The Control Mechanism for the Enforcement of European Court of Human Rights Decisions (II)

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The States are responsible for the effective implementation of the European Convention, which implies a divided responsibility of all authorities to prevent or remedy the violations of human rights at the national level.

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5. Methods of Coercion Available to the Committee of Ministers

ACCORDING TO the literature, when States make objections or fail to take the necessary measures, the Committee of Ministers has at its disposal two "weapons": it can adopt interim resolutions or may threaten with the implementation of Article 8 of the Statute of the Council of Europe.

5.1. Adopting Interim Resolutions

ACCORDING TO Rule 16, the Committee of Ministers may adopt interim resolutions, notably in order to provide information on the progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution.

This practice was introduced with the case Ben Yacoub v. Belgium,[1] the Committee of Ministers abandoning in

this way the formal control previously exerted and affirming its power to supervise whether the State concerned has taken effective measures designed to remedy the found violation.[2]

The mentioned practice was strengthened over the time, in particular by the well known case of the Greek refineries Stran and Stratis Andreadis v. Greece, in which Greece questioned the arrangements for the payment of just satisfaction. In this case, the Committee of Ministers adopted in 1996 an interim resolution which "called insistently" upon the Greek State to pay, in the shortest possible time, the compensation granted by the European Court and the penalties for delay and rejected Greece's proposal to make five annual payments between 1996 and 2000.[3] The firm position of the Committee of Ministers was successful, and the Greek Government complied and made a quick payment of the compensations, a fact which was recorded in a final resolution of the Committee.[4]

Interim resolutions may take various forms. The first type consists of taking note that no measures have been adopted, and inviting the state to comply with the judgment.[5] This is a simple public and official finding of the non-execution. The second type provides the Committee of Ministers with the opportunity to note certain progress and to encourage the State to adopt new measures in the future. This formulation allows the Committee to comment directly on the possible means of complying with the judgment of the Court. This is the most common method used. Mention must be made of the resolution DH (99) 434 of 9 June 1999 entitled "Action of the security forces in Turkey: measures of a general character," and also the resolution DH (2007) 73 of 6 June 2007 in the case McKerr v. the United Kingdom, on the security forces' actions in Northern Ireland. In this way, the Committee of Ministers may hope to exert pressure on the national parliaments in order for them to adopt the appropriate legislative reforms. Finally, the third type, used only exceptionally, is designed to threaten a state with more serious measures, owing to the time which has elapsed and to the urgency of the situation. The resolution adopted in 2001 in the case of Loizidou v. Turkey comes within this category.[6] In the case of Ilaşcu and others v. Moldova and the Russian Federation no less than four interim resolutions of this kind were adopted, the last one on 10 May 2006,[7] which reiterates that "the obligation to abide the judgments of the Court is unconditional and is a requirement for membership of Council of Europe." Furthermore, the Committee of Ministers declares "its resolve to ensure, with all means available to the Organization, the Russian Federation's compliance with the obligations under this judgment of the Court and calls on Member States authorities to take those actions they deem appropriate to this end." In response to the latter injunction, a statement was made by the Finnish Delegation on behalf

of the European Union, with the support of 14 other delegations (including candidates for accession), in which they recalled the requirement to execute the judgment, and called for the most recent interim resolution (from 10 May 2006) to be drawn to the attention of United Nations and the OSCE. The case has been considered at virtually all meetings of the Committee of Ministers Delegations (and not just at DH meetings) since 2004 and has also given rise to action by the Parliamentary Assembly and Secretary-General of the Council of Europe. The failure to execute the judgment of the Court, mainly by the Russian Federation, has led to the case being referred to the Court again.[8]

It is E. Lambert-Abdelgawad's opinion that in the absence of detailed provisions in the Convention, the Committee of Ministers is quite free when it comes to using the appropriate means which are at its disposal. For example, it can require a state to present a written report on the measures adopted or even an annual report on the progress achieved, for example in 2000 on the length of legal proceedings in Italy.

One new development expressly laid down in the resolutions is that the Committee itself is now able to identify the cases in which there exists a structural or systemic problem. If the Court does not actually find any systemic failing, the Committee of Ministers can itself identify such a failing in order to put pressure on a state to execute a judgment of the European Court more quickly.[9] In the case of such systemic problems, the Committee demands evidence of a notable lessening of the problem in addition to the adoption of general measures. Such evidence can be provided by the national statistics or the number of similar cases brought before the Court.

In order to remedy the shortcomings of interim resolutions, which take a long time to draft and adopt, a document prepared by the Department for the execution of the judgments of the European Court of Human Rights in November 2006[10] suggests that faster and more instructive decisions should replace interim resolutions in certain circumstances, and that these decisions should be followed by press releases. At the same time, any interim resolutions that are adopted should be more detailed and should be translated and circulated by the national authorities concerned. This proposal is becoming a practice of the Committee, which even more frequently endorses information documents prepared by the secretariat of the Department for the execution of the judgments of the Council of Europe, in cases where it is necessary to help a state clarify the measures required and/or draw up an action plan.[11]

Such memoranda make it possible to go into considerable detail regarding the actions to be taken to execute the judgments of the Court and, respectively, to review the measures already taken, their effects and the work still to be done. At the same time, it provides the opportunity for greater transparency,

which increases the pressure exerted on the state to accelerate the execution proceedings. These documents can also publicise the good practices of states in which similar cases have arisen. Last but not least, the Committee of Ministers may concurrently take the initiative of convening a special seminar with the national authorities of the convicted state in order to facilitate the execution of judgments in certain cases.[12]

5.2. Application of Article 8 of the Statute of the Council of Europe

Exclusion of a state from the Council of Europe is, theoretically, one response when a state categorically refuses to execute a judgment. Under Article 8 of the Statute, "any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine." Persistent failure to execute a judgment of the European Court could be interpreted as a serious violation of the "principles of the rule of law and of enjoyment . . . of human rights and fundamental freedoms," within the meaning of Article 3 of the Statute. In reality, this measure has never been used.

