee has always been able to bring about an acceptable solution even in those cases where the respondent State has shown initial resistance to the Court's judgment.

11 Address: www.dhdirhr.coe.fr/hudoc or www.coe.fr/cm.; If there is no agreement, it would appear that Article 20 of the Statute of the Council of Europe is applicable so that a majority of 2/3 of those voting and a majority of those entitled to vote would be enough.

12 See the statement of the President of the Committee of Ministers, the Greek Minister of Foreign Affairs, to the Parliamentary Assembly on 22 September 1998 in response to an oral question about the state of affairs in the Loizidou case – "A few weeks ago the Turkish Ministry of Foreign Affairs convened the ambassadors of the Council of Europe member states posted in Ankara and handed them a memorandum. In this memorandum it is clearly stated that Turkey will not comply with the Court's judgment, on the grounds that the Turks consider that they are not liable for what is going on in the occupied part of Cyprus. If Turkey insists on her refusal beyond the three-month term provided for the execution of the Court's judgment, the Committee of Ministers will certainly assume its responsibility, provided by Article 54 of the Convention of Human Rights, and will – I am sure – use all statutory means at its disposal to obtain the execution of the Court's judgment. If Turkey does not pay the compensation and does not take individual measures to restore Mrs Loizidou's rights, putting an end to their violation, then Turkey is simply being consistent with what it has already declared. In such a case the problem is not with Turkey, the problem remains with all the other members of the Committee of Ministers." See the verbatim record of the afternoon debate on 22 September 1998 – web-address: stars.coe.fr. The Committee of Ministers has subsequently confirmed that the judgment of the Court is binding on Turkey and that they expect Turkey to pay the just satisfaction awarded to the applicant – see Interim Resolution DH (99) 680.

13 Resolution DH (70) 1.

Serious problems have also in the past arisen in respect notably of Cyprus under the British Rule[14] and Turkey in respect of both the Cyprus question[15] and the internal situation after the military *coup* in 1980[16]. It should be recalled, however, that all these situations occurred under the earlier system so that in none of these cases had the respondent State accepted the compulsory jurisdiction of the Court. The Committee of Ministers was, accordingly, compelled to deal with them without the additional legitimacy inherent in a Court decision on the violation question.

The great number of cases before the Committee of Ministers at each meeting for control of execution is presently the greatest cause of concern. Under the old system some500-600 new violations were found every year, many of which concerned one specific problem which has not yet found a solution. The problem is the length of judicial proceedings before the Italian courts (in many cases reaching the Committee the applicant is still at first instance after 9-10 years of proceedings). Even if Italy has undertaken important execution measures (notably the appointment of 5000 judges of the peace, 1000 extra judges to deal with old cases and a number of procedural reforms[17]) these are not sufficient and the Court continues to find an important number of violations of the Convention. The Committee has also decided to keep theses cases on its agenda until satisfactory execution measures have been taken. Presently, the Committee has almost 1.500 cases of this kind pending before it.

How many such situations the Convention system is able to handle is not clear. The threat posed by such situations emphasises, however, the importance of rapid and efficient execution of Court judgments and stresses the importance of the work of the Committee of Ministers in supervising execution. Problems such as the Italian does, as the Committee of Ministers has stated in one of its resolution pose a serious threat to the idea that all European States must respect the Rule of Law. Citizens shall thus not have to have recourse to private justice to solve the problems they will inevitably have in any society.

III. THE COMMITTEE OF MINISTERS' PRACTICE IN EXECUTION MATTERS

A. General

Even if the Articles of the "old" Convention governing the execution of cases decided by the Court and the Committee of Ministers (Articles 52, 53 and 54 for the Court and 32 for the Committee of Ministers) were drafted somewhat differently[18], the Committee of Ministers' practice in execution questions has been the same in both cases[19]. The aim of Protocol N° 11

14 The Commission's report of September 1958 in this case has recently been published by the Committee of Ministers at the request of the United Kingdom Government – see resolution DH(97)376.
15 See resolutions DH (92)12 and (79)1 – today Turkey has accepted the compulsory jurisdiction of the Court and in a pending case of Cyprus against Turkey the Committee of Ministers adopted a resolution DH (97) 337 in order to urge Turkey to participate in the proceedings before the Commission – which Turkey also finally did.
16 Five interstate applications introduced against Turkey by Denmark, France, the Netherlands, Norway and Sweden in July 1982 – ending up with a friendly settlement before the Commission.
17 See notably resolutions DH (95)82 and (97)336.
18 Article 32 was inserted late in the drafting process in order to accommodate those States which did not wish to accept the compulsory jurisdiction of the Court – it is not clear why there was eventually such a difference in wording as compared to Articles 52-54, one may perhaps presume that the States refusing a Court procedure wished the powers of the Committee to be more clearly spelled out than was felt necessary by those who accepted the compulsory jurisdiction of the Court.
19 See for example the Committee of Ministers answer to parliamentary question n° 378 (CM/Del/Dec(98)646.

being to reinforce the transparency and efficiency of the collective guarantee, it is no surprise that the existing practice has been continued under the new Article 46.

