

PRESENTATION

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OVERVIEW OF THE EUROPEAN EXPERIENCE IN GIVING EFFECT TO THE PROTECTIONS IN EUROPEAN HUMAN RIGHTS INSTRUMENTS

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1. Introduction

Since the entry into force of the European Convention of Human Rights the number of Contracting Parties has almost tripled. As a result of this the number of cases pending before the European Commission and the European Court of Human Rights had grown so enormously, necessitating reform of the supervisory mechanisms. The purpose of these reforms was to enhance the efficiency of the means of protection, to shorten procedures and to maintain the present high quality of human rights protection. To this end, the Committee of Ministers of the Council of Europe adopted Protocol No. 11 to the Convention in May 1994. The Protocol has now entered into force and on 1 November 1998 the European Convention will be in force according the amendments of the said Protocol.¹

Since the entry into force of Protocol No. 11 a new single Court has replaced the two existing supervisory organs, namely the European Commission on Human Rights and the European Court of Human Rights, and performs the functions carried out by these organs. While the underlying purpose of the system remained the same, the Court now had a further role to play in the consolidation of democracy and the rule of law in the wider Europe. The scope of its competence and the breadth of its geographical reach are unprecedented in the history of international law.

The Committee of Ministers of the Council of Europe retained its competence under the former Article 54 (supervision of the judgment of the Court), while its competence under former Article 32 in respect of individual applications has been abolished.²

In the first decades of its existence the Court firmly established its position in the European constitutional landscape. It produced an extensive body of case-law giving concrete content to the Convention rights and freedoms, specifying the nature of States' obligations, and above all adapting the Convention standards in line with evolving European societies. It applied a living instrument in a process of continuing and dynamic interaction between the international mechanism and the national legal systems.

The events of 1989 and 1990 brought in their train a vast change in the Council of Europe, in that there was a rapid increase in the number of its member States, from 23 at the end of 1989 to 45 in 2003. In its approach to enlargement, the Council of Europe decided that ratification of the Convention shortly after joining the Organization should be a condition for accession thereto. Consequently, the Convention, to which 22 States had previously been party, was ratified in or after 1990 by 19 new member States, most of them being countries of Central and Eastern Europe. For the enforcement machinery this meant that the number of potential applicants, if calculated by reference to the population of the Contracting States, grew from 451 to 772

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¹ See in more detail Explanatory Report on Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 155), 1994, Council of Europe Publishing; Yvonne Klerk, "Protocol No. 11 to the European Convention for Human Rights: A Drastic Revision of the Supervisory Mechanism under the ECHR", NQHR, Vol. 14, No. 1 (1996), pp. 35-46; A. Drzemczewski, "A Major Overhaul of the European Convention Control Mechanism: Protocol No. 11", *Collected Courses of the Academy of European Law; 1995 The Protection of Human Rights in Europe*, The Hague 1997, pp. 125-244.

² Hereafter reference will be made to the provisions, as amended by Protocol No. 11.

million.³ Ratification of the Convention by a new member State entailed the election of a new judge, who had to familiarize him or herself fully with the practices, traditions, perspectives and case-law of the Strasbourg institutions. It may also be observed that, when the reform leading to Protocol No. 11 was first conceived, this substantial and rapid enlargement of the Council of Europe and the impact it would have on the control machinery was not anticipated.

2. Developments after the entry into force of Protocol No. 11

On 4 November 2000 Protocol No. 12 was opened for signature.⁴ Article 1 of the Protocol provides a general non-discrimination clause and thereby affords a scope of protection which extends beyond the "enjoyment of the rights and freedoms set forth in [the] Convention". In particular, the additional scope of protection under Article 1 concerns cases where a person is discriminated against:

- i. in the enjoyment of any right specifically granted to an individual under national law;
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

The Protocol will enter into force after 10 member States have deposited their ratification.⁵ The Evaluation Group is unable to forecast the date of entry into force of Protocol No. 12 to the Convention or its implications for the Court's case-load. However, it is widely accepted that the Protocol, concerning as it does non-discrimination, is bound to generate a substantial volume of business when the time comes. Furthermore, it may well render more complex applications that would have been lodged even without the Protocol's existence.⁶

Furthermore, the Council of Europe organises a wide spectrum of activities on abolition of death penalty, both leading up to a decision on abolition and following such a decision. These activities are implemented in the framework of Co-operation Programmes, including Joint Programmes between the Council of Europe and the Commission of the European Union. A separate Joint Programme between the Council of Europe and the European Commission focusing specifically on abolition of the death penalty was implemented in 2000-2001. A blueprint for public awareness activities has also been prepared, that has since been applied to specific countries, with the prime objective of ensuring that Governments fulfil their commitment to ratify Protocol No 6

³ Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG(Court2001)1 27 September 2001, para 15, <http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm>.