The case of Loizidou v. Turkey led the Committee of Ministers officially to brandish the threat of exclusion for the first time, although the threat was implausible.

This may also be seen from the fact that in that case the Committee had a tendency to resign its role to the states. Although the interim resolution of 26 June 2001 does not make express reference to Article 8 of the Statute of Council of Europe, it nevertheless states that the Committee "declares its resolve to ensure, with all means available to the Organization, Turkey's compliance with its obligation under this judgment."

In particular, the Committee of Ministers calls upon the authorities of Member States "to take such action as they deem appropriate to this end," thus demonstrating, in the opinion of the authors of the literature,[13] the limits of the Committee of Ministers' authority to secure the execution of a judgment.

We recall in this context that a similar language was used in the interim resolutions adopted against the Russian Federation regarding the case Ilaşcu and others v. Moldova and the Russian Federation, cited above.

Therefore we may consider that in its work the Committee of Ministers must show imagination and propose other interim measures. For example, before adopting a formal request for the withdrawal from the Council of Europe, it

is possible to refuse to the State at fault the right to participate in the Committee of Ministers' meetings. The call for other international organizations to exercise pressure on that State can also take effect.[14]

6. The Review or Reopening of Domestic Judicial Proceedings

AN ESSENTIAL aspect of the execution procedure of the European Court's judgment, regarding the individual measures under Article 41 of the Convention, is represented by the obligation of the State concerned to ensure the reinstatement of the injured party in the same situation as that party enjoyed prior to the found violation: "restitutio in integrum." When this is no longer possible, the judgment of the Court will contain the State's obligation to pay equitable compensations. We recall that, as the European Court decided, "if the nature of the breach allows *restitutio in integrum*, it is for the respondent State to effect it. If, on the other hand, national law does not allow—or allows only partial—reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be."[15]

It is F. Sudre's opinion that there are circumstances, particularly in the case of violation of Articles 5, 6 and 7 in criminal matters of the European Convention, in which the review or the reopening of the domestic judicial proceedings turns out to be most effective, if not the only, instrument used in order to achieve "restitutio in integrum."[16]

As a principle, it is a delicate situation when the Court finds that the violation of the Convention was produced by a final and irrevocable domestic judgment. In such a situation, the removal of the violation is likely to question the nature of *res judicata* of the domestic judgment. In this case, a conflict[17] arises between the *res judicata* nature of the domestic judgment and the *res judicata* force of the judgment of the European Court, on the obligation of the State concerned to execute the latter, under Article 46 par 1 of the Convention. From this perspective, the most appropriate solution to ensure the compliance of the applicant's domestic situation with the judgment of the European Court is to establish a procedure for the revision of the domestic judgment in question.

The interest in the proper execution of the judgment of the European Court in such situations led the Committee of Ministers to draw up and adopt Rec (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.[18] In the

Recommendation, the Committee of Ministers invites the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, "restitutio in integrum." At the same time, the Committee encourages the Contracting Parties to examine their national legal systems with a view to ensuring that there exist adequate possibilities for a re-examination of the case, including the reopening of proceedings, in instances where the European Court has found a violation of the Convention, especially where:

• the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision on the issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and

• the judgment of the Court leads to the conclusion that the impugned domestic decision is on the merits contrary to the Convention, or the violation found is based on procedural errors or shortcomings of such gravity that serious doubt is cast on the outcome of the domestic proceedings complained of.

According to Harris et al., it is certain that although the situation in the Member States was different in the early 1990s, now, thanks to Rec (2002) 2 and to the practice of the European Court and the Committee of Ministers, "a clear majority of the States members of the Council of Europe provides now expressly the possibility to reopen a case following a judgment of the Court".[19]

C. Bîrsan invokes, in his turn, a study of the Steering Committee for Human Rights (CDDH) of the Council of Europe, released on 12 September 2005 via the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), to conclude that virtually all different national laws contain provisions relating to such a possibility in criminal matters; most legal systems of the Contracting States have introduced such a possibility even in civil cases, and, where the judicial jurisdiction are separate from the administrative ones, even in the administrative courts.[20]

In the literature were presented cases of Member States which allowed the reopening of the procedure even previous to the Rec (2002) 2. The following national law systems have had such provisions: the Criminal Procedure Code of the Kingdom of Norway (Section 391 par. 2); the Criminal Code of the Grand Duchy of Luxembourg, as amended in 1981 (Article 443 par. 5); the Criminal Procedure Code of the Swiss canton of Appenzell-Rhodes (Article 223 par. 4); the new Article 139 (a) of the Federal Law on the Organization of the Judicial System; the Belgian Code of Criminal Investigation (Article 441), etc.[21]

Although the Convention (Article 41) does not force the States to recall into question the *res judicata* nature of a domestic court decision which the European

Court has declared incompatible with the Convention, even before the cited recommendation of the Committee of Ministers, according to F. Sudre[22] there were several States (Austria, Belgium, Denmark, Luxembourg, Malta, Norway, Switzerland), which introduced in their national legislation ad hoc procedures for recasting such decisions: for example, the judgment Piersak v. Belgium in October 1982, Unterpertinger v. Austria of 24 November 1986, Schuler-Zgraggen v. Switzerland of 24 June 1993 led to the reopening of the national proceedings.