The requirements on the respondent State as they appear in the Committee's practice may be divided in three categories:

- *Payment* of the monetary just satisfaction which may have been awarded the applicant – this is very clear obligation specifying what sum, to whom and when.

- *Other individual measures* where a mere monetary award cannot achieve full redress (*restitutio in integrum*). This obligation is more one of result, leaving the respondent State a large margin of appreciation as to the means best suited under the national legal system to achieve the redress required (for example in choosing between reopening of proceedings or. presidential grace).

- *General measures*, aiming at preventing new violations of the same kind – also here the respondent State is only held to an obligation of result – no more similar violations – and the State enjoys a very wide margin of appreciation in choosing the means most appropriate to achieve this aim.

- Although there is no clearly defined *time frame* for the adoption of individual and general measures, the Committee of Ministers has developed a procedure stressing the necessity of rapid action.

How does then the Committee of Ministers exercise its control of the proper fulfilment of these requirements?

B. The first examination

All new cases requiring control of execution are put on the Committee's agenda without delay (i.e. in practice not later than 6 weeks after the Court's judgment, i.e. the usual period between two human rights meetings)[20].

Due to the short lapse of time, the respondent Government will often have little information to provide at this first meeting, especially as the dead-line for paying any just satisfaction has not yet expired. This is in particular so as the obligation to abide by the judgments of the Court is to a large extent one of result. The Court has always rejected requests that it should order specific execution measures – it is for the respondent State to choose, under the supervision of the Committee of Ministers, the means which will prevent new violations and provide full redress to the applicant. This choice may be complicated and require quite some time for reflection[21]. However, in certain cases the details of the measures envisaged may be discussed already at this first meeting. This may notably be so if the applicant is serving a prison sentence on account of acts which may not constitute a crime under the Convention.

With respect to the last point, it should be stressed that the applicant is entitled to submit

20 See Rule 1 of the Rules adopted in 1976 for the application of Article 54 of the Convention.
21 See for example the Committee of Ministers answer to parliamentary question n° 378: execution may be delayed notably because of the scope of the reform chosen to implement the Court's judgment, because of procedural problems inherent in the law-making process or because it is necessary to wait for additional decisions from Strasbourg in order to be able to assess the scope of the reform required.

complaints to the Committee of Ministers if he or she considers that the respondent State fails to execute properly the Court's judgment. This right is, however, only clearly recognised as far as the complaints relate to the applicant's personal situation[22]. The fate of the applicant's, or any other person's or organisation's, possible comments with respect to the question of the general measures is not regulated in the Committee's present Rules.

C. Control of payment

The case will usually come up for renewed examination after the expiry of the time limit set for the payment of the just satisfaction (usually 3 months). If proof of payment has not been sent in by then the case will come back on every meeting until such proof has been submitted (usually in the form of an extract from the Government's bank account, a receipt signed by the applicant or similar documentation).

Despite this close supervision of the payments, it remained a fact for a long time that payments were often late. Accordingly, the old Court and the Committee decided to introduce as from January 1996 an order to pay default interest after the expiry of the ordinary 3-month payment dead-line[23].

The aim of the default interest is, as the Committee stated in its interim resolution in the Stran Greek Refineries case to safeguard the value of the awards in case of late payment. The rule of thumb applied by the Court is to apply the legal interest rate of the respondent State unless there is evidence that this rate does not protect the value of the award, in which case a more appropriate rate will be applied.

Another difficult payment issue is that of attachment or setting off.

Under the Ringeisen judgment of 1973 it appeared as if non-pecuniary damages should not be subject to attachment. However, the wording of this judgment[24] combined with the position adopted by the Committee of Ministers in certain subsequent cases, notably the allowing of attachment of the non-pecuniary damages in the Unterpertinger case[25], created substantial uncertainty as to the validity of this rule. In 1995 Austria nevertheless accepted in two Article 32 cases decided by the Committee that the non-pecuniary damages awarded should be free from attachment[26]. It indicated, however, that this acceptance could not be seen as any precedent for future cases. Subsequently, the Court was seized by the Commission to clarify this difficult and often reoccurring issue. However, in a rather formalistic judgment the Court refrained from answering because the Commission's question was not correctly framed[27]!

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22 Cf footnote 1 to the Rules adopted by the Committee for the application of Article 54 of the "old" Convention.