⁴ ETS, No. 177.

⁵ At present (April 2003) Protocol No. 12 has been ratified by 3 States.

⁶ Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG(Court2001)1 27 September 2001, para 36.

of the ECHR and abolish the death penalty by law. As a result of this Protocol No. 13⁷ concerning the abolition of death penalty in all times will enter into force on 1 July 2003. It is not expected that this Protocol will lead to a dramatic rise in the number of applications.

The Court is confronted with a steadily rising volume of applications, which grew by over 500% between 1993 and 2000. This is not solely the consequence of the accession of new States; in older member States individuals also increasingly turn to Strasbourg. The system is seriously overloaded and, with the relatively limited resources available to it, the Court's ability to respond is in danger. Urgent action is now required for Europe's unique achievement in human rights protection to be safeguarded for the 21st Century.

The Court is assisted by a Registry, which at 1 February 2001 was composed of 295 officials (185 permanent, 95 temporary and 15 trainees). Of these 196 (including 62 permanent and 31 temporary lawyers) were case-processing staff, responsible for dealing with correspondence, examining applications and preparing files and documents thereon for the attention of the judges; the remainder are engaged in managerial, administrative, translation and support duties.

The number of officials in the Registry has also grown with time, as is shown by the following figures for permanent staff: 1989: 74; 1997: 161; 2001: 185. In December 2000, the Committee of Ministers approved a special appropriation to cover the recruitment of 45 additional temporary lawyers and an additional 15 secretaries and the maintenance of a scheme for trainee lawyers.⁸

In its sifting task, the Court has until now followed the previous practice of the Commission, in that applications received are not immediately registered. There will first of all be correspondence between the Registry and the individual concerned, whose attention will be drawn to matters that may render the application inadmissible (for example, failure to exhaust domestic remedies or comply with the time-limit for applying; complaint or allegation having no connection with a right guaranteed by the Convention or ill-founded in the light of existing case-law). Nevertheless, if applicants insist, their applications must – save in the event of failure to supply certain documents or information – be registered, no power of decision being vested in the Registry. The fact that this practice leads very many applicants to desist explains the vast difference between the number of applications received (“provisional applications”) and of applications registered.

The annual number of provisional applications grew from 4,044 in 1988 to 20,538 in 1999, and then to 26,398 in 2000 (that is, by some 553% over the full period and by some 28% in the last year). In the first seven months of 2001, 20,739 provisional applications were received; if the same rate were maintained, provisional applications in 2001 would total 35,553, an increase of nearly 35% over 2000.

The annual number of applications registered grew from 1,013 in 1988 to 8,402 in 1999, and then to 10,486 in 2000 (that is, by some 935% over the full period and by some 25% in the last year). In the first seven months of 2001, 7,909 applications were registered; if the same rate were maintained, registered applications in 2001 would total 13,558, an increase of more than 29% over 2000.⁹ No year between 1988 and 2000 saw a significant decrease in the number of applications, whether provisional or registered.

⁷ ETS, No. 187.

⁸ *Ibidem*, para 18.

⁹ *Ibidem*, para 25.

Special situation arising from applications concerning the length of court proceedings in Italy and the applications concerning gross violations in Turkey and Russia

Many applications received in Strasbourg allege that the length of domestic criminal, civil or administrative court proceedings has exceeded the “reasonable time” stipulated in Article 6 para. 1 of the Convention (more than 3,129 of a total of 5,307 applications declared admissible between 1955 and 1999). A particularly high number of such applications have concerned Italy. Thus, of the total of 21,128 applications registered in the period from 1 November 1998 to 31 January 2001, 2,211 were directed against Italy; of these, 1,516 related to the length of proceedings. Again, of the 1,085 applications declared admissible in 2000, 486 concerned Italy and, in 428 cases, related to this same issue. In addition, as at July 2001, there were altogether about 10,000 further provisional applications against Italy falling into this category, of which 3,177 files were ready for registration but could not be processed for lack of human resources in the Registry.