In the case of France, the Committee of Ministers Recommendation R (2002) 2, as well as the public impact generated by the debates in Strasbourg, in the Committee of Ministers, in the case Hakkar v. France, led to a legislative reform which allowed, basically, the reviewing of a final decision of a Criminal Court considered by the European Court as being in breach of the provisions of the Convention, in those cases where the violation found by the European judge generates to the convicted person, by its nature and gravity, "damaging consequences that just satisfaction granted pursuant to Article 41 of the Convention, could not be erased" (Article 626.1 and the following of the Code of Criminal Procedure).[23] The mentioned legislative reform was made in June 2000 by a parliamentary amendment presented by lawmaker Jack Lang and approved by the Law No. 2000-516 amending the Criminal Procedure Code.

In the case of Romania, we may note that such procedures were included in the domestic legal system, both in criminal and civil matters. Thus, Law No. 576/2004 introduced a separate text in the Criminal Procedure Code, e.g. Article 408, which provides the possibility of reviewing the judgments following of a judgment of the European Court that found "the violation of a right provided by the European Convention." The provisions of this text determine which persons may require the revision in such a situation, the period within which the review can be requested (one year from the date on which the judgment of the European Court was published in the Official Journal), the possibility of suspending the execution of the appealed judgment, and the procedure for the revision and its effects.

In civil matters, Government Emergency Ordinance No. 58/2003, Article 322 of the Civil Procedure Code, in its section 9, introduced a new reason for the revision of a final and irrevocable judgment of a Civil Court, a revision that may be required if the European Court has established the existence of a violation of the rights granted by the Convention, "due to a domestic judgment, and the serious consequences of such a violation continue to occur and can be remedied only by the revision of that judgment." This review may be requested within three months from the date of the publication in the Official Journal

of the European Court's judgment, according to the new paragraph 3 of Article 324 of the Civil Procedure Code.

In practice it was found that the reopening of domestic procedures may occur:

• as a result of an exigency expressed by the European Court itself in the execution order of the judgment, a situation that is statistically slightly less encountered so far, but for which an upward trend is registered among the judges' choices;

• between the time of the judgment on the merits and that of the just satisfaction (Article 41), which is deliberately delayed in some cases by the Court, and which gives the national authorities the opportunity to react;

• in most situations, during the execution proceedings which are under the supervision of the Committee of Ministers.

In the first case, Luzius Wildhaber, the former President of the European Court of Human Rights, cites a number of cases in which the European Court decided in favor of reopening the domestic procedures even in the execution order of the judgment, which may be seen as an appropriate measure for the remedy of the individual situation according to "restitutio in integrum" principle.[24]

According to Wildhaber, the European Court has shown, in the specific context of the cases regarding Turkey, and in relation to the independence and impartiality of the state security courts, in the case of Gençel v. Turkey on 23 October 2003 (not yet published) that, in principle, the most appropriate form of redress would be for the complainant to be retried at an early date, if he desires so. The same author quotes the case of Somogyi v. Italy of 18 May 2004, in which the Court adopted a similar position. Along the same lines, in the case of Öcalan v. Turkey of 22 May 2005, the Grand Chamber considered that, where an individual had been convicted by a court which did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, is in principle an appropriate way of redressing the violation.

E. Lambert-Abdelgawad considers that the reopening of proceedings, when it was recommended by the European Court, is an appropriate individual measure of "restitutio in integrum" and cites the case of Csikos v. Hungary concerning the violation of Article 6 par 1 of the Convention.[25] The author refers to the Resolution CM/Res DH (2008) 72, adopted by the Committee of Ministers during the execution proceedings, which mentions that "the affair was reopened before the Regional Court of Eger." The same author also refers to the cases De Almeida Azevedo v. Portugal of 23 January 2007 and Du Roy et Malaurie v. France, in which the resolutions adopted by the Committee of Ministers during the execution confirm the deletion of non-compliant provisions from the

criminal records of the complainants following the considerations from the execution order of the judgments of the European Court.[26]

The cited author mentions the judgment on Lungoci v. Romania of 26 January 2006, relating to the violation of the right of access to a court, in which the Court noted that the reopening of proceedings was a possibility in Romania and that the State should ensure the completion of this procedure, if the applicant desires so.[27]

On the other hand, in relation to the other two categories of situations mentioned above, in which the domestic proceedings may be reopened, in the opinion of F. Sundberg[28] 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 rendered its judgment on just satisfaction, as for example in the cases of Barbera, Messegué and Jabardo v. Spain or Schuler-Zgraggen v. Switzerland. Sometimes, reopening has been granted only subsequently, when the Committee supervised the proper execution, as for example in the case of Unterpertinger v. Austria, Open Door and Dublin Well V. Ireland, Z. v. Finland, Jersild v. Denmark or Welch v. United Kingdom.