23Whereas the Court opted for a system of interest on a daily basis, the Committee decided to have interest on a monthly basis (in practice this provided governments with an extra month to pay in Committee cases). The underlying reasons have not been published but certain features which distinguish the Committee's situation as compared to that of the Court may have played a role. Among these one may cite the great number of cases and the anonymity of the applicant as a result of the mainly written procedure applied before the Commission and the applicant's lack of standing before the Committee before the execution stage. As a result administrations may have had more difficulties in ascertaining the exact day on which payment was received and a "rougher" calculation method may have had some appeal.

24 As explicited by the Court in its interpretative judgment of 23 June 1973.

25 See Resolution DH(89)2

26 See Resolutions DH(94)66 and 67 in the cases Kremzow II and III.

27 See the Allenet de Ribemont interpretative judgment of 7 August 1996.

In view of this situation, the Committee of Ministers would presently only appear to apply the rather self-evident rule formulated by the Court in the Piersack judgment[28] according to which the applicant cannot be held responsible for any costs incurred by the State when violating the Convention. Accordingly, such debts may not be enforced through setting off or attachment[29].

In addition, counsel's right to payment is sometimes safeguarded through a special award directly to counsel already in the just satisfaction decision itself. Such separate awards require, however, that it is clear at the time of decision how much money remains unpaid to counsel. This may cause procedural problems and this solution is rare.

The most difficult case relating to late payment so far has been Stran Greek Refineries and Stratis Andreadis against Greece. The Greek Government did not accept to pay within the 3-month time-limit set by the Court because of the size of the award (almost 30 million US dollars)[30]. The Government wished instead to pay through instalments over a period of five years without interest instead of within three months. During almost two years the other member States exercised pressure on the Greek form of a resolution by the Committee of Ministers (DH (96) 251) in which the CM insistently urged Greece to pay. The pressure also took inter alia the form of initiatives by the President of the Committee of Ministers on behalf of the Committee. The Estonian Minister of Foreign Affairs, thus turned directly to the Greek Minister of Foreign Affairs, underlining the fact that the credibility and effectiveness of the mechanism for the collective enforcement of human rights established under the Convention was based on the respect of the obligations freely entered into by the States and in particular on respect of the decisions of the supervisory bodies. The Greek Minister of Foreign Affairs replied expressing his personal commitment to resolving the issue[31]. Nevertheless, the Committee of Ministers had to wait for another 3 months before the payment of over 30 million US dollars (including interest to compensate for the delay) was made[32]. During this last phase the case was on the agenda at every important Committee of Ministers' meeting, thus sometimes almost every week. The case is one of the few recent illustrations of the fact that the Convention is a collective guarantee and that enforcement may well come from diplomatic or other pressure exercised by the other member States on the defaulting party. The Committee has recently reaffirmed its firm approach to payment of just satisfaction in the Loizidou case against Turkey (Interim Resolution DH (99) 680).

D. Other individual measures

The payment of a sum of money may not always be able to provide adequate redress because of the nature of the violation found. One such situation is when an applicant has been sentenced to a lengthy prison sentence after a trial which has violated the Convention, either because of a lack of fairness or because the applicant's acts have been found to constitute the legitimate exercise of one of the rights and freedoms protected by the Convention.

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28 Judgment of 26 October 1984

29 Cf Resolution DH(98)283

30 The size of which had been known to the Greek Government since 1984: it corresponded to an arbitration award rendered against the Government that year. The violation was that the Greek Parliament had abolished the arbitration award by special legislation while the question of payment was pending before the Supreme Court – the inferior courts had all upheld the validity of the award.

31 See Resolution DH(97)184

32 Idem.

It may be noted that the power to look into the necessity of specific individual measures is shared between the Committee of Ministers and the Court (under the "old" Convention also the Commission): it may thus be dealt with either in the context of awarding just satisfaction or in the context of the supervision of the execution of the judgment. An important explanation for this situation is that the Court has, since its Ringeisen judgment of 1972, in general decided to award monetary damages quickly rather than awaiting the exhaustion of the domestic remedies which might exist or which could be created[33], to provide full redress [34]. As a result, the additional individual measures required have often been taken at the execution stage, before the Committee of Ministers.

One example of such individual measures is the reopening of judicial proceedings, either to ensure a fair trial in criminal cases or in order to abolish a national decision contrary to the Convention. The reopening cases illustrate well the overlapping competences of the Court and the Committee of Ministers. Sometimes reopening has thus been decided before the Court has rendered its judgment on just satisfaction, as for example in the cases of Barbera, Messegué and Jabardo v. Spain[35] or Schuler-Zgraggen v. Switzerland[36]. Sometimes, reopening has been granted only subsequently, when the Committee supervised the proper execution, as for example in the case of Unterpertinger v. Austria[37], Open Door and Dublin Well V. Ireland[38], Z. v. Finland[39], Jersild v. Denmark[40] or Welch v. United Kingdom[41].

Other important individual measures which have been adopted include measures of grace (totally lifting conviction or simply reducing sentences[42]), the striking of convictions out of criminal records (often following the repayment of the fines imposed as part of the just satisfaction[43]), the granting of residence permits or other permits, such as that to start a school[44].