Legislation on this matter has very recently been adopted, in the shape of Law No. 89 of 24 March 2001, which provides that anyone who has suffered pecuniary or non-pecuniary damage by reason of violation of the “reasonable time” requirement is entitled to lodge a request for just satisfaction with the Court of Appeal. In the framework of the execution of judgments, the Committee of Ministers is awaiting to assess the impact of a broader range of measures taken by Italy with a view to speeding up court proceedings. The effect of the new Law and those other measures on the case-load of the Strasbourg Court remains to be seen.¹⁰

Another factor overburdening the workload of the Court is the great number of cases concerning violation of the right to life, torture and inhuman treatment and in some cases even disappearances in Turkey. In 1999 the Court delivered 18 judgments against Turkey in 2000 26 and in 2001 171 of which 57 ended in a friendly settlement. In 2002 the Court decided 105 cases against Turkey. Over the same period almost 600 applications against Turkey have been declared admissible. The most of these cases are very time-consuming since on many occasions investigations on the spot are necessary and the Court has to hear a great number of witnesses.¹¹

A new problem area will be the Russian Federation where since 1999 almost 12000 complaints have been lodged of which 7500 have been registered.

The statistics also reveal that, of the applications received that survive the initial sifting process and are registered, few proceed to judgment on the merits. Of the 13,858 registered applications disposed of by the Court in 2001 (with the 2000 figures in brackets):

- 8,989 (6,776) were declared inadmissible or struck out of the list
- 151 (165) were concluded by a friendly settlement;
- 725 (753) were the subject of a judgment on the merits;

Since the new Court commenced its activities, its “productivity” has significantly increased. In 2000 the number of applications disposed of drew closer to, or in two months (March and September) equaled, the number of applications registered, the monthly averages being 643 disposed of and 874 registered and the annual totals being 7,711 disposed of and 10,486

¹⁰ *Ibidem*, para 27.

¹¹ Council of Europe, Survey of Activities, European Court of Human Rights, <http://www.echr.coe.int/Eng/InfoNotesAndSurveys.htm>.

registered. However, it must be remembered that the Court did not have a clean slate in November 1998, having inherited a legacy from the former Court and Commission.

The Court considers that, ideally, a case should be finally disposed of within two years. Since this is very difficult to achieve in the current situation, it has set itself a “target for the handling of applications” of three years.

Roughly 50% of applications are disposed of by the Court within one year of registration, but a considerable number is not terminated within the 3-year target. The latter was true, for example, of about 2,250 of the 19,200 applications pending in September 2001. Some cases are not disposed of until after a period of 4-6 years (for example, about 514 of the 4,719 applications registered in 1997).

Here again, there are differences between the Contracting States. At the end of July 2001, the number of applications per State in which the maximum duration for one of the phases after registration had been exceeded ranged from 1 to 1,459, with 18 States having 100 or more such applications.¹²

According to the Evaluation Group any assessment of the implications of the problem must depend in the first place on a forecast of the number of applications that will be received by the Court in the future. However, it is extremely difficult to make such a forecast with accuracy. It is conceivable that measures taken at national level might have an effect on the Court’s workload. On the other hand, recent years have seen no slacking-off in the number of applications and there are few grounds for supposing that this will occur in the next ten years or so. Experience has shown that publicity given to important cases, coupled with increasing knowledge of the Convention machinery on the part of the legal profession and the population in general, has a “snowball” effect. This point is of particular relevance for those States which have ratified the Convention more recently; the flow of applications from them is not yet very great (4,959 out of the 10,486 applications registered in 2000 concerned countries of Central and Eastern Europe) and in some cases has hardly begun. Nor is there any evidence of a significant falling-off of interest from the older Contracting States.¹³

The Council of Europe’s Internal Auditor, by taking the number of applications registered for each year and each country over the last ten years and applying statistical methods, estimated, in his report to the Secretary General, that the number of applications registered would be 14,655 in 2002 and 20,720 in 2005. In the five-year period from 2000 (when 10,486 applications were registered) to 2005, there would thus be an overall increase of nearly 100%. The Auditor recognized that his projections were conservative; indeed, it can be seen that they fall below the recorded increase for 2000 and the calculated increase for 2001.

On the basis of the foregoing and particularly the country-by-country analysis, the Evaluation Group considers that there is no ground for disputing that an increase in the number of registered applications of at least the order indicated by the Auditor will occur.

¹²Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG(Court2001)1 27 September 2001, para 31.

¹³*Ibidem*, para 35.

