RETHINKING THE MECHANISMS FOR JUDGEMENT COMPLIANCE IN THE COUNCIL OF EUROPE AND ELIMINATING THE 'LEGAL/POLITICAL GAP'

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ABSTRACT

This article examines the mechanisms through which the Committee of Ministers ensures that the Council of Europe Member States comply with the decisions of the European Court of Human Rights. It then offers new ideas as to how these mechanisms can be improved and evaluates the organisation's attempt to deal with non-compliance problems through Protocol 14. It concludes that only by eliminating what has been termed the 'legal/political gap', will the organisation be truly effective in policing human rights abuses in Europe. This should be done through a series of changes, namely a more dynamic approach by the Committee, greater involvement of the court in the implementation process and better cooperation with the European Union and the European Commissioner for Human Rights. The organisation's nature has changed from a group of self-policing States to largely a training centre for new democracies. The Council needs to adapt quickly: unless its authority is firmly established in this new state of affairs, its ineffectiveness will encourage further non-compliance by the newer Member States.

A INTRODUCTION

The Council of Europe is the most renowned human rights organisation worldwide. Nonetheless, following its enlargement in the 1990s and its failure to adapt accordingly, its reputation and effectiveness in terms of judgment compliance are being compromised daily. The Council has traditionally relied on a combination of legal and political pressures for the implementation of judgments. The legal mechanisms include the influence of the European Court of Human Rights[1] in domestic legal systems and the fact that the European Convention on Human Rights has been nationally implemented by all Member States, while political mechanisms mostly rely on pressure from the Committee of Ministers and national organisations. The court and the Committee function independently from each other, both formally and behind the scenes; however, implementation mechanisms can only achieve their true potential if the gap between the organisation's legal and political bodies is reduced as much as possible. By drawing a clear dividing line between the legally binding judgments of the ECtHR and the political statements of the Committee, the system is downplaying the importance of the latter and harms the organisation's overall efficiency. This article does not focus on the Committee or on the ECtHR in particular; its aim is to discuss the relationship between the two bodies and suggest ways in which their cooperation can be improved.

The paper begins by examining the Council's characteristics which transformed it into a uniquely respected organisation and questions whether they remain helpful in the post-1990 era. It then proposes necessary reforms to avoid the organisation's decline: greater involvement of the ECtHR in the execution process and a more robust attitude against violators in the Committee. Only by making the Council's bodies more aware of their common goals and their relationship to each other and to other international organisations, can the currently failing implementation mechanisms regain their effectiveness.

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[1] Henceforth, 'ECtHR' or 'Court'.

B THE WORKING MECHANISMS OF THE COUNCIL OF EUROPE

Unlike most types of international treaties, human rights treaties are non-reciprocal: the State has no incentive to abide by the limitations on its sovereign power apart from good will since other Member States have no reason to force it to do so.[2] Thus, most human rights bodies are unknown to the general public and their decisions are largely ignored by governments,[3] a situation which can be contrasted with the European Union or the World Trade Organisation, organisations whose primary concern is the States' economies. The exception to this is the Council of Europe: it consists of 47 Member States, yet it is compared to the German Federal and US Supreme Courts rather than other international bodies.

Despite the well accepted recognition of the Council's effectiveness, if its aim is truly to secure 'the universal and effective recognition and observance of the Rights therein declared,'[4] the statistics show a less satisfactory picture. The more 'rapidly general measures are taken by States to execute judgments, the fewer repetitive applications there will be,'[5] yet 60% of the court's judgments concern violations already condemned in the respondent State.[6] This is at a time when cases reaching the ECtHR have increased by 15% between 2006 and 2007 and just 4 States generate half of the court's case load (Russia, Romania, Turkey and Ukraine).[7] That is partly because of the individual complaints procedure, but it must also indicate that the Committee is in some ways failing its task. If the Council is to avoid the 'ultimate asphyxiation of the system and a steady, painful loss of credibility,'[8] its working procedures must be reconsidered.

The organisation's legal and political processes are largely distinct: on the legal level, the ECtHR decides whether a violation has taken place, and if it has, the case is sent to the political body of the Council, the Committee of Ministers, through which diplomatic pressure is exerted on the respondent State.[9] The gap between these two procedures (what will be termed in this article as the 'legal/political gap') determines the effectiveness of the organisation as a whole. It affects each State to a different extent, since pressure for implementation works not only on a European, but on a national level as well. However, the smaller the gap, the less likely a State is to take advantage of it and stray from its responsibilities. It is suggested that the mechanism operating in the Committee ensures that a small individual improvement in compliance by many States cumulatively increases the overall pressure on those few non-compliant Parties. However, bridging the gap by unilaterally increasing the powers of only one body is impossible in an organisation that works by unanimity. Thus, all mechanisms need to be slightly modified, since the change has to be subtle enough for the States to agree to, but effective enough to make a difference in compliance. The next four sections will discuss the existing mechanisms of the Council, the extent to which they are helpful today and how they can be improved. The mechanisms are:

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[2] R Provost 'Reciprocity in Human Rights and Humanitarian Law' (1994) 65 British Year Book of International Law 383.

[3] For example, the European Committee for the Prevention of Torture, carried out as of 2/12/2008 260 visits in all Member States and published 210 reports, but does not mention in how many situations action was taken following the report http://cpt.coe.int/en/ (2 March 2010).

[4] European Convention of Human Rights, preamble para 3.

[5] Explanatory Report of Protocol 14 para 16.

[6] ibid para 68.

[7] M Boyle 'On Reforming the Operation of the European Court of Human Rights' (2008) European Human Rights Law Review 1, 4.

[8] ibid.

[9] E Lambert-Abdelgawad *The Execution of Judgments of the ECHR* (Human Rights Files No 19 2002); E Lambert-Abdelgawad *The Execution of Judgements of the ECHR* (2nd edn Human Rights Files No 19 2008).

the ECtHR's credibility, the Committee's diplomatic pressure, the effect of the Council's relationship with the EU and the mechanism of indirect national pressure.