The question of individual measures will be examined frequently, often at each Committee of Ministers meeting until adequate measures have been adopted.

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33 See for example the legislations adopted in the Pataki and Dunshirn cases against Austria (Resolution DH (-63) 2, or in the Vagrancy case against Belgium (Resolution (72) 2) in order to provide the applicants with the effective remedies which the Court found were lacking in the national legal systems.

34 See the Court's reasons in its Article 50 judgment in the Ringeisen case (22 June 1972, para. 6) when rejecting the Austrian authorities claim that Ringeisen had to exhaust domestic remedies also on the question of just satisfaction.

35 See the Court's Article 50 judgment of 13 June 1994.

36 See the Court's Article 50 judgment of 31 January 1995.

37 See Resolution DH(89) 2.

38 See Resolution DH(96) 368.

39 Case still pending before the Committee of Ministers awaiting further execution measures.

40 See Resolution DH(95)202.

41 See Resolution DH(97) 222.

42 See for example : Neumeister, judgment of 17 May 1974 (The President of the Federal Republic granted a pardon regarding the remainder of sentence to compensate for the excessive length of detention on remand) ; Weeks, Resolution DH(89) 18 (The month following the delivery of the principal judgment, Her Majesty the Queen, on the recommendation of the Home Secretary, remitted the applicant's life sentence by means of the Royal Prerogative) ; Bönisch, Resolution DH (87) 1 (The President of Austria granted a pardon expunging the sentences and removed applicant's name from criminal records to compensate for unfair proceedings).

43 See for example Resolutions DH (85)4 Marijnissen, DH (90) 26 Jon Kristinsen, DH (94) 23 Schwabe.

44 Chahal, case pending awaiting other execution measures; Ahmed, case pending awaiting other execution measures, Monica Paez, judgment of 30 October 1997.

E. General measures to prevent new violations

After the discussions at the Committee of Ministers' first meeting, the question of general measures is in principle pursued regularly at all subsequent meetings together with the question of payment, and, possibly, individual measures. When general measures become the only outstanding question, the case will normally be examined at intervals not exceeding 6 months[45].

What general measures will be adopted is the result of a number of factors, in particular the clarity of the indications contained in the Court's judgment with regard to the origins of the violation found (which texts, if any, applied by whom, violated the Convention?) and the reasons used to explain why the national norms, decisions or practice violated the Convention.

The aim of the general measures is to prevent new similar violations of the Convention. This appears clearly from the resolutions adopted by the Committee of Ministers. Today there also appears to be general agreement that States have a legal obligation to take such measures. This point was subject to some discussion in the past[46:] but, in fact, the Committee has never closed its examination of the execution of a Court judgment when there has been a clear risk of new violations. This is not surprising as the credibility of the Convention system depends to a large extent on the Committee's capacity to maintain this practice.

This is not to say that the Committee has never accepted measures which subsequently have been found to be insufficient. One example concerns the rules on legal aid in Scotland, where the first change introduced after the Granger case was found not to protect against new violations in the Maxwell and Boner cases. Such cases are, however, rare.

Legislative changes correspond presently to somewhat more than 50% of the general measures taken by respondent States. The remaining percents are distributed primarily between various kinds of administrative measures (for example ministerial circulars or administrative regulations) and changes of court practice. A few cases also imply the necessity of important educational measures or practical measures such as the construction of adequate prison facilities or the increase of the number of judges.

1. Legislative and regulatory changes

The Committee has taken note of around 140 legislative reforms since the Convention system started to function.

One of the problems with legislative reforms is the time required to achieve the change and, linked therewith, the great difficulty of refusing an adopted law as a new change may require many additional years. The Committee will, accordingly, ensure that it is informed already of draft legislation: This enables it to provide warning signals at an early stage of the legislative process. Regulatory reforms, in the sense of reforms of government regulations do usually not pose the same problem because of the less rigid and time-consuming procedures applicable.

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45 See Rule 2 of the Committee's Rules for the application of Article 54.

46 See for example Resolution DH (83)4 and Hans-Jürgen Bartsch article "The supervisory functions of the Committee of Ministers under Article 54 – a postscript to Luedicke-Belkacem-Koç" in "Protecting Human Rights: The European Dimension", Carl Heymanns Verlag KG, 1988, pp. 47-55.

Another problem relates to implementation. Will the adoption of a new law really prevent new violations? For example, abolish practices of torture and ill-treatment? In the Sargin and Yagçi resolution of 1993[47] and in the Erdagöz resolution of 1996[48], the Committee took note of a number of important legislative and regulatory changes aimed at preventing torture in Turkish police stations. The fact that this legislation did not effectively prevent torture was, however, evident from a number of sources, notably the public statement on Turkey made in December 1996 by the Council of Europe's Committee for the Prevention of Torture[49].