3. The execution of judgments of the European Court of Human Rights

The foreseeable development of cases from the perspective of execution of judgments is also dramatic. There is every reason to suppose that the predicted increase in the Court's case-load will lead to a significant increase in the number of judgments sent to the Committee of Ministers for supervision of their execution. While in the year 2000, 495 new judgments were sent to the Committee of Ministers, the figure for 2001 had already risen to 650 by the beginning of September 2001. This suggests that the total number for this year will be around 825 judgments. Past, ongoing and future increases in the number of cases registered and processed by the Court will undoubtedly mean that the annual number of new judgments requiring supervision will continue to increase, most probably to around 1,100 in 2002 and possibly reaching some 1,400 in 2003. In terms of the overall number of pending cases, the figures are equally telling: 2,161 in 2000 and already 2,650 at September 2001, suggesting an end-of-year figure of around 2,800 cases. Finally, the workload concerning specifically the supervision of the adoption of general measures is also rising: whereas in 2000 the adoption of 181 general measures had to be supervised, the figure for 2001 is currently around 200. This part of the work is particularly time-consuming.¹⁴

4. Proposals to allow European Court of Human Rights to decline cases

In October 2002, the Committee of Ministers' Steering Committee for Human Rights, (CDDH) issued a report setting out its interim conclusions on the reform proposals. Among other things, the CDDH agreed to examine further whether to allow the Court the power to decline to examine in detail applications that raise 'no substantial issue' under the European Convention; how to filter applications without creating a separate division within the Court and how to handle repetitive cases. It agreed *not* to pursue further the proposals to send back applications to national authorities; to create a separate division to deal with the preliminary examination of applications; to create a system of regional courts or to give the Court a wider competence to give advisory opinions.

If adopted, this proposal would mean that the Court would no longer issue rulings on all cases that meet the current admissibility criteria. Instead, the Court would only rule on cases that raise 'substantive' issues under the European Convention. Individuals whose complaints the Court considers raise 'no substantive issue' would not be able to get a ruling by the Court about whether their Convention rights have been violated, even if the case falls within the current admissibility criteria. This would mark a radical departure from the current system, where the right to individual application is at the heart of the European Convention system for the protection of human rights.

Besides its concern at the possible effects on individuals if their right to have their cases examined by the Court is diminished. According to Amnesty International such a change would not help the Court overcome the problems it faces due to the increase in the number of applications received. The Court's problem is not a lack of judicial time, but a lack of Registry time for the processing applications.¹⁵ The freeing up of judicial time through more rigorous 'filtering' of cases is more likely to add to the processing problem rather than solve it.

An expansion of the existing friendly settlement process, as envisaged by the Evaluation Group,

¹⁴ Council of Europe, Survey of Activities, European Court of Human Rights, <http://www.echr.coe.int/Eng/InfoNotesAndSurveys.htm>.

¹⁵ As indicated by the *Report of the Evaluation Groups to the Committee of Ministers on the European court of Human Rights*, § 69, available at <http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm>

which could be seen as a convenient means of reducing the Court's caseload, must not be to the detriment of the individual right of application (including determinations of the merits of most cases). It should be stressed, however, that the striking out of applications under Article 37 of the Convention should be regarded as a wholly exceptional procedure. The suggestion that an applicant's consent could be dispensed with in striking an application out of the list should be rarely, if ever, invoked. This would require a clear admission of liability by the respondent Government in the particular circumstances of the applicant's case, and could only apply where the applicant's position is manifestly unreasonable. There would have to be a rigorous consideration by the Court of the respondent Government's settlement offer and a careful assessment as to whether the offer provides as full a remedy as is appropriate in the circumstances. This must include a detailed consideration of the nature of the application and the substance of the alleged Convention violation(s), as well as the extent of any admission of responsibility and undertakings by the respondent Government. It is suggested that the Court must also ensure that any such undertaking is sufficiently specific (in relation to both the measure which the State has agreed to adopt and the timetable for its implementation) to enable the Committee of Ministers effectively to supervise its enforcement. Finally, the Court should set out its reasons in full for any such decision.

Amnesty International noted with the concern the use of the striking out procedure without the applicant's consent in *Akman v Turkey*, Judgment of June 26, 2001, in the context of a right to life case concerning the fatal shooting of the applicant's son by the Turkish security forces. The Court's judgment in *Akman* failed to resolve the dispute as to what happened to the applicant's son, and that it failed to refer either to the obligation under Article 2 to provide an effective investigation into the incident or the obligation under Article 13 to provide an effective remedy. It is also of concern that the respondent Government in the *Akman* case gave no undertaking to attempt to investigate the circumstances of the case or to consider whether criminal or disciplinary proceedings should be brought. The striking out of such a case in those circumstances fails to ensure "respect for human rights" as required by Article 37 and risks damaging the Court's credibility.