1 The Legal Mechanism of the Council and the Credibility of the Court

The first mechanism, the credibility of the ECtHR, is achieved through the court's transparent reasoning.[10] The fact that almost every case has dissenting judgements shows that the proportionality test is not merely a tactic for the court to protect the applicant, but a tool which helps it reach the fairest result.[11] This great success has led to a debate that is dividing the court: should it deliver individual or constitutional justice? Those in favour of individual justice, mainly most NGOs, argue that the court's responsibility under the Convention is to provide redress for every violation.[12] However, a court with 800 million potential applicants can never achieve this goal, making constitutional justice the only viable alternative. 'Constitutional justice' has two different meanings: the first is that the court should interpret the Convention and by giving guidance to national courts act as the Supreme Court of Europe, what has been termed 'Embeddedness'.[13] The second interpretation suggests that the ECtHR should deal with serious violation cases and not necessarily with those that have a general point to make.[14] The problem with this suggestion is that the court will focus on article 2 and 3 violations at the expense of other articles and more compliant States. Secondly, it has become clear that the Committee does not have the teeth to implement gross and systematic violations. Consequently, this interpretation will not only harm the organisation's reputation, but will arguably fail to deliver any justice. Instead, by giving guidance to the national courts and shifting some responsibility to their shoulders through Embeddedness, national courts become active participants and are more likely to play by the ECtHR's rules. This will have a positive effect not only in terms of implementation of decisions, but also in the coherence of the law. Hefler argues that Embeddedness faces two problems: firstly, national Supreme Courts are willing to apply ECtHR's guidelines, this willingness is reduced in lower courts where most cases are dealt with.[15] This can only be solved by educating lawyers and judges, not only on a European level, but most importantly domestically through the National Human Rights Institutions.[16] The second problem is that in some countries, it is the courts themselves that are refusing to cooperate and are lacking impartiality.[17] The solution to this is a more rigorous approach on the international level, a suggestion that will be elaborated in the second part of the paper. Despite these difficulties, Embeddedness is a necessary development for better implementation of judgments.

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[10] *Boyle* (n 7).

[11] S. Palmer 'A Wrong Turning: Article 3 ECHR and Proportionality' (2006) 65 Cambridge Law Journal 438, 447. 'Proportionality is assessed by balancing the importance of the interference against the seriousness of interfering with a fundamental right.'

[12] For example, Amnesty International 'Amnesty International's Comments on the Interim Activity Report: Guaranteeing the Long Term Effectiveness of the European Court of Human Rights' (Report) (February 2004) AI Index IOR 61/005.

[13] L Hefler 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 European Journal of International Law 125, 128.

[14] Interview with ex- ECtHR Judge Loukaides, Nicosia (2 February 2009).

[15] *Hefler* (n 13) 134.

[16] Henceforth 'NHRIs'.

[17] For example, in *Shamayev v Georgia and Russia* (*App No 36378/02*) a fact finding mission was organised by the Council in Russia in September 2003. The Council was notified a month later that the Stavropol Regional Court refused to grant the Court delegation access to the applicants.

2 The Political Mechanism of the Council and the Workings of the Committee of Ministers

The Committee of Ministers is a forum where Member States' representatives (either the Foreign Minister or his Strasbourg based deputy) put pressure on the respondent State to remedy the violation and prevent further ones from taking place. The Committee reviews each case every six months and issues interim resolutions on the State's progress, until the decision has been fully implemented and a final resolution is published. Most States take this process seriously: for example, the Cypriot government employed Lord Lester of Herne Hill, QC to represent it in the Committee on the Turkish occupation issue, showing that it considers the Committee an effective medium through which it can present its case.[18]

However, perhaps due to the different levels of democratic maturity in the organisation, the Committee has been inconsistent in what it will accept as an effective execution of a judgment. Sometimes it is not satisfied with merely a draft proposal and waits for the enactment of the legislation and in others, bringing the judgment to the domestic authorities' attention is enough.[19] Where an amendment in the legislation is unnecessary because national courts will prevent similar violations, the Committee requires proof through judicial practice.[20] Again, the time period for which this is monitored varies.

This flexibility, arguably an inherent characteristic of the political negotiation process, might have been acceptable when membership was restricted and expectations from States were more predictable, but this is no longer the case. If deviation from ECtHR standards due to political exploitation of the Committee's processes is inevitable, more power should be transferred to other bodies of the organisation. Therefore, a dilemma lies before the Council: the court can either expand its role to match its increasing significance in Europe, or it can restrain it, to match the capabilities of the Committee for the sake of a more internationally coherent organisation. Solutions to this 'legal/political gap' problem are discussed in section three.

3 The Vague Relationship Between the Council of Europe and the European Union

A number of the Council's most committed Members are also key players in the EU context, creating a relationship of cooperation and respect between the two organisations. It is suggested that this could work to the Council's advantage by creating an added incentive for Member States to implement the ECtHR's decisions. However, despite its potential, the EU-Council relationship remains underdeveloped and hinders the organisation's well-functioning. Following the drafting of the EU Charter of Fundamental Rights and 'the emergence of significant «conflicts of loyalties»'[21] the legitimacy of both systems is potentially compromised. This was illustrated in *Mathews v. UK*[22] which found the UK liable for violating the right to vote during the Euro-elections and forced it to decide between ignoring an ECtHR or a European Council decision.

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[18] *Cyprus v Turkey* (App No 25781/94) (2002) 35 EHRR 30. Memorandum prepared by the Secretariat of the Department for the Execution of judgments of the ECHR (DG-HL).

[19] S Greer *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge Cambridge University Press 2006) 158 (Henceforth, '*The ECHR: Achievements'*).

[20] For a more detailed discussion of this and examples, see Lambert-Abdelgawad (n 9) (2008).

[21] R Harmsen 'National Responsibility for European Community Acts under the European Convention of Human Rights: recasting the accession debate' (2001) 7 European Public Law 625, 644.

[22] (App no 24833/94) (1999) 28 EHRR 361.