We may mention, in this context, the Romanian jurisprudence on reopening the domestic procedure, registered during the execution proceedings under the supervision of the Committee of Ministers.

E. Lambert-Abdelgawad cites two cases from Romania.[29] She first refers to the case of Partidul Comuniştilor (Nepecerişti) and Ungureanu v. Romania, in which Romania was convicted by the European Court for violation of Article 11 for the refusal to register the applicant as a political party. The author recalls the text of the resolution[30] adopted by the Committee of Ministers during the execution proceedings, which states that "the second applicant requested and obtained the revision of the 1996 court decision rejecting his application for the registration of the political group. On February 9, 2006 the *Bucharest Tribunal admitted the request for revision* and ordered the applicant's registration as a political party."

The mentioned author also indicates that a judicial revision was also granted in the case of SC Maşinexportimport industrial Group SA v. Romania, when the European Court convicted Romania for the violation of Article 6 par 1 due to the overturning of a final judgment following the Prosecutor General's intervention.[31]

We have presented in extenso the issue of the reopening of domestic proceedings on the basis of a judgment of conviction handed down by the European Court, because of the relevance of this topic for the execution procedure and the supervision carried out by the Committee of Ministers. As previously mentioned, the Committee also supervises the execution of individual measures, including

those arising from applying the "restitutio in integrum" principle. Reopening proceedings forms an integral part of this process, and the Committee of Ministers makes the adoption of its final resolution dependent on the convicted state's reaction by reviewing the domestic law system. Furthermore, the Committee of Ministers now considers that, in addition to the reopening of proceedings, an appropriate execution in certain criminal cases involves, starting from the presumption of innocence, the release of the applicants as an integral part of the right to reparation, of course in the absence of any compelling reasons justifying their continued detention pending the outcome of the new trial.[32]

7. The Role of the Parliamentary Assembly of the Council of Europe in the Execution of Judgments of the European Court

The European Convention does not provide any explicit role in the execution of the European Court's judgments for the Parliamentary Assembly. However, the practice of the past few years has established a political role, e.g. to exert a "positive pressure" on the States concerned and to support the Committee of Ministers. Indeed, Resolution 1226 adopted in 2000 by the Parliamentary Assembly concerning the execution of the judgments of the European Court decided that the matter should be included on the agenda of the Assembly and should be debated regularly. The attention of the Assembly for this matter springs from the overburdening of the Court with tens of thousands of cases, and from the need to rationalize the proceedings, including the execution of judgments, as well as from the reluctance of some States to comply with the requests from the Committee of Ministers for the execution of the conviction judgments in a reasonable period of time, some of these cases having a political nature. The most commonly mentioned in this respect has been Turkey's conduct in the execution proceedings that followed its conviction in the Loizidou case.

Political pressure by public means, including the warning of the States which refuse to abide by the initiation of some special monitoring procedures, may contribute in the end to the acceleration of the execution of the judgments handed down by the European Court.

Even before the Resolution 1226 (2000), the involvement of Parliament in the supervision of the execution of the European Court judgments was based on the instructions sent by the Assembly to the Committee on Legal Affairs

and Human Rights, through Order No. 484 (1993). The Committee was instructed to submit reports "when problems arise on the situation of human rights in member states including their compliance with judgments by the European Court."

At the same time, this sui generis competence was enhanced by the Order No. 488 (1993) for the introduction of the monitoring procedure, extended by Order No. 508 (1995) on the honoring of commitments of the Member States of the Council of Europe.

Later, after the adoption of Resolution 1226 (2000), the Assembly decided to grant a mandate with no lapse limit to the Committee on Legal Affairs to continue work in this area. On the basis of Resolution 1268 (2002), the Assembly requested the Committee to act in particular for an "updating of the situation on execution of judgments and to inform it when it considers that is necessary." The granting of a mandate with no lapse limit to a Committee of the Assembly constitutes an exception to the Rule 25.3 of the Rules of procedure,[33] which highlights the importance given to this matter.[34]

Moreover, the mentioned Committee was given a mandate by the Assembly through Resolution 1516 (2006) for a more proactive approach in the supervision of the execution of judgments, in particular concerning cases involving major structural problems or in which unacceptable delays of implementation have arisen. As a consequence, since 2000 the Parliamentary Assembly has adopted six reports and resolutions, and five recommendations on this matter, in the stated desire to help states to fully comply with the judgments of the European Court.

The cases were selected on the basis of three criteria: the time elapsed from the decision of the Court; the existence of an interim resolution of the Committee of Ministers; the importance of the issue raised by this case. The third criterion mentioned gave birth to two specific reports (of the six adopted by the Assembly) concerning Turkey.