It is acknowledged that the Court's fact-finding hearings may be time-consuming and expensive, however, in exceptional cases, such procedures are essential to the Convention system and must be continued. Such hearings have been conducted in complex and serious cases where there has been no or inadequate investigations by the national authorities, accordingly it is the very failure of the national authorities to provide an effective remedy in respect of violations of the Convention which creates the need for the Court to hold fact-finding hearings. There are particular situations, such as allegations concerning torture or death in custody raising issues under Articles 2 and/or 3 of the Convention, where it is the state, rather than the applicant, which has the capability to obtain and/or preserve essential evidence. Where the state fails in its duties in this respect, the case may only be capable of authoritative resolution by the hearing of oral evidence. Where the national authorities fail to conduct such independent, impartial and thorough hearings, the European Court should do so. Given that the burden of proof falls essentially on the applicant to establish her/his case, to deny an applicant an oral hearing in some circumstances would be significantly to disadvantage the applicant.

5. The Role of the Committee of Ministers

One of the great advantages of the reform of the control mechanism under the Convention is undoubtedly the direct access of the individual to the Court. This idea is not new, already in December 1947 a number of prominent European politicians and other groups formed the

'International Committee of the Movements for European Unity', which organized in May 1948 the 'Congress of Europe' in The Hague. In a number of resolutions of this Congress there was a call for the establishment of a political and economic union. There should be a Charter of Human Rights and a Court of Justice with adequate sanctions for the implementation of this Charter should be created. But the supervision machinery was less strong than the original proposal: the rights of individuals to lodge complaints with the Commission and the jurisdiction of the Court were made optional, and the Committee of Ministers was brought in as the final arbiter in cases which were not referred to the Court of Human Rights. It took thus almost half a century to realize the ideals of the 'Congress of Europe'.

During the drafting of Protocol No. 11 the need for a political element in the control system has been put forward. Especially with respect to inter-State complaints it was argued that such an element had certain advantages. However, the advocates of a political element attributed a role in this respect to the Committee of Ministers and did not put forward any argument in favour of the Commission. The role of the Committee of Ministers under the supervisory mechanism of the Convention has been criticized on several occasions by a number of prominent scholars.¹⁶ It might be seen as one of the advantages of the present reform that it removes one of the anomalies in the design of the control mechanism, which had its reasons at the time of its creation but which is no longer justified in the present situation. At least insofar as individual applications are concerned there is under the present situation no role for the Committee of Ministers in the decision-making process under the Convention.

According to Article 46(2) ECHR the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. While taking into account the discretion of the respondent States to choose the means whereby they implement individual or general measures, the Committee supervises that the chosen means effectively achieve the result required by the judgment. The collective nature of the Convention system, underlined in the Preamble of the Convention, means that all the States, not just the respondent State, are responsible for ensuring that cases reach a satisfactory outcome.

After having invited the respondent State to inform it of the measures taken in consequence of the judgment, the Committee will first check that any sum awarded to the applicant by the Court by way of "just satisfaction" has been paid and that any other necessary individual measure has been taken. It will then satisfy it that the requisite general measures have been taken. Finally, it will certify, by adopting a public resolution, that it has exercised its functions under Article 46(2) ECHR.

In the great majority of cases, the Committee is able to fulfill its function under Article 46 without difficulty. In some cases, however, problems do arise. Political motives or strongly held cultural ideas may render difficult or delay the passing of legislation, as may pressures on parliamentary time. Given the increased number and complexity of the execution problems posed, the Committee is more and more facing difficulties in ensuring States' rapid compliance with judgments. Moreover, in recent years some States have challenged, on the occasion of several individual cases, the authority of the Court's judgments with regard either to "just satisfaction" or

¹⁶ See e.g. H. Golsong, "Die eigenartige Rolle des Ministerkomitees des Europa-rates als eine der beiden Endentscheidungsinstanzen im Rahmen der MRK", *EuGRZ* (1975), pp. 448-449; P. Leuprecht, "*The Protection of Human Rights by Political Bodies - The Example of the Committee of Ministers of the Council of Europe*", *Progress in the Spirit of Human Rights* in: M. Nowak, Steuer, Tretter (eds) Engel Verlag (1988), p. 95 (103-104); A. Drzemczewski, "A 'non-decision' of the Committee of Ministers under Article 32(1) of the European Convention on Human Rights: The East African Asian Cases", *Modern Law Review* (1978), pp. 337-342.

to specific measures required by the judgments. The Committee's position has, however, always remained that States have, under Article 46 of the Convention, unconditionally undertaken to comply with the judgments of the Court.