The vague relationship between the two organisations is also reflected in the language of the Copenhagen criteria,[23] the EU accession criteria for new Member States. They require that the applicant countries have stable institutions, are able to guarantee democracy, the rule of law, human rights, respect and protect minorities. These undefined principles partly depend on ECtHR compliance, but it is unclear to what extent.[24] Thus, Member States can use such vague requirements to keep candidate States out of the EU and protect their national interests, without harming their good international relations. Following its accession application, Turkey made a number of domestic changes[25] which were considered unsatisfactory by the EU. Conversely, although some differences were noted in minorities' protection in Eastern Europe, the European Commission used virtually identical language to describe the situation in each country.[26] Despite concerns over its poor human rights record, Slovakia joined the EU in 2004 while Turkey is waiting (arguably in vain) for an accession date. Following the Commission's Report 'The Europe Agreements and Beyond: a Strategy to Prepare the Countries of Central and Eastern Europe for Accession',[27] the EU has politically and financially supported these States, while Turkey has only received criticism.

This makes sense politically: Turkey's has a high birth rate and a population of 76 million people[28] making it the largest country in the EU, which translates into an influential minority in the Parliamentary Assembly. Concurrently, the poor living conditions Turks live in, make countries such as Germany (with a Turkish population of 6 million people) worried of mass immigration as soon as Turkey receives full membership.[29] These factors undeniably affect Turkey's accession prospects, but they cannot be openly admitted, turning human rights into a useful scapegoat. When asked whether this is a problem, the ex-ECtHR Cypriot Judge Loukaides stated: 'A violation is a violation. The fact that the EU is using human rights as a tool for its political objectives does not change a simple fact.'[30] However, one should disagree[31]: this approach makes the Turkish population disillusioned with human rights as they are portrayed as hurdles to a better European life, undermining their significance and popularity.[32] Unless the Council is to become another 'intra-EU politics «toy»,'[33] it must keep up with the political realities in Europe and aim for a clearer relationship with the EU.

4 The Indirect National Pressure for Compliance

The fourth and most complex mechanism for compliance is indirect pressure in each State. This pressure arguably comes from the State's constitution, NHRIs, 'elite opinion' and to a

[23] European Council in Copenhagen, Conclusions of the Presidency, 21-22 June 1993, (SN 180/1/93 REV 1).
[24] H Arikan 'A Lost Opportunity? A Critique of the EU's Human Rights Policy Towards Turkey' (2002) 7 Mediterranean Politics 19, 22.
[25] For example, it amended the penal code and did not ratify 200 death sentences.
[26] Arikan (n 24) 32.
[27] Commission (EC), 'The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession' COM (94) 320 final, 13 July 1994.
[28] Central Intelligence Agency 'The World Factbook' <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html> (25 February 2010).
[29] C Kassimeris and L Tsoumpanou 'The Impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms on Turkey's EU Candidacy' (2008) 12 International Journal of Human Rights 329 (Henceforth, 'The impact of the ECHR on Turkey's EU candidacy').
[30] Interview with ex- ECtHR Judge Loukaides, Nicosia (2 February 2009).
[31] Kassimeris (n 29).
[32] ibid.
[33] S Stavrides 'The Parliamentary Forum of the Euro-Mediterranean Partnership: An Assessment' (2002) 7 Mediterranean Politics 30, 43.

lesser extent, general public opinion. It is the interaction between these factors and their varying influence in each country that makes each State's record and attitude towards specific rights unique. Ideally, these factors push for the implementation of ECtHR decisions on a national level, downplaying the inherent weakness of international pressure mechanisms and alleviating the non-reciprocity of human rights treaties. However, because the newer, less compliant Member States lack one or more of the pressure mechanisms, a more internationally robust attitude, the subject matter of the next part of this paper, is necessary.

Each State has incorporated the Convention in its own legal system and pressure to abide by national legislation is in most cases sufficient to ensure compliance. Thus, the litmus paper for compliance is found in the controversial cases, which are usually not supported by the general public and have no direct political consequences.[34] What is necessary to induce compliance in such cases therefore, is pressure from the 'elite opinion', for example, academics and human rights organisations. Generally, the mutual interlocking pressure from these internal factors can influence compliance. For example, if the UK Parliament decides to violate a human right, it has to pass a law expressly stating this. This law would be lobbied against by 'elite opinion' groups which would argue that this violates the Human Rights Act 1998, imposing political prices (such as the division of the governing party) that the government might be reluctant to pay. Even if this fails, the courts can issue a declaration of incompatibility, sending the law back to Parliament.[35] At this stage, 'elite opinion' will become more forceful and general public opinion will be engaged since the Act's opponents might use the media to influence the political climate – few governments are willing to risk being labelled 'anti-human rights'. NHRIs, whose main role is to educate the public about their human rights, will also participate in this process.

It is therefore vital that some respect for human rights exists before the State joins the Council so that these internal mechanisms can play their role. It is submitted that if human rights protection does not meet a minimum threshold nationally, European pressure, which is largely residual, remains ineffective. The EU is uniquely important in this respect because despite its international position the doctrine of direct effect allows it to initiate change from within. The fact that existing respect for human rights is lacking in a number of the newer Member States should have been anticipated by the Council. When the new States were admitted in the organisation, the argument was that they would gain more as insiders rather than outsiders.[36] However, when the Council was transformed from a 'club of democracies'[37] into partly a 'training centre'[38] for new Member States, it failed to act as an 'adjudicator of transition'[39] and guide the new Members to meet the required standards. Additionally, the Council should have maintained some minimum standard in its accession requirements. For example, Russian politicians did not keep their anti-human rights sentiments a secret and it is questionable whether they understood the obligations they undertook at the time.[40] Recently, in *Shamayev v Russia and Georgia*[41] the Russian

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[34] An example of such a controversial decision, which the Member State complied with is *McCann v United Kingdom* (1996) 21 EHRR 97.

[35] As happened for example in *Bellinger v Bellinger* [2003] UKHL 21.