As recent developments, in January 2009, the Committee on Legal Affairs and Human Rights gave a mandate to the new rapporteur of the Parliamentary Assembly (appointed previously, in January 2007) to prepare a new report, based on visits scheduled in eight States (Bulgaria, Greece, Italy, Republic of Moldova, Romania, Russian Federation, Turkey and Ukraine), states considered as facing outstanding problems related to a slow execution of judgments and/or difficulties relating to the (non)execution of judgments.[35]

Resolution 1226 (2000) and the following effectively offer a wide range of means of action:

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

• hold regular debates about the execution of judgments, during one of the four annual plenary sessions;

• adopt recommendations to the Committee of Ministers, and through it to the convicted states, concerning the execution of certain judgments;

• invite the parliamentary delegations of the states concerned[36] to do their utmost to bring about the quick and efficient execution of the judgments of the European Court;

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

• if necessary, hold an urgent debate;

• open a monitoring procedure in the case of a member state refusing to implement a decision of the Court;

• envisage, if these measures fail, making use of other possibilities, in particular those provided for in its own Rules of Procedure and/or of a recommendation to the Committee of Ministers to make use of Article 8 of the Statute, which allows, under certain conditions, the suspension or even the exclusion of a state from the Council.[37]

The States are responsible for the effective implementation of the European Convention, which implies a divided responsibility of all authorities (Government, the legislature and the judiciary) to prevent or remedy the violations of human rights at the national level. From the standpoint of the parliament, its role is to ensure the compatibility of the draft laws with the provisions of the European Convention, and later, during the proceedings which follow the conviction by the European Court, when such legislative reforms may be necessary to be adopted as general measures on the basis of the conviction judgment. However, considering the dual role of the members of national parliaments in question—members of both national parliaments and of the PACE—you can better understand the importance of the action of the Parliamentary Assembly.[38]

In conclusion, although the Parliamentary Assembly has not been designated as a body to supervise the execution of the judgments of the Court (except, perhaps, for the special procedure of monitoring the Member States carried out by the Committee on the Honoring of Obligations and Commitments), PACE and the national parliaments of the Member States can and in practice have an important contribution to the rapid and effective execution of judgments of the European Court. The practice of the recent years has shown that the Assembly has a bigger role in proposing solutions in cases involving delays in the execution and situations of non-execution. Such examples may be found in cases related to the non-payment of just satisfaction,[39] reopening of domes-

tic procedures,[40] or the adoption of necessary constitutional or legislative reforms to prevent similar violations of the European Convention.[41]

This role was, moreover, explicitly confirmed in the High Level Conference on the Future of the European Court of Human Rights, held in Interlaken (18–19 February 2010) under the Swiss presidency of the Committee of Ministers of the Council of Europe. The final documents "stress the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, i.e. Governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level."[42]

8. Supervision of the European Court on the Execution of its Judgments

THE OLDER doctrine and the previous practice of the European Court used to give exclusive jurisdiction to the Committee of Ministers on the supervision of the execution of judgments of the Court, based on the explicit provisions of Article 46 par. 2 of the Convention: "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

As suggested above, the developments in the jurisprudence of the European Court, as well as those at the level of the Convention, concerning the adoption and entry into force of Protocol 14, have changed to a certain extent the present situation.

The influence exercised by the Parliamentary Assembly and the explicit and more and more frequent involvement of the European Court in the supervision of the execution of its judgments are the two main developments recorded in this field in recent years.

8.1. Supervisory Methods Traditionally Employed by the Court

SUPERVISION BY the Court is above all preventive in nature. In spite of the declaratory nature of its judgments and the absence of a power to issue directions, the European Court is now clarifying the scope of its judgments more often. For example, in the case of Kruslin and Huvig v. France, the judgments can thus provide an important guide for the domestic rules.[43] The principle according to which the Court does not prescribe the means of complying with its judgments is thus largely for the sake of form.

The first indications of this line are related to the interference with the right to property, where the Court stated that "the best form of redress would be in principle for the state to return the land."[44] In the case of Papamichalopoulos and others v. Greece (the case Brumărescu v. Romania is similar), the Court went one step further, since it offered the state an alternative: either *restitutio in integrum* or payment of compensation for the pecuniary damage.

The requirement for property to be returned also becomes more coercive when it is included in the operative part of the judgment.[45]

On the other hand, we have mentioned before in detail the more recent jurisprudence in which, in more and more cases, the Court is also recommending the reopening of domestic legal proceedings on the basis of a conviction judgment, when this is the most appropriate form of redress, and when the applicant desires so. This recommendation is included more and more in the operative part of the judgment.[46] Such recommendations have now been currently extended to general measures, and the "pilot" judgment procedure has opened the way to a more widespread use of the Court's power of recommendation. We will elaborate on that issue separately.

Furthermore, we mentioned above that the Court has sometimes used the technique of dissociating the judgment on the merits from the judgment that awards just satisfaction. In this way it may allow the state concerned time to execute the judgment, and if its reaction proves unsatisfactory, it may order the just satisfaction. We have cited above the judgment in the case Schuler-Zgraggen v. Switzerland.

8.2. The New "Pilot Case" Procedure

THE INTRODUCTION of the "pilot case" procedure is an extension of the Court's practice of making recommendations. Of the cases for which the Committee of Ministers supervises the execution, 95% are not pilot cases.[47]

The Court's judgment in the case Broniowski v. Poland of 22 June 2004 marks an important moment in the development of its jurisprudence on the application both of Articles 41 and 46 of the Convention, by indicating[48] to the concerned state concrete general measures, likely to lead to a domestic solution to the cases involving the same subject. In that case, the applicant asked for compensation for properties which he had to abandon beyond the Bug River, in the aftermath of the Second World War. In the meantime, we have to mention that around 80,000 people were in the same situation, people who, similarly, from 1944 to 1953, had to abandon their properties in the mentioned region, i.e. in the Eastern Poland provinces from before the war.