If, in case of problems, the confidential scrutiny by the other governments at the Committee's meetings should fail to achieve the necessary result, the Chairman-in-Office of the Committee can be invited to make direct, usually confidential, contacts (letters, meetings, etc.) with the Minister of Foreign Affairs of the respondent State. Furthermore, public interim resolutions may be adopted, notably to convey the Committee's concerns to interested States, organizations and parties and to make relevant suggestions to the authorities of the respondent State. If there are serious obstacles to execution, the Committee will adopt a more strongly worded interim resolution urging the authorities of the respondent State to take the necessary steps in order to ensure that the judgment is complied with. The Rome Ministerial Conference called upon the Committee of Ministers to seek further measures that might be taken in this connection.

According to the Rules for the application of Article 46, the Committee's agenda is public (Rule 1a). Information provided by the State to the Committee of Ministers and the documents relating thereto are also accessible to the public (Rule 5). This Rule has the advantage of ensuring that applicants and their lawyers are kept duly informed about the state of proceedings before the Committee. The Deputies recently decided that, in application of these Rules, the annotated Agenda and Order of Business of each meeting, which contains information on the progress of execution of judgments, would be rendered public a few days after the meeting. According to Article 21 of the Statute of the Council of Europe, the Committee's deliberations remain confidential. On each of the last three points, the Committee may decide otherwise.

Just as the number of applications filed with the Strasbourg institutions has continued to increase very substantially, so too has the number of cases considered by the Committee of Ministers (24 cases at the February 1992 meeting; 273 at that of September 1995; an average of 800 cases at each of the six 2-day meetings in 2000, with a peak of 1,885 at the meeting of September 2000; an average of 1,000 cases at each of the six 2-day meetings in 2001, with a peak of approximately 2,300 cases to be examined at the meeting to be held in October 2001).

The working methods of the Committee have been under more or less constant review in recent years. The latest reform undertaken in 2000 implied the adoption of new Rules for the application of Article 46 para. 2 and a radically revised documentation system. Emphasis has also been given to the use of written procedures and of internet technology.

In order to save valuable Committee of Ministers' time, cases raising similar problem(s) vis-à-vis a certain State are examined together *en bloc* and payment control and other routine control (such as publication and dissemination of judgments) are usually dealt with through written procedure, i.e. without any debate. Despite these efforts, it is the general experience that, because of the sheer volume of material to be dealt with, not all cases raising problems, and thus requiring debate, receive as much attention as they might need.

On 28 September 2000 the Parliamentary Assembly adopted resolution 1226(2000) on "Execution of judgments of the European Court of Human Rights", in which it underlined that the responsibility for the problems of execution of Court's judgments lay primarily with the States, but also pointed out that it lay partly with the Court, its judgments being at times not sufficiently clear, and with the Committee of Ministers, "which ...[did] not exert enough pressure when

supervising the execution of judgments'.¹⁷ In its report of the European Commission for Democracy through Law (Venice Commission) it noted its impression that it often takes a long time before Governments provide the Secretariat with pertinent and exhaustive information on both factual development of cases and the legal situation pertaining in the country. In the Commission's opinion, this insufficient and unsatisfactory co-operation by member States constitutes another major shortcoming in the procedure before the Committee of Ministers.¹⁸

The Inter-American Commission on Human Rights plays a role which to a certain extent is comparable to that of the Committee of Ministers of the Council of Europe. It has three categories of powers. One with respect to all member States of the Organization of American States; another *vis-à-vis* the State Parties to the American Convention on Human Rights and a third with regard to the OAS member States not Parties to the American Convention. Thus, apart from its quasi-judicial character it also acts as political body, while the Inter-American Commission on Human Rights fully meets the requirements of independence. In this respect, the drafters of Protocol No. 11 completely neglected the role which the Inter-American Commission on Human Rights has played and plays in enforcing respect for human rights and fundamental freedoms in the American continent. The main tool at the disposal of the Committee of Ministers is peer pressure. It also had recourse, and recently more and more so, to pressure by publicity.¹⁹