[36] R Harmsen 'The European Convention on Human Rights After Enlargement' (2001) 5 International Journal of Human Rights 18, 28 (Henceforth, 'The ECHR After Enlargement').

[37] F. Surde 'La Commmunauté Européenne et Les Droits Fondamentaux Apréx le Traité D'Amsterdam: Ves un Nouveau Système Européen de Protection des Droits de l'Homme? (1998) La Semaine Juridique 9, 9.

[38] ibid.

[39] Harmsen (n 36) 29.

[40] For example, Sergei Stepashin, the Russian Minister of Justice, stated in a public newspaper in 1994: 'I am in favour of human rights violations if this human being is criminal' (Found in B Bowring 'Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross Purposes?' (1997) European Human Rights Law Review 628.

authorities refused to allow the applicants' representatives to contact their clients and cancelled the fact-finding mission organised by the Council.[42] Problematically, the Council was not only prepared to turn a blind eye to violations before accession, but it maintains a similar attitude after it.

Apart from dissimilar levels of political willingness to comply with judgments, Member States differ culturally and economically. For example, Moldova might want to follow the court's decisions, but it lacks the resources to do so. Simultaneously, Azerbaijan faces significant human rights problems, yet it sends very few cases to the court, because the majority of its citizens lack the education and its lawyers the expertise to take this step. Consequently, fewer people are aware of their human rights and less prepared to press for their implementation on the national level. Greer outlines seven main reasons why States fail to meet their Convention obligations: 'political problems, the daunting scale of reforms required, legislative procedures, budgetary issues, public opinions, conflicting EU obligations and bureaucratic inertia.'[43] Each country faces at different times all, some or none of these problems. At the other end of the spectrum, Germany has a good compliance record but rarely uses the ECtHR as it usually protects civil liberties through its domestic system.[44] These ranging national attitudes suggest that it is illusionary to assume that a single tactic will successfully boost compliance rates or that we can universally rely on the national processes for implementation; the Committee's flexible mechanisms are therefore necessary for the well-functioning of the organisation. Nevertheless, if such flexibility is allowed without more specific guidance from the court, the factors outlined by Greer will become a fertile ground for accommodating excuses from less compliant States.

C SUGGESTIONS FOR MORE EFFICIENT WORKING PROCEDURES IN THE COUNCIL OF EUROPE

The Council's working mechanisms might have been efficient in the 1990s, but following its expansion, they must be developed further to fill the growing gap between the legal and the political processes of the organisation. Despite the increasing chances of Protocol 14's non-ratification due to the Russian veto, it still merits consideration as it includes the Council's most recent proposals on this matter. Nonetheless, Protocol 14 was only intended to be a short to medium term solution so new proposals would be necessary shortly following its unlikely ratification. The following sections will examine the Protocol's solutions and any suggestions that could have been included but were not. Most of the suggestions are of a general nature, but two of them (exclusion from the Council and better cooperation with the EU) will be examined in light of the State they aim to affect the most (Russia and Turkey respectively).

1 A More Proactive Approach by the Council as a Whole

Rather than dealing with the compliance issue independently, Protocol 14 was primarily concerned with the overburdening of the court; in this respect therefore, it is a lost opportunity. A long overdue change that was not suggested is the translation of case law and

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[41] (App no 36378/02) [2005] ECHR 233.

[42] L Zwaakand and Y Haeck 'Council of Europe' (2008) 26 Netherlands Quarterly of Human Rights 125, 126.

[43] Greer (n 19) 158.

[44] For a comparative analysis between Germany and the other Member States, see European Court of Human Rights *Annual Report 2008* (Strasbourg Registry of the European Court of Human Rights 2008) 132.

interim resolutions in the official languages of the Member States. Many decisions concern the administrative authorities rather than the legislature and not every State official can read English or French. Decisions are binding on the respondent State, leaving the majority of Germans or Russians to be governed by a law which they do not understand. Ironically, it is the translation of documents into many languages that will unify the Council of Europe. If the judgment is available in the State's formal language, it is more easily considered as part of the national law and implemented due to rule of law pressures. Finally, the Council should endorse the Group of Wise Persons' suggestion that translated material 'should be distributed as widely as possible, particularly within public institutions such as courts, investigative bodies, prison administrations, and non-state entities such as bar associations and professional organisations. Law faculties should also figure among the most important recipients of these publications.'[45] These bodies possess what has been previously called 'elite opinion'; translating judgements makes it more likely that indirect national pressure will push for their execution.

Translation becomes increasingly important if States are granted an *erga omnes* right, one of Greer's suggestions for improved compliance rates.[46] An *erga omnes* right can be litigated by every country and not only by the victim. It is thus possible, that one day Norway could bring a claim against Turkey for failing to meet its obligations, sending the message that systematic violators will not be tolerated. Despite the tremendous advantages of this right, it is unlikely that it will ever be used since Norway has no interest in ruining its relations with Turkey, wasting time and money without itself benefiting from it. Greer himself explains that the underutilised inter-state procedure rests on a naive contradiction: 'the belief that litigious animosity between States will promote greater unity and respect for shared values.'[47] Why is the *erga omnes* procedure any different? Therefore, more realistic and effective suggestions are needed.

2 A More Dynamic Approach by the Committee against Non-Compliant States

Article 8 of the Statute of the Council of Europe makes possible the exclusion of a systematically non-compliant State from the Council. This has never been used; it was contemplated only once during the seven-year Junta in Greece, but the Generals withdrew before the Council had taken any action.[48] It has been threatened indirectly once, when the Committee stressed 'the compulsory jurisdiction of the court and the binding nature of its judgments' and asked the States 'to ensure, with all means available to the Organisation, Turkey's compliance with its obligations.'[49] This goes to the root of Kamminga's criticism that the 'the more serious and widespread the violations, the less adequate has been the response.'[50] States are much less likely to remedy systematic and gross violations because they know that the threat of exclusion, aiming to prevent exactly these, will never be used. The example that will be used in this discussion is Russia, a uniquely problematic State, not only because of its numerous violations, but mainly because of its consistent lack of political willingness to improve. Thus, such aggressive use of the Council's powers should only be

[45] Council of Europe 'Report of the Group of Wise Persons to the Committee of Ministers' (CM 2006 203) para 74 (Henceforth, 'Wise Persons' Report').
[46] Greer (n 19) 280-281.
[47] ibid 317.
[48] Lambert-Abdelgawad (n 9) (2008).
[49] Committee of Ministers, Interim Resolution ResDH (2001) 80 paras 6 and 8.
[50] M Kamminga 'Is the ECHR Sufficiently Equipped to Cope with Gross and Systematic Violations?' (1994) 12 Netherlands Quarterly of Human Rights 153, 163.

made where national pressure mechanisms are completely ineffective, rendering other forms of pressure in the Committee futile.