The Court decided to freeze the examination of similar cases pending the adoption of domestic means of redress. In this case, the Grand Chamber held that the question of compensation under Article 41 was not ready for decision, a technique which, as we mentioned before, allowed for pressure to be put on the state and any remaining damage not compensated for at domestic level to be better assessed. According to the Grand Chamber judgment of 28 September 2005 endorsing the friendly settlement, this was a logical position consistent with the principle of subsidiarity in the European system and giving the state the option of adopting the requisite individual (pecuniary and/or non-pecuniary) measures at the same time as general measures.

The Polish Government, in July 2005, passed a new law setting the ceiling for compensation for property at 20% of its original value, a solution agreed by the European Court.

The law was the basis for both the friendly settlement, of which the Court took note in its decision of 28 September 2005, and for the striking of two similar cases out of the Court's list of cases, first on 4 December 2007, and then of another 110 similar cases, and respectively of another 176 cases, the last ones on 10 June 2008. Other similar complaints, which were filed in Strasbourg, would certainly have similar solutions.

Subsequently, the examination of the Broniowski case by the Committee of Ministers was closed with a final resolution, which took into account all the aspects of individual and general character which were presented.

Briefly speaking, the "pilot judgments/cases" procedure developed in recent years seeks to facilitate the execution, with the appropriate domestic means, of groups of similar cases (repetitive cases), which highlight systemic or structural deficiencies. The purpose of the procedure is to help national authorities to eliminate the structural problem that has generated a large number of identical applications on the Court's list of cases, through the adoption of appropriate general measures.

Through a "pilot judgment" the European Court:

• establishes if there has been a violation of a right provided by the European Convention;

• identifies the malfunctioning of the domestic legislation in which the violation has originated;

• indicates (recommends) to the national authorities how the malfunction should be eliminated;

• supports the State concerned to adopt effective domestic remedies which would allow the potential applicants to apply to a competent national authority in similar cases.

Usually, the Court establishes a calendar for taking a series of measures for the purposes mentioned above, and decides the "freezing" of all other related cases for a certain period of time.

It is interesting to mention that according to the official data available at the European Court, currently there are over 1,000 repetitive cases pending. In more than 150 judgments, the Court found similar violations of the European Convention on Human Rights.

Currently, even in Romania we are facing some "pilot" judgments. After 1999, the Court issued several decisions on the lack of efficiency of the successive domestic provisions of the mechanism of restitution of property nationalized during the communist regime, or of the compensations where *restitutio in integrum* was not possible. Starting with the judgments in the cases Viaşu,[49] Katz[50] and Faimblat[51] v. Romania, the European Court noticed the existence of a structural problem with regard to this mechanism, suggesting the adoption of legislative, administrative and budgetary measures, as general measures, necessary in order to find a solution to this systemic problem.

The literature points out however that the new European Court's policy has not been without its critics, especially as it is not explicitly stated in the Convention.

In the Grand Chamber, the case Hutten-Czypska v. Poland gave the opportunity to Judge Zagrebelski to have a dissenting opinion. He did not dispute the "erga omnes" effects of the European Court's judgments, but was concerned that "pilot judgment" might upset the balance between the Court and the Committee of Ministers and make the mistake of shifting the Court on to the political terrain.[52] Lambert-Abdelgawad cites the position of the Italian Government before the Grand Chamber in the Sejdovic case. The Italian authorities "were not opposed in principle to the Court's giving fairly detailed indications of the general measures to be taken. However, the new practice pursued by the Court ran the risk of nullifying the principle that states were free to choose the means of executing judgments. It also ran counter to the spirit of the Convention and lacked a clear legal basis."[53]According to the Italian Government, this interpretation was confirmed by Protocol No. 14 and a literal reading of the Committee of Ministers resolution.[54]

Some states objected to these indications by the Court, once they move outside the scope of "pilot case" procedures, given that the Court had itself stated, since the Broniowski case, that such indication of measures was an exception and related to the existence of large-scale systemic problems. The Finnish Government took a similar position in the case Johansson v. Finland of 6 September 2007, and so did Judge Fura-Sandström with his partly dissenting opinion in the case L v. Lithuania of 11 September 2007.

It is essential to underline that this procedure is a tool used by the Court in the service of the Committee of Ministers and states for the better execution of judgments in certain cases. It never modifies the obligation of national authorities to adopt general measures following a judgment.

8.3. Innovations Introduced by Protocol No. 14

WITH THE entry into force of Protocol No. 14, the most important changes to the Convention's system are related to the execution of the European Court's judgments. The reason for these changes is related to the need of guaranteeing the long-term effectiveness of the Court, particularly when dealing with overburdening.[55]

Protocol No. 14 has given the Committee of Ministers two new remedies before the Court in Strasbourg. The Court will thus come to the assistance of the Committee of Ministers in the event of problems in interpreting the scope of a judgment or if a state fails to execute it.