The Council of Europe lacks a mechanism under which the Member States can be kept under constant surveillance on their compliance with the commitments accepted within the Council of Europe. On 10 November 1994 the Committee of Ministers has tried to fill this gap and adopted a declaration on compliance with commitments. This declaration envisages a political mechanism under which the Members of the Council of Europe, its Secretary General or its Parliamentary Assembly may refer questions of implementation of commitments concerning the situations of democracy, human rights and the rule of law to the Committee of Ministers. On 20 April 1995, the Committee of Ministers adopted the procedure for implementing the above-mentioned declaration. This mechanism does not effect the existing procedures arising from statutory or conventional control mechanisms. The discussions will be confidential and held in camera 'with a view to ensuring compliance with commitments, in the framework of a constructive dialogue'. Finally, the Committee of Ministers in cases requiring specific action, may decide to request the Secretary General to make contacts, collect information or furnish advice; to issue an opinion or recommendation; forward a communication to the Parliamentary Assembly or take any other decision within its statutory powers. Whatever opinion may be given on this mechanism it certainly does not provide the Committee of Ministers with more powers than it already had. It also will probably result in even less willingness on the part of the Member States to make use of the already existing inter-state complaint mechanism under Article 33 ECHR.

The mechanism has, however, the advantage that it creates a platform for the Committee and the Member States to discuss and examine on a structural basis the human rights situation in all Member States of the Council of Europe, while this only could take place on an *ad hoc* basis. It also provides a more convenient tool for the Member States to give room to an 'early warning system' when there are indications that one of the Member States does not fulfill its obligations. In the more than fifty

¹⁷ According to the statistics made available by the Department for the Execution of Judgments of the European Court of Human Rights, Directorate II, Council of Europe, the average time between a judgment and its execution for all States was 399,5 days for the years 1985-1991, and 345,85 days for the years 1995-2001. Cases currently before the Committee of Ministers have been pending for an average of 731,64 days. New cases before the Committee of Ministers have been 1060 (estimates July 2002), 755 in 2001, and 504 in 1999.

¹⁸ Council of Europe, Opinion No. 209/2002, 18 December 2002, CDL-AD (2002) 34, p. 8.

¹⁹ See in particular Rules 1 a), 5 of the new "Rules for the application of Article 46(2) of the ECHR", approved by the Committee of Ministers on 10 October 2001 at its 736th meeting of Ministers' Deputies.

years of its existence, there have been situations, that silent diplomacy could have had a better result than the existing complaint procedures.²⁰ This monitoring role of the Committee of Ministers could also be used as a procedure of monitoring of respect of commitments in respect of a State which refuses to execute a judgment of the Court. As *ultimum remedium*, the application of Article 8 in conjunction with Article 3 of the Statute of the Council of Europe (suspension or termination of membership) is available to the Committee of Ministers.²¹

6. The European Union and Human Rights

Describing the human rights system in Europe a few words have to be said about the role of the European Union in this respect. In its screening of candidate countries to the European Union the European Commission takes carefully note, whether the candidate country has adhered to a series of human rights instruments among the ECHR, the European Social Charter (ESC), the European Convention for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment (CPT), the Framework Convention for the Protection of Minorities and the global human rights treaties, like the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Convention against Racial Discrimination (CERD).

In 1989, the European Commission stressed that priority was given to achieving the aims of the Single European Act²² and that it was undesirable to start accession negotiations with any country before 1993. In 1993 the Copenhagen European Council established the accession criteria for countries wishing to join the European Union (EU). They were to possess stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The Treaties on European Union (concluded in Maastricht on 7 February 1992 and Amsterdam, 2 October 1997) build on the established case law of the European Court of Justice. The European Court of Justice has incorporated the rights enshrined in the European Convention on Human Rights (ECHR) into general principles of Community law, which has been ratified by all Member States of the European Union. Sometimes, however, the Court will allow an appeal to other human rights conventions, such as the International Covenant of Civil and Political Rights (ICCPR).²³ The Treaty of Amsterdam contains the additional provision, in Article 6 paragraph 1, that the EU is founded on the principle of freedom, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which the Member States have in common. Article 7 has a sanction/suspension clause. Article 46 provides for the exercise of judicial control over respect for human rights. Article F, paragraph 2 of the Treaty (Article 6, paragraph 2 of the Treaty of Amsterdam) lays down that the Union shall respect fundamental rights, as guaranteed by the ECHR, including the *acquis*.²⁴

Since the European Union has adopted its own Charter of Fundamental Rights, which does not a legally binding character, a strange situation might be created. What exactly should be the relationship with the existing instruments, like the ECHR. How would be the role of the Court of

²⁰ See in this respect: Andrew Drzemczewski, Monitoring by the Committee of Ministers of the Council of Europe: A useful 'Human Rights' Mechanism?, *Baltic Yearbook of International Law*, Volume 2, 2002, pp. 83-103.