Harmsen argues that the Committee 'will have to hold States strictly to account for their implementation of court decisions – taking such actions as are necessary, up to and including suspension from the Council itself.'[51] Before contemplating whether this is advantageous, the Council should clarify that membership is not something that States of an (albeit low) democratic status can take for granted; it is a privilege they must keep earning. Today, Eastern European States with little experience in human rights protection, the rule of law and democratic institutions have no incentive apart from their good will to comply with the court's decisions.[52] The fact that they form a significant part of the organisation makes the Committee's pressure even less significant. Had the Council demanded substantial improvements before their accession, the Committee's task would have been much simpler. Notably, a number of these States have recently joined the EU, emphasising that a closer relationship with the EU, including clarification of the Copenhagen criteria, would have been to the Council's advantage. As things stand however, the only remaining tool in the Committee's hands is the threat of exclusion.

The strongest argument against exclusion is that some protection is better than no protection, which will be the outcome if a State is excluded from the Council.[53] Problematically, only one country will be penalised for its actions, as others (equally deserving the same fate) will swiftly comply in order to avoid the punishment. This country will also be the one with the most violations and in the greatest need for the Council's guidance. Nevertheless, some countries are compromising the Council's reputation and using its money and time with no visible improvement. For example, Mr Putin has suggested that Russia's non-ratification of Protocol 14 is a reaction to the judgment in *Ilaşcu and Others v. Moldova and Russia*.[54] With attitudes dangerously resembling blackmail, one wonders what the Committee will accept before considering exclusion. The court in *Ilaşcu* had asked for the prisoner's immediate release, but five years and four interim resolutions later, this has still not happened. As Mark Janis predicted, 'the same political importance of Russia that has prompted the Council of Europe to accept its admittance, will make it especially difficult for Strasburg to force the Russian Government to comply with adverse findings.'[55] Arguably, only Russia has this sort of power. However, more than 50% of the courts' decisions ordering compensation are not executed at all or not within a reasonable period.[56] This is partly due to a lack of political willingness to comply, and not only Russia's. Slovenia, Georgia and Moldova had in 2008 the most violations per person,[57] becoming Russia's potential allies in defying the court.

A further issue is whether the article's use should be discretionary or whether it should depend on a predefined test, considering that its discretionary use so far has failed to convince of its success. Understandably, no country is willing to step up first and ask that a violator is excluded. If article 8 kicked in automatically and the Committee merely had to decide whether to execute its power, its use would not be so unlikely. Thus, an accurate test

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[51] Harmsen (n 36) 35.
[52] P Leach 'Strasbourg's oversight of Russia – an increasingly strained relationship' (2007) Public Law 640.
[53] Lambert-Abdelgawad (n 9) (2002, 2008).
[54] (App no 48787/99) (2005) 40 EHRR 46.
[55] M. Janis 'Russia and the "Legality" of Strasbourg Law' (1997) European Journal of International Law 93, 98.
[56] European Commission for the Efficiency of Justice '*Examination of problems related to the execution of decisions by national civil courts against the State and its entities in the Russian Federation'* (CEPEJ 2005 (8) 9 December 2005) para 11.
[57] European Court of Human Rights 'Annual Report 2008: Provisional Edition' (Strasbourg Registry of the European Court of Human Rights 2008) 140-141.

with time limits and number of violations is necessary to make the threat of exclusion a real one. This suggestion however, raises more questions than it answers: will exclusion follow automatically if the test is satisfied or will some discretion be left to the Committee? Will the test catch countries with serious violations, numerous violations or both? Italy faces enormous article 6 problems, but it should not receive the same penalty as a systematic violator of articles 2 and 3. On the other hand, a systematic violator of article 10 is intentionally downplaying the Council's biggest tool, national pressure, and should be punished. Finally, as the Russian veto on Protocol 14 suggests, an amendment to article 8 will be politically next to impossible. Despite article 8's appeal in increasing the Committee's power, albeit due to lack of a better alternative, a number of loose strings must be brought together before it becomes an effective tool.

3 Suggestions for More Involvement of the Court

A third suggestion for the minimisation of the legal/political gap is expanding the court's functions and actively involving it in the implementation procedure, thus supplementing the Committee's work. If the court is to preserve its role as Europe's human rights guarantor, 'it will have to demonstrate a more acute awareness of its connections to the wider institutional system [of] which it is part.'[58] Traditionally, the respondent State chooses 'subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation.'[59] Although this suggests that only the State can choose the most appropriate measure, it should not stop the ECtHR from providing non-binding suggestions.[60] Since court judgments receive more publicity than Committee resolutions, such suggestions would put implementation measures in the spotlight and encourage national pressure. The fact that this suggestion was not included in Protocol 14 was fortunately not perceived by the court as a sign towards a more reserved approach and in *Panovits v. Cyprus*[61] it argued that the court should take measures to 'facilitate the Committee of Ministers' task in discharging these functions.'[62] The court's thinly argued jurisprudence and the lack of suggestions to remedy the violation are significant factors leading to the political exploitation of the Committee's procedures, one of the factors identified in the previous section as contributing to the non-enforcement of decisions. This problem is heightened in cases where it is unclear why a violation was found in the first place, such as in *Chorherr v. Austria*[63] where the ECtHR did not give a reasoning at all; unsurprisingly, the whole decision is only 18 paragraphs long. Finally, greater involvement is consistent with the court's attitude in increasingly recommending the reopening of domestic legal procedures and with the relatively precise criteria it has set in the calculation of just satisfaction.