8.3.1. REFERRAL TO THE COURT IN THE EVENT OF A "PROBLEM OF INTERPRETATION" CONCERNING A JUDGMENT

ACCORDING TO the new Article 46 par. 3, this further referral is calculated to deal with a phenomenon that has been clearly identified by legal opinion and practice: the lack of clarity in a judgment is sometimes detrimental to its prompt and proper execution.

In essence, a case can be referred to the Court only by the Committee of Ministers—and not by the applicant or respondent state—with a two thirds majority, which, according to the explanatory report, should result in the Committee of Ministers "using this possibility sparingly, to avoid overburdening the Court."

No time limit is set, a fact confirmed by the explanatory report, since the need for interpretation may in fact arise long after the date on which the judgment was delivered. However, the doctrine considers[56] that the request cannot be made after the adoption of the final resolution by the Committee of Ministers, which may find that the judgment has been executed. This procedure should thus be confined to fairly isolated cases where the Court has not had an opportunity to clarify its case-law through a subsequent judgment or has not indicated the general measures to be taken in view of its new "policy" since the Broniowski case.

In conclusion, the procedure will make it possible to obtain from the Court the precise meaning of what it ordered earlier and, thus, will facilitate the supervision of the execution by the Committee of Ministers.

8.3.2. REFERRAL TO THE COURT FOR A STATE'S FAILURE TO EXECUTE A JUDGMENT

AT STRASBOURG, this procedure has been recognized only very recently. Historically, prior to the adoption of Protocol No. 14, the Court always refused to find a state in breach of Article 46 of the Convention. While the Court hinted at the problem in the case Olsson v. Sweden of 27 November 1992, in the case Mehemi (No. 2) v. France it clearly declined jurisdiction.

The changes introduced by the Protocol No. 14 to the new Article 46 par. 4 and 5 are considered the most striking provision of the reform.[57]

Under the Article 46 par. 4, if the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under Article 46 par. 1.

In its turn, Article 46 par. 5 adds that, if the Court finds a violation of par. 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken; on the contrary, if the Court finds no violation of Article 46 par. 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case. The procedure is, in this case, entirely in the hands of the Committee of Ministers and it is not open to the applicants; the decision will be taken by a qualified majority, in the form of a reasoned interim resolution. The competence to settle the case belongs to the Grand Chamber, and the proceedings culminate in a judgment.

The explanatory report of Protocol No. 14 clearly explains that this procedure of finding the non-execution of a judgment of the Court is not intended "to reopen the question of a violation of a right provided by the Convention, already decided in the Court's first judgment"; the purpose of the new procedure is to rule whether the state has taken the general and individual measures required by the judgment that found the violation.

The authors of Protocol No. 14 felt that the "political pressure" exerted by such proceedings should suffice to secure execution of the Court's initial judgment by the state concerned.[58]

Viewed as a whole, the new procedure appears as a way of achieving a political and legal pressure. This way of "appeal" has a political nature, because it is in the hands of a political body. At the same time, it has a legal nature, because an eventual non-execution will be found by a judgment of the European Court who will sit as the Grand Chamber. However, the judgment of the Court will only find the eventual non-execution; it is the task of the Committee of Ministers to decide the measures to be applied to the State concerned, in the light of the relevant provisions of the Statute of the Council of Europe.

Extreme sanctions are envisaged under Article 8 of the Statute, such as the suspension of the right to vote in the Committee of Ministers and the decision that the state concerned is no longer a member of the Organization.

In conclusion, the new text of Article 46 adds, in par. 4 and 5, a possibility for exerting an additional pressure on the state concerned, by joint means of the European Court (the judgment that found the non-execution) and of the Committee of Ministers (the measures that will be decided as a result of the judgment). This procedure supports and reinforces the competence of the Committee of Ministers to supervise the execution of the European Court of Human Rights' judgments, as stipulated in Article 46 par. 2 of the Convention. ❑

Notes

1. The judgment of the European Court of 27 November 1987.
2. The interim resolution DH (88) 13 of 29 September 1988.
3. The interim resolution DH (96) 251.
4. The final resolution DH (97) 184 of 20 March 1997.
5. See interim resolution Res DH (2001) 79 of 26 June 2001 in the case Mathews v. Great Britain.
6. The Resolution Res DH (2001) 80 of 26 June 2001.
7. The Resolution Res DH (2006) 26.
8. Case Ivanţoc, Popa, and others v. Moldova and the Russian Federation, complaint registered under number 23687/05. In this case, the Committee of Ministers decided to suspend the supervision of the execution of the first judgment of the Court, until a second one was made public.
9. See Interim Resolution Res DH (2006) 1 of 8 February 2006 relating to the control of civil proceedings re-opening in the Russian Federation.
10. CM/inf/DH (2006) revised 3E of 24 November 2006.
11. See CM/inf/DH (2007) 30 of 14 June, 2007 on "Non-enforcement of domestic judicial decisions in Ukraine: general measures to comply with the judgments of the European Court of Human Rights."
12. See CM/inf/DH (2006) 45 of 1 December 2006: "Round table on non-execution of judgments against the State and its entities in the Russian Federation: remaining problems and solutions required."
13. Elisabeth Lambert-Abdelgawad, "L'Exécution des arrêts de la Cour Européenne des Droits de l'Homme (2008)," *Revue trimestrielle des Droits de l'Homme* 79 (1 July 2009): 651–682.
14. See the case Ilaşcu and others v. Moldova and Russian Federation.
15. European Court's judgment Iatridis v. Greece of 19 October 2000 (just satisfaction); European Court's judgment Brumărescu v. Romania (just satisfaction).
16. Frédéric Sudre, *Dreptul european şi internaţional al drepturilor omului*, trans. (Iaşi: Polirom, 2006), 477.