The Committee is not well-equipped to supervise the real effects of the norms enacted to comply with the Court's judgments and depends to a great extent on the information submitted by the respondent State. The Committee's Rules of Procedure do not provide for any on site visits or hearings of witnesses. Other sources of information do, however, exist, for example in the form of information provided by the other Contracting parties or by the other Council of Europe organs such as the public statements or reports of the Committee for the Prevention of Torture. Also other information in the public domain may be taken into account, notably from the United Nations.

Despite these shortcomings, attempts are made to ensure that the texts adopted by the national authorities are effectively applied. For example in the Dierckx case concerning the Belgian State's non-payment of its debts the Committee's resolution of 1995[50] took note not only of the adoption of new regulations designating specific state property which could be seized to secure the payment of State debts, but also of the actual setting up of the register in which the state property in question should be entered and its starting to function. Similarly, in the Bouamar case concerning the sending of a juvenile delinquent to ordinary remand prison failing adequate detention centres for young offenders in Belgium, the Committee in its resolution of 1995[51] took note not only of the new Act prohibiting the sending of young offenders to such remand prisons, but awaited also the construction of a number of adequate detention centres for young offenders. Also in the Erdagöz case concerning torture in Turkish arrest centres, the Committee took note in its resolution of 1996 of certain implementing directives and educational measures vis-à-vis the police force[52]. The above-mentioned cases relating to the excessive length of judicial proceedings in Italy reflect the same approach as the Committee in its first resolution of 1995 took note, not only of the law creating the 5 000 new posts of justices of the peace, but also of the actual appointments of most of the judges. How close to the reality the Committee is able to come when supervising the execution of the judgments is, despite these examples, an open question.

2. Courts violating the Convention

One of the more difficult execution problems relate to violations stemming, not from legislation, but from the domestic courts' jurisprudence, for example when solving legislative ambiguities or exercising discretionary powers (notably when applying legislation with general or vague clauses: an oral hearing shall be held "if necessary" or a journalist may be called upon to reveal his sources if this is "in the interest of justice").

47 DH (95) 99.
48 DH (96) 17.
49 Available notably on the "Torture Committee's" web site: www.cpt.coe.fr.
50 DH Final (95) 105.
51 DH (95) 16.
52 DH (96)17

In order to assess whether there is any risk of new violations, it would appear that the Committee asks itself what evidence there is that the domestic courts will for the future adapt their interpretation of the domestic law to the jurisprudence of the Court.

A first prerequisite for such a development is, however, that the national courts and those pleading before them be made aware of the Court's judgment. The Committee's resolutions, accordingly, regularly contain information on the publication and dissemination of the judgments, where necessary in translation to the language used in the respondent State.

As to the existence of a willingness to effectively apply the Strasbourg jurisprudence, the Committee's normal counterpart, the respondent Government, is usually in no position to give any promises on behalf of the courts because of the separation of powers. Clear evidence can only come from the courts themselves.

If the respondent Government can provide national case-law to the effect that the highest national court concerned accepts the precedent value of the Court's judgments, the Committee of Ministers appears to consider the simple publication and/or internal circulation of the Court's judgment (where necessary) in translation as a sufficient execution measure: in these cases the Committee and the respondent Government will presume that the national courts will adapt their jurisprudence for the future. Today, the Committee has received such evidence in respect of most countries[53].

If there are no clear indications from the Supreme Court the situation is somewhat more complicated. If the Supreme Court has expressed itself clearly against any duty for the national authorities to give precedent value to the Court's judgments in the interpretation of national law, the only solution is either proof of an effective change of case-law (through the submission of new domestic judgments), or new legislation. Until such evidence has been submitted the Committee will continue its supervision of the execution.

This was for example the situation in the Fredin II case against Sweden in which the Court found the Swedish Supreme Administrative Court's restrictive practice in allowing oral hearings to violate the right to fair trial. The Supreme Administrative Court had not at the time rendered any judgments containing declarations, similar to those made by the Swedish Supreme Court, in favour of according precedent value to the Court's judgments. It was thus no surprise that the Committee did not close the case on the basis of the mere publication of the Court's judgment, but waited for evidence of a change of case-law or legislation. Roughly one year after the Fredin II judgment the Government submitted two decisions from the Supreme Administrative Court, one taken before the incorporation of the Convention on 1 January 1996, one taken after this date, both evidencing a less restrictive interpretation of the right to an oral hearing. In the latter decision of 7 February 1995, the Supreme Court added a general comment to the effect that after the incorporation the Convention's rules regarding oral hearings had direct effect in Swedish law. In the light of these decisions the Committee decided to close its supervision of the proper execution of the judgment.