A reason for the obscurity of ECtHR's decisions is the margin of appreciation, which despite its frequent use, is applied inconsistently. It has been used both to avoid expressing an opinion on a controversial issue and to extend the width of the exceptions under which the State can justify the violation.[64] Consequently, a significant part of the case law is sent to the

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[58] Harmsen (n 36) 34.
[59] *Ilaşcu v Moldova and Russia* (App no 48787/99) (2005) 40 EHRR 46 para 487.
[60] Steering Committee for Human Rights 'Guaranteeing Long-Term Effectiveness of the Control System of the European Court of Human Rights' (Report) CDDH 2003/006, 35-36.
[61] (App no 4268/04).
[62] ibid, Joint Concurring Opinion of Judges Spielmann and Jebens para 17.
[63] (App no 13308/87).
[64] G. Letsas 'Two concepts of the margin of appreciation' (2006) 26 Oxford Journal of Legal Studies 705

Committee with little guidance, allowing for more negotiation and a more watered down outcome. Admittedly, the margin is facilitating the organisation's effectiveness by giving States more autonomy in deciding how much international interference to accept in their legal systems. However, it is the Committee and not the court that should take into account such political considerations, so as to avoid the risk of creating a two-tier structure through which the newer democracies might distance themselves from the Council's expected standards.

The reasoning behind the ECtHR's refusal to offer specific guidelines is that it does not know the national situation to such an extent so as to make a suggestion to the legislature.[65] This argument should not be taken lightly; the ECtHR is an international court providing guidance, but the main players are the States themselves. However, these difficulties can be overcome by making the court's suggestions non-binding and by informing it of the State's situation through a well organised system of annual reports. The court has overridden the subsidiarity principle before, when it started acting as a first instance court when this was done inadequately by the respondent State. This was supported on the basis of necessity: had the ECtHR not taken this step, justice would not be delivered. The court finds itself in a similar dilemma today; hopefully it will be as pioneering as the last time.

Offering guidance to States (which is supported by the interpretation proceedings in Protocol 14), implies that the ECtHR should deliver more detailed judgments, something which is not necessarily incompatible with the court's role as Europe's Constitutional Court. If the ECtHR is to acquire constitutional status, it must deliver its judgments in more general terms[66], but this should not stop it from providing specific guidelines to the respondent State after that. This will make the judgments longer, but it will be beneficial in the long term since it will be easier for the Committee to monitor objectively whether the judgment has been complied with. Additionally, the increasing guidance and responsibility given to national courts will result in fewer cases reaching the ECtHR, since most will be adequately dealt with domestically.[67] This however, presupposes the independence of the judiciary and a developed rule of law, which begs the question once again: can States of such different values and democratic maturity form an efficient international organisation?

Discussion of the court's contribution would be incomplete without mentioning the pilot judgments procedure. This allows the court to find the violation only once, freeze cases with identical facts and send them back to be tried by national courts.[68] Even though this is probably effective in saving the court's time, it is less so in terms of compliance. Theoretically, the procedure shows to the respondent State the systematic violation, so action is taken; however, in almost all of these cases the State is aware of the problem and merely ignores it. The assumption is that the domestic system will deal with the violations, but unless there is political willingness and an independent judiciary, this cannot happen. Pilot judgements do not solve cases, they merely hide them. Finally, the procedure seems to be in contrast with another tactic of the court, namely giving priority to systemic violation cases. It is still unclear from the court's jurisprudence how it decides between these two methods, potentially undermining the court's credibility. Despite the persuasiveness of these

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[65] ibid 721-722.
[66] Harmsen (n 36) 37.
[67] Amnesty International 'Amnesty International's Comments on the Interim Activity Report: Guaranteeing the Long Term Effectiveness of the European Court of Human Rights' (Report)(February 2004) AI Index IOR 61/005, para 7.
[68] Case Comment 'Pilot judgments: applications raising the same issue' (2008) 2 European Human Rights Law Review 279, 279.

arguments the court has recently used the mechanism in *Burdov v. Russia (No. 2)*.[69] It remains to be seen whether pilot judgements will prove effective in the Russian context.

4 The Micro Level: Cooperation Between the Constituent Bodies of the Council

(a) The Infringement Proceedings

The infringement proceedings, suggested in article 16(4) of Protocol 14, are to be used when the Committee wants to emphasise a State's consistent failure to meet its obligations and will be available following a formal notice issued by a two thirds majority. The Committee will use this power discretionarily, increasing the risk of being accused by the respondent State as motivated by aims other than human rights protection and endangering the Council's reputation as an impartial organisation. This is especially problematic with respect to Russia which has already made such allegations.

Underlying this mechanism is an unfounded assumption that the sheer fear of the proceedings will encourage compliance. However, if pressure from the Committee has failed so far, why should it succeed now? What new factor motivates the State to act that did not exist before? Additionally, the court cannot reopen the question of whether a violation has occurred; it will merely rule on whether the State has taken the required measures following its last judgment. Consequently, either the court will find that the obligation has been discharged (contradicting the Committee's findings) or that it has not, sending the case back to the Committee. Unless the Committee uses article 8, its only other alternative is to continue with diplomatic pressures as before. Thus, apart from exceptional circumstances, the procedure will merely highlight the organisation's weaknesses as a whole rather than achieve anything substantial.

The court itself has made its reservations towards the infringement proceedings clear, further undermining their potential effectiveness:

> What would be the procedural rights of the respondent State? What form would the decision finding a violation take? Who would represent the Committee of Ministers before the [c]ourt? What would be the basis for making a finding of violation? Would this not raise questions of interpretation of the initial judgment?[70]

The problem is not that the procedure blurs the distinction between the legal and political organs of the organisation, but that it has not been thought through properly, leading to possible conflict rather than cooperation between them. If and when the Council is given an opportunity to rethink the Protocol's successor, article 16(4) merits reconsideration.