²¹ See Resolution DH (70) 1 of 15 April 1970 concerning the inter-State applications of Denmark, Norway, Sweden and the Netherlands v. Greece, Rec. 1959-1989, p. 44.

²² With the Single European Act the concepts of human rights entered into the basic treaties, which finally led to the Treaty on the European Union.

²³ ECJ Orkem judgment (374/97) of 18 October 1989.

²⁴ See in this respect: Alan Rosas, *The European Union and International Human Rights Instruments*, The European Union and the International Legal Order: Discord or Harmony?, Vincent Kronenberger (ed), The Hague, 2001, p. 55-57.

Justice and the European Court? This question could be answered if for instance the European Union would join the ECHR. In this the technical questions are likely to be solved, but although there is an ongoing discussion about the pros and cons of a possible accession, not much progress has been made.

Conclusion

It was common ground that the existing machinery of the Convention is overburdened with work. Several factors have attributed to the overwhelming workload of the supervisory organs in Strasbourg. The length of proceedings under the Convention, the enlargement of the Council of Europe, the wide acceptance of the right of individual petition, the acceptance of the jurisdiction of the Court, and above all the fact that the complaints lodged are more complex than at the start of the control mechanism.

The drafting of a new Protocol amending the control mechanism of the Convention was a unique opportunity to revise the role of the Commission. The drafters of the Protocol could have looked at the competence and tasks of the Inter-American Commission on Human Rights. This Commission, can initiate for example, on its own motion fact finding missions, when there are serious indications of gross and systematic violations of human rights in a certain country. It does not have to wait until a complaint in that respect has been lodged. It cannot longer be hold that Europe does not need such an active kind of supervision.²⁵

Also the Parliamentary Assembly keeps track of the way in which the Committee of Ministers exercises its supervisory function concerning the execution of judgments. In that respect it adopts resolutions and addresses recommendations to the Committee of Ministers, including recommendations to put pressure on the Government concerned to adopt the necessary measures and/or to pay the amount of damages fixed by the Court.²⁶

The Secretary General of the Council of Europe may under Article 52 ECHR request any member State explanations as to the manner in which its internal law ensures the effective implementation of the Convention, including the manner of execution of the Court's judgments. It seems that the Secretary General recently has intensified the use of his competence under Article 52.²⁷

The Court itself should be able play a more active role in the supervision of the execution of its judgments by the respondent States. However, it should be acknowledged that the Court's powers do not include that to order the respondent State to take specific measures in order to remedy the violation found, unlike the Inter-American Court of Human Rights which, pursuant to Article 63(1) of the American Convention on Human Rights, "may rule, if appropriate, that the consequences of the measure or situation that constituted the breach of [a provision of the Convention] be remedied". The obligations incumbent on a State on account of a violation on its part are therefore obligations of result. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 ECHR.²⁸

²⁵ See M. Kamminga, "Is the ECHR equipped to cope with gross and systematic violations?", NQHR, Vol. 12 (1994), pp. 153-164.

²⁶ See Recommendation 1576 (2002) on "Implementation of Decisions of the European Court by Turkey".

²⁷ See also Council of Europe. 25-02-2003, Steering Committee for Human Rights, CDDH-GDR (2003)014.

²⁸ See in more detail Council of Europe, Opinion on the Implementation of the Judgments of the European Court of Human Rights, CDL-AD (2002) 34.

These measures should be considered seriously in order to find a solution for the overwhelming workload of the Court and it should be taken for granted that an eventual solution may not be to the detriment of the access of the individual to the Court. One of the major steps taken by the drafters of Protocol No. 11 is the guarantee of direct access of the individual to the Court. If we would accept the proposal not to deal on the merits of a case when it raise no substantive issue, would open the door for rejecting cases, without even to give substantial reasoning for it. Although the Strasbourg system is under a heavy pressure and some may say the Strasbourg is the victim of its own success. I would rather say, it is not a victim of its own success, but a victim of a general reluctance of the member States, to take the European Convention seriously. Human rights violations first of all should be redressed at the domestic level and the Strasbourg Court should only be used as an *ultimum remedium*.