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53 See for example the following resolutions: with respect to Sweden resolution DH (95) 92 in the case Fredin N° 2; Finland, resolution DH (96)607 in the case of Kerojärvi; Denmark, resolution DH (95)212 in the Jersild case; Italy, resolution DH((93)63 in the Brozicek case, United Kingdom, resolution DH (97)507 in the Goodwin case; the Netherlands, resolution DH (95)240 in the Lala case; Spain, resolution DH (95)93, Switzerland, resolution DH (94)77.

The situation was similar in respect of Greece when the Committee had to verify whether the Greek courts would henceforth restrict their interpretation of the crime of proselytism in a manner consonant with the freedom of religion protected by the Convention and the Court's Kokkinakis judgment[54]. Only after the Court's judgment had been disseminated by circular letter to all courts and public prosecutors and evidence had been provided that no more criminal proceedings were brought in violation of Article 9, did the Committee decide to close the case (the case was on the Committee's agenda for well over three years before the necessary evidence had been produced).

If the violation has been ordered by the national legislation in such a way that the national judges would really have to judge *contra legem* in order to prevent new violations, a change of the relevant legislation appears in most cases to be the only alternative.

The courts of some countries have, however, demonstrated a capacity to judge even *contra legem* in special cases, so for example the Swiss courts. This was first demonstrated in the case of F. v. Switzerland[55] in which the Swiss courts stopped applying the rules permitting them to prohibit a person from remarrying after the Court had found that the application of these rules amounted to a violation of Article 12: the rules became obsolete.

Similarly, in the wake of the case of Castells v. Spain the Government convinced the Committee that, in view of the authority accorded the Strasbourg jurisprudence in Spanish law, the mere publication of the Court's judgment had introduced the *exceptio veritatis* in Spanish defamation proceedings[56].

Sometimes the interpretation problem appears so difficult that the Committee will like to see evidence of a change of case-law, even in respect of courts normally open to the Strasbourg jurisprudence, before closing its supervision of the execution.

Thus, in the Lingens, Oberschlick and Schwabe cases[57] the applicants had made or published value judgments likely to lower their opponents in the esteem of others and could not under the law (Article 111 of the Criminal Code) avoid condemnation unless they could prove their statements to be true. How does one prove, for example, that someone engages in the "basest opportunism" (Lingens)? As it is not possible to prove the truth of such value statements all the applicants were convicted. The European Court, however, found the statements to fall within the legitimate exercise of freedom of expression. Before the Committee, the Austrian Government appears to have claimed that the problem could be solved through case law despite the clear wording of the law. The Committee seems, however, exceptionally[58], to

54 See resolution DH (97)576.

55 See Resolution DH (94)77. The situation in the wake of the Marckx judgment (13 June 1979) was interesting in that the first instance court attempted already in 1983 to give direct effect to the European Court's judgment, but was finally overturned by the Court of Appeal and Court of Cassation who considered that the necessary change of the law was too great to be carried out by the judiciary – see the description of the situation in the Vermeire judgment (29 November 1991) and in the information provided by the Belgian Government in resolution DH (88) 3.

56 Resolution DH (95) 93.

57 See judgments 8 July 1986, 23 May 1991 28 August 1992, respectively.

58 In Austria the Convention has constitutional rank and the domestic courts in general provide direct effect to the judgments of the Court.

have had doubts as to the Austrian courts' capacity to overcome the wording of the law and waited until concrete evidence to this effect was presented. The evidence needed was presented by the Austrian Government in the form of a Federal Court judgment of 1994[59] limiting the criminalised field considerably through the introduction of a new requirement that value judgments had to be "excessive" in order to be punishable. In the light of this change of case-law, the Committee found that it had exercised its functions and closed its examination of the execution of these cases[60].

3. Complex measures

Even if both States and the Committee of Ministers attempt to have general measures adopted as soon as possible in order to avoid new violations of the Convention, such measures are sometimes difficult to elaborate and time-consuming to render effective.

An important example of this problem is the mini-crisis with Italy, alluded to in the introduction, caused by the very big number of violations found against this country on account of unreasonably long proceedings in civil cases (recently the average length of proceedings in those cases which were still at first instance when decided by the Committee under Article 32 of the old Convention was 10 years with some 50% of the cases still pending).

Some 2-400 new cases a year have been brought on this issue over the last years and in September 1999 the Committee had around 1.400 such cases pending at various procedural stages. However, the problem is not new and the first Court judgments on the issue came in the early 1990's. In 1995 Italy reported to the Committee that it had solved the problem notably by engaging some 5.000 new judges of first instance – the justices of the peace. The Committee obviously considered that this was an important step in the right direction and decided in 1995 to close its examination of the execution of the then some 600 pending cases related to this issue[61]. However, new cases have continued to arrive to the Committee from the Commission and in July 1997 the Committee adopted a resolution in which it decided to resume its supervision of the matter and not to close its supervision of execution until new effective reforms had been adopted. The new resolution indicated that the Italian Government had already submitted new proposals to improve the situation, including appointing yet another 1.000 new judges (to be recruited notably among lawyers) to deal only with old cases clogging up the system and relying more on the single judge rather than the college of three at first instance[62].