(b) The Interpretation Proceedings

Another suggestion in Protocol 14 is the interpretation proceedings through which the Committee (again, with a two thirds majority) will send the case to the court for further clarification if it considers that the 'execution of a final judgment is hindered by a problem of

[69] (App no 59498/00) (2004) 38 EHRR 29.

[70] Steering Committee for Human Rights 'Response (2 February 2004) of the European Court of Human Rights to the CDDH's Interim Activity Report' CDDH-GDR 2004/001, s 29, 30.

interpretation'.[71] Since a factor for non-compliance (or more dangerously, only superficial compliance) is lack of clarity in the court's reasoning, the Committee will in time clarify the extent and type of guidance it expects from the ECtHR.[72] The mechanism will encourage dialogue between the Committee and the court, thus limit the gap between the two bodies. Furthermore, the proceedings will be useful in universalising the interpretation of the Convention. Concerns about added workload overburdening the court are exaggerated as the procedure will be confined to isolated cases where the court has not had an opportunity to clarify its case law through a subsequent judgment.[73] The mechanism will also separate States which truly require further judicial guidance from those which are camouflaging their political unwillingness with difficulty to act due to lack of clarity in the decision. The court should not wait for the ratification Protocol 14 to use the proceedings, as it has already recognised their validity and desirability: in *Ringeisen v. Austria*[74] the question was whether the court could deliver a further judgement by way of interpretation. Austria argued that this was impossible without a Convention amendment because under article 52 judgements are final. The court unanimously rejected this since the object of the article was to exclude the possibility of appeals; interpretation of a judgment is not an appeal as it is delivered by the same court. Admittedly, the Protocol mechanism is broader than the *Ringeisen* interpretation process because it gives the court the opportunity to interpret general points of law, not just specific judgments. Nevertheless, the court's reasoning remains persuasive for the interpretation proceedings as well and could be expanded to operate as a remedy to one of the Council's classic problems.

(c) The European Commissioner for Human Rights

Another body which could play a more prominent role in the better implementation of judgments is the Commissioner for Human Rights. The Commissioner's responsibilities include identifying possible shortcomings in national laws, facilitating the activities of NHRIs and providing advice and information regarding human rights protection across the region.[75] Despite all these, it remains marginalised in the implementation procedure. Under the Council umbrella, there are a number of bodies generally unknown to the public which have similar functions between themselves, resulting either in duplication of their work or conflicting proposals on the same issues.[76] These bodies individually ask for annual governmental reports, making the task look like a bureaucratic obligation rather than a useful exercise of self-criticism. The integration of the work of these bodies through the Commissioner's office could be to the advantage of both the States and the Council.

The States would deal with a single, influential body and send only one annual report, enabling the Commissioner to monitor and evaluate their progress as a whole and encouraging the States themselves to take their reporting obligation more seriously. The Commissioner should lay down specific requirements, including the avoidance of media reports and academic opinions in reporting as they give the government considerable scope to

[71] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)(ECHR) Protocol 14, art 16(3).
[72] S Greer 'Protocol 14 and the future of the European Court of Human Rights' (2005) Public Law 83.
[73] Steering Committee for Human Rights, 'Guaranteeing Long-Term Effectiveness of the Control System of the European Court of Human Rights' (Report) (April 2003) CDDH 2003/006.
[74] (App no 2614/65).
[75] Committee of Ministers Res (99)50 (1999) On the Council of Europe Commissioner for Human Rights, art 3
[76] For example, the Forum for the Future of Democracy is in danger of duplicating the work of the Venice Commission.

only include favourable comments.[77] Furthermore, reporting would be taken more seriously if the Commissioner had the power to carry out organised and ad hoc investigations to ensure that the reports were accurate, a power that could not be granted to the numerous Committees since that would be an unacceptable infringement of state sovereignty. The gathering of reports would enable the Commissioner to act as an easy access point to information, an integrated library for the States and the Council. The Commissioner could give the ECtHR a more detailed understanding of each country's problems and legitimise judgments containing general solutions for systematic violations. Its position as the Council's Library would also make it unnecessary for the ECtHR to act as a first instance court, thus saving the court even more time and further protecting its credibility since the information before it will have been provided by an independent body. Furthermore, the reports would help the court identify systematic violations more easily and would be a useful tool for the Council to determine whether the suggestions outlined above are indeed effective. Finally, the Commissioner's library should also include information on the national reforms for better enforcement of decisions. Ukraine and Italy have recently made such reforms[78]; the next State to do this could have access to them and might avoid having to reinvent the wheel.

The integration would make the Committees more aware of the workings of other bodies and their conclusions would acquire added weight due to the support of a more influential body. However, this suggestion brings with it the danger of a 'one size fits all' approach which could ignore less traditional rights, such as social rights, and will be vigorously opposed by the relevant Committees.[79] Therefore, they should be given a strong say in what questions are being asked and if the information provided is inadequate, States should be made aware of this. Notably, a number of social rights and equality issues are addressed in the EU context as well, making the case for closer cooperation between the two organisations even stronger, and the need for an integrated body within the Council more necessary.

The Parliamentary Assembly's suggestion to allow the Commissioner to lodge complaints to the ECtHR[80] was rejected due to fears of increasing the court's workload; however, the process would arguably have had the opposite result as similar cases would be brought together in group actions. The Commissioner could focus on cases which are unlikely to be brought to justice by the victims themselves, carrying out the bulk of his work in the newer democracies where people are generally poorer and more reluctant to take action to secure their rights.[81] This will be an important part of a coordinated approach by the Council to bring newer democracies up to the standard expected by the organisation. Furthermore, national reforms on a more general scale (for example, legislative amendments) will only need to be made once, as one case will deal with different issues of the same violation. It is more likely that Parliaments will remedy a grave violation rather than many less serious ones, partly because national pressure will be motivated more easily for a big change than a small one.