17. Corneliu Bîrsan, *Convenţia europeană a drepturilor omului—comentariu pe articole*, vol. 2, *Procedura în faţa Curţii. Executarea hotărârilor* (Bucharest: C. H. Beck, 2006), 582.
18. Recommendation Rec (2000) 2 was adopted at the 694th meeting of 19 January 2000. See Annex 1.
19. David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 2nd edition (Oxford: Oxford University Press, 2009), 875.
20. Bîrsan, 583.
21. Louis-Edmond Pettiti, Emmanuel Decaux, and Pierre-Henri Imbert, *La Convention Européenne des Droits de l'Homme*, 2nd edition (Paris: Économica, 1999), 861.
22. Sudre, 477.
23. Ibid., 477–478.
24. Luzius Wildhaber, "The Execution of Judgments of the European Court of Human Rights: Recent Developments," in *Common Values in International Law* (Kehl: N. P. Engel Verlag, 2006), 679.
25. Lambert-Abdelgawad, 662.
26. Ibid.
27. Ibid., 24.
28. Frederik Sundberg, "Control of Execution of Decisions under the ECHR, European Commission for Democracy Through Law, CDL– JU (99) 29 Restricted," Strasbourg, 8 December 1999, 9.
29. Lambert-Abdelgawad, 662.
30. Resolution CM/Res DH (2008) 16 of 27 March 2008.
31. See Resolution CM/Res DH (2008) 87 of 8 October, 2008, which cites the decision of 27 November 2006 the High Court of Cassation and Justice which was granted the revision requested by the applicant company.
32. Lambert-Abdelgawad, 22–23.
33. The mentioned rule lays down a two-year term for the finalization of a report from the committee concerned.
34. Andrew Z. Drzemczewski, "The Parliamentary Assembly's Involvement in the Supervision of the Judgments of the Strasbourg Court," *Netherlands Quarterly of Human Rights* 28, 2 (2010): 167.
35. Ibid.
36. The Parliamentary Assembly of Council of Europe (PACE) consists of members of national parliaments of the Member States, appointed by those states according to their regulations; the appointed members form the national delegation of the respective state.
37. Bîrsan, 603.
38. Drzemczewski, 173.
39. See the PACE' reaction to the rapporteur E. Jurgens' proposal regarding the developments in the cases Stran etc. v. Greece and Loizidou v. Turkey, in the context of the adoption of the report and of the PACE Resolution 1226 (2000).
40. See cases Hakkar v. France of 8 October 2002 and Zana v. Turkey, of 25 November 1997.

41. See PACE Resolutions 1380 (2004) and 1381 (2004) on "Security forces and the violation of the freedom of expression in Turkey."
42. See "Proceedings—High Level Conference on the Future of the European Court of Human Rights," Interlaken, 18–19 February 2010, Council of Europe 2010, 119.
43. Lambert-Abdelgawad, 46.
44. Judgment Hentrich v. France (former Article 50) of 3 July 1995.
45. Judgment of Section III in the case Raicu v. Romania of 19 October 2006.
46. Lambert-Abdelgawad, 47.
47. Ibid, 48.
48. F. Sudre and C. Bîrsan use the term "indicates," while Lambert-Abdelgawad uses the term "recommend."
49. The judgment of the European Court of 9 December 2008.
50. The judgment of the European Court of 20 January 2009.
51. The judgment of the European Court of 13 January 2009.
52. Lambert-Abdelgawad, 52.
53. Par. 115–118 of the European Court's judgment in the case Sejdovic v. Italy of 1 March 2006.
54. Resolution (2004) 3 of the Committee of Ministers.
55. Harris et al., 883.
56. Bîrsan, 606.
57. Lambert-Abdelgawad, 56.
58. Section 99 of the Explanatory Report of Protocol 14.

Abstract

The Control Mechanism for the Enforcement of European Court of Human Rights Decisions

The paper examines the manner in which the enforcement of the rulings of the European Court of Human Rights is monitored and controlled, as the execution of those judgments depends on the states concerned. Thus, due to the fact that the judgments are declaratory and they are not directly enforceable, by themselves, in the Contracting States, although they are binding for the convicted states, the supervision of their execution goes to the Committee of Ministers, a political organ, and not to the judicial organ wherefrom they originated. Within this control mechanism, alongside the Committee of Ministers, the European Court has come to play a greater part in supervising the execution of its own decisions. At the same time, the Parliamentary Assembly of the Council of Europe became more active with the passing of time, exerting a growing pressure on the member states and supporting the Committee of Ministers to ensure a proper execution of the conviction judgments of the European Court.

Keywords

European Court of Human Rights, control mechanism, Committee of Ministers, Parliamentary Assembly of the Council of Europe