E. Interim resolutions

If the general measure to be adopted is clear but may take considerable time to achieve (complex parliamentary legislation e.g.), the Committee of Ministers has more and more adopted the practice of adopting an interim resolution on the execution question in which it takes note of the reforms planned. This procedure clarifies the situation for the public and prevents unnecessary speculations as to the reasons for the silence of the Committee of

59 See the judgment of the Supreme Court (Oberster Gerichtsfhof) of 18 May 1993 (11 OS 25/93-6)).
60 See resolutions DH (87) 2, (93) 60 and (94) 23.
61 See resolution DH (95) 82 in the Zanghi case.
62 See resolution DH (97) 336.

Ministers on the issue of execution.

It would appear, however, that this option is mainly resorted to if some interim measures have been taken to prevent, as far as possible, any new violation of the Convention during the waiting period (e.g. some administrative reform or change of court practice). Such interim resolutions have been adopted notably in the case of Öztürk v. Germany[63], F. v. Switzerland[64] and in a number of Belgian cases following the Pauwels[65] and Borgers[66] judgments.

F. The time problem – the special role of Constitutional courts

The average time between the first complaint to the Council of Europe with respect to a certain violation and the adoption of measures preventing new violations only appears to be somewhat over 6 years, and the time from a judgment (or under the old system also a Committee of Ministers' resolution) to full execution only somewhat under 2 years. These figures appear quite encouraging. Nevertheless, some notable exceptions exist.

With most courts accepting to give direct effect to the judgments of the European Court, these exceptions will mainly concern cases involving changes of legislation.

It is cases of this kind that the special powers of Constitutional courts may be of special importance. This point is well illustrated by the Gaygasuz case against Austria.

Following the Court's judgment of 16 September 1996 in the Gaygasuz case, the Austrian Parliament on 14 July 1997 adopted legislation to prevent new violations of the Convention. The new legislation would, however, not enter into force until 1 January 2000. The possibility of further violations of the Convention until the entry into force of this legislation was a serious problem. The situation was, however, saved by the Austrian Constitutional Court which annulled on 11 March 1998 with immediate effect, as unconstitutional, the impugned provisions of the old law still in force. As a result Parliament brought the new provisions into force already on 1 April 1998[67].

The same attitude has been adopted by the Austrian Constitutional Court in the Informationsverein Lentia case, in which the legislator was given 1 year to abolish the old state monopoly legislation regarding television and radio broadcasts and adopt new rules[68]. Also other Constitutional courts have adopted similar attitudes: see for example the German Constitutional Court in the wake of the Karlheinz Schmidt case (annulling legislation discriminating men in that women were exempted both from paying special dues to the fire brigades and from the duty to perform actual fire fighting service, whereas men had to either pay the dues or perform the service)[69], the Slovak Constitutional Court in the wake of the Lauko and Kadubec cases (annulling legislation preventing judicial review of administrative

63 See Interim resolution DH (89) 8
64 See Interim resolution DH (89) 9
65 See Interim resolution DH (96) 676
66 See Interim resolution DH (98) 133
67 See Resolution DH (98) 372
68 See Resolution DH (98) 142
69 See Resolution DH (96) 100

offences)[70], the Romanian Constitutional Court in the wake of the Vasilescu cased (concerning legislation preventing judicial review of certain acts of the police)[71].

G. Role of Committees of Governmental experts

If the Committee of Ministers encounters a difficult legal question it may decide to refer the matter to an expert Committee. This has been done on a few occasions, for example in order to submit proposals for rules of procedure for the Committee (the present Rules were proposed by such an expert Committee in 1976), to give opinions on issues such as the opportunity of introducing a system of default interest[72] or the possibility of attaching the awards of just satisfaction[73].

IV. THE PARLIAMENTARY ASSEMBLY

The Parliamentary Assembly has no clearly defined role under the Convention, except insofar as it elects judges (earlier it also proposed candidates for the Commission to the Committee). It has, however, shown itself quite interested in execution questions – an interest which has mostly taken the form of questions, oral or written, to the Committee of Ministers[74]. The Committee has in general provided substantial answers to such questions.

The Parliamentary Assembly is also presently examining a proposal to follow more closely the question of the execution of the Court's judgments, not only as far as the respondent State is concerned, but also as far as all the member States are concerned[75]- the *erga omnes* effect in principle attributable to Court judgments[76].

Considering amongst other things that execution may often require legislative changes, this interest on the part of the Assembly appears to be a valuable reinforcement of the system. One may notably presume that it is an indication that the Assembly will more actively help to put pressure on national parliaments so that these rapidly and efficiently implement judgments of the Court.