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[77] V Dimitrijevic 'The monitoring of human rights and the prevention of Human Rights violations through reporting procedures' in A Bloes, L Leicht, M Nowak, A Rosas (eds) *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms* (Kluwer Academic Dordrecht 1993).

[78] P. Leach 'Strasbourg's Oversight of Russia – An Increasingly Strained Relationship' (2007) Public Law 640, 652-653.

[79] This is an assumption made by the author deriving from the observation that when the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC) were combined to form the Equality and Human Rights Commission, similar objections existed.

[80] Committee of Ministers, Parliamentary Assembly Recommendation 1606 (27 June 2003).

[81] European Court of Human Rights *Annual Report 2008* (Strasbourg Registry of the European Court of Human Rights 2008) 142. For example, despite Azerbaijan's serious human rights violations, it has one of the lowest rates of applications to the ECtHR per 10,000 people.

Leach persuasively argues that concerns that the Commissioner's power to bring claims will compromise its advisory role behind the scenes are unfounded.[82] In fact, if the power is used selectively, it might enhance the Commissioner's position as it will strengthen his soft law functions. Finally, giving standing to the Commissioner will alleviate the shortcomings of the *erga omnes* approach which has a similar purpose, but which no State is likely to use due to political considerations. The Commissioner's more prominent role bridges the gap between the organisation's legal and political procedures as the integrated reporting process provides tools and information to the Committee to adopt a more robust attitude against violators. Simultaneously, it strengthens existing mechanisms such as the ECtHR's credibility and integrated national pressure and provides a medium through which the relationship between the Council and the EU can develop further.

4 The Macro-Level: The Council's International Relationships – Better Cooperation with the European Union

Today, neither the EU nor the Council can go forward with accession, but such a step would be beneficial to both parties. If the EU is to justify its move towards a European 'citizenship',[83] genuine human rights protection is a necessary ingredient. Also, accession will show to Member States that the EU can adequately protect human rights, thus avoiding another constitutional rebellion like the one led by Germany in the 1990s.[84] Finally, the EU will acquire the right to defend itself in proceedings rather than having to rely on one of its Member States.[85] Simultaneously, the Council will formally become the supreme human rights body in Europe, overriding conflicting interpretations of the EU Charter on Fundamental Rights and reinforcing the need to transform the ECtHR into a constitutional court. Judge Loukaides suggested[86] that the significance of accession will largely be theoretical because only in very rare cases will the ECtHR review the actions of EU institutions. In fact, the ECJ will have to make fundamental changes to its interpretation of article 230(4) (individual petition to the ECJ) if it wants to avoid article 6 violations. An improved individual petition procedure will impact on the ECJ's jurisprudence and could enhance cooperation between EU States, resulting in stronger alliances and more robust attitudes in the Committee.

The common arena in which the two organisations work, which calls for greater cooperation between them, is illustrated through the case of *Apostolides v. Orams*.[87] The issue was whether Apostolides, a Greek Cypriot owning a house in the occupied area, could demand from the Orams, who had illegally acquired its title from a Turkish Cypriot, to vacate the house and pay damages. He obtained a ruling from a Cypriot court[88] that this was possible and sought to enforce it in the UK under Regulation No 44/2001 which ensures the free movement of judgments. The Court of Appeal asked the ECJ whether such a ruling was enforceable in the UK, despite the Cypriot government's non-effective control in the occupied area. The court ruled that the judgment was enforceable, making the ECJ a relevant court in the Turkish/Cypriot issue, even though Turkey is not an EU Member State.

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[82] P Leach 'Human Rights Hotspots and the European Court' (2004) 154 New Law Journal 183, 183.
[83] Treaty Establishing the European Community art 17(1).
[84] This culminated in the *Solange cases* delivered by the Bundesverfassungsgericht (the German Federal Constitutional Court).
[85] Interview with ex- ECtHR Judge Loukaides, Nicosia (2 February 2009).
[86] ibid.
[87] *Case C-420/07, [2009] ECR 00*.
[88] Judgments dated 9 November 2004 and 19 April 2005 of the Nicosia District Court in the Republic of Cyprus.

Although the ECtHR had recently held that the compensation regime introduced by the 'Turkish Republic of Northern Cyprus' is in principle sufficient to meet the damage claims[89] and despite the fact that Apostolides had not applied to the Commission, damages were payable. Following this decision, Greek Cypriots whose property has been sold to EU citizens have a (more effective and quicker) alternative remedy to the ECtHR. Notably, had an ECtHR judgment on this specific property claim existed, he would not have had recourse to the ECJ, putting at a disadvantage those who sought redress through the Council. Finally, Advocate General Kokott discussed whether her judgment would 'undermine the efforts of the international community to find a solution to the Cyprus problem,'[90] a matter which should have arguably been dealt with by a political body, such as the Committee of Ministers. The judgment might confer individual justice to Mr Apostolides, but it also emphasises that the vague relationship between the two organisations is not to the Council's advantage.

Despite Protocol 14 making provisions about EU accession in the Council,[91] it does not include any other steps to clarify the relationship between the two organisations. Such clarification would put pressure on existing and aspiring Members States, most significantly Turkey. States such as Russia will remain largely unaffected, but the underlying theory behind most of the suggestions in this paper is that a specific approach to smaller groups of countries is more effective than a general tactic for all States. It has already been argued that the Copenhagen criteria are vague and easily manipulated. The Council and the EU could form a Joint Committee which could assess each EU Applicant State's improvement, bearing in mind its national situation and resources. The Joint Committee should work with clear criteria, untainted by political considerations as much as possible. Its suggestions could indicate to the EU whether the State can become a Member and to the Council whether the execution procedure is working effectively. Although these indications should not be binding, they could justify and legitimise decisions of both organisations.

Nevertheless, the argument that the vagueness of the criteria is deliberate and preferable to the alternative has its merits. No one can predict what will happen if Turkey is told that it can never join the EU, but its efforts for human rights protection could immediately stop. On the other hand, if it is given a definite date, it might lose its incentive for improvement. However