V. CONCLUSIONS

The effective implementation of the Convention has been a central theme since the major restructuring of the European political landscape after 1989. The first Council of Europe Summit in Vienna in 1993 thus laid down the principles for a new Convention system aimed at coping with the increasing number of member States and of complaints. The Second

70 See Resolution DH (99) 554
71 See Resolution DH (99) 676
72 Steering Committee for Human Rights report of 37th meeting, appendix V.
73 Steering Committee for Human Rights report of 37th meeting, appendix VI.
74 See for example written question doc. 7457, of 17 January 1995 re late payments of just satisfaction; oral question n° 8 at the January session 1997 regarding the Stran Greek Refineries case, AS(1997)CR 3; oral question n° 18 of the January Session 1998, AS (1998)CR 3 regarding the Zana case; written question n° 378 regarding the execution of the oldest case on the Committee's role and what action had been takrn in two cases requiring individual measures – Hakkar against France and Socialist Party v; Turkey.
75 Motion for a Resolution regarding the execution of judgments of the Court and a follow-up of the jurisprudence of the Court and the European Commission of Human Rights presented by Mr Clerfayt and several of his colleagues, doc. 7777 of 13 March 1997.
76 See notably the judgment of the Court in the case of Ireland v. the United Kingdom of 18 January 1978.

Summit in Strasbourg in 1997 celebrated the finalisation of this work.

The new system is now in force and the question of the effective implementation of the new Court's judgments has received much attention: it was for example a central theme of the Council of Europe's 8th colloquy in Budapest in 1996 and also an important theme of another recent Council of Europe colloquy: "In our hands" celebrating the 50th anniversary of the Universal Declaration of Human Rights.

The present article has tried to provide some information on the special traits of the Convention system, and in particular of the Committee of Ministers' role as supervisor of the correct execution of judgments so as to enable a better understanding of the Convention's capacity to contribute to the maintenance and development of the new European order.

As noted above, the Committee of Ministers' experience of supervising execution is presently encouraging. The Convention has become a living part of the legal cultures of the member States. The full impact of the new political environment and of the increase of both the number of Contracting parties and the number of individuals enjoying the Convention's protection has, however, not yet been fully felt.

So far the average time required to rectify the violations of which the Convention system is seized is thus rather short, only somewhat in excess of 6 years, and it is rare that the measures accepted by the Committee as execution are subsequently found insufficient by the Court.

When controlling execution, the Committee has strongly emphasised the national authorities' responsibility to prevent new violations of the Convention. The publication of the Courts judgments (if necessary in translation) and their dissemination to the domestic authorities (where appropriate together with adequate explanations, e.g. in circular letters from the responsible Minister) is thus a regular execution measure.

On their side the respondent Governments are today frequently capable of declaring, on the basis of existing practice and jurisprudence, that domestic courts and authorities will prevent new violations by according authority to the Court's judgments in the interpretation of domestic law. Some courts have even gone so far as to judge *contra legem.* Constitutional courts have joined this movement and have in a number of cases declared null and void legislation having been found by the Court to violate the Convention.

The time required for execution where legislation is involved is more problematic and certain cases have raised serious concern in this respect: e.g. the Marckx case required 9 years before it was executed[77]; the Gaskin case is not yet executed despite more than 10 years having passed since the Court's judgment[78]. The special powers of constitutional courts may here provide particularly important, as has been demonstrated by a number of such courts over the last few years, to ensure that the legislative reforms necessary to rectify the violation found are taken without undue delay.

The absence of rapid execution may in certain situations lead to a flooding of the system with complaints regarding a certain situation in violation of the Convention. The above-mentioned

77 See resolution DH (88)3

78 See the explanations given by the Committee of Ministers in its above-mentioned reply to Parliamentary question n° 378 by Ms Ragnarsdottir and other colleagues.

Italian length of proceedings cases is such an example. Such situation are dangerous, both for the populations concerned and for the effectiveness of the Strasbourg system, the limited resources of which are drained.

The Convention's capacity to deal with gross large scale violations is still rather untested. The earlier experiences of the military take-overs in Greece and Turkey took place in a context which excluded the Court: the solution to the problems at the time involved only the Committee of Ministers. With Protocol 11, States have agreed to submit also conflicts of this kind the fair and independent scrutiny of the new Court. States have thereby also formally undertaken to abide by the judgments given by the Court.

It may nevertheless be foreseen that the stopping of such large scale violations will put to the test the strength of member States' faith in the Convention system. So far that faith has been great and the European idea shows no signs of weakening. One may therefore perhaps dare to hope that the Convention system will be able to surmount such problems, should they arise.

Perhaps one dares even express the hope that efficient implementation of the Convention and rapid rectification of those violations which may nevertheless be established, will prevent the development of such large scale violations, thus sparing Europe the huge efforts required to deal with such major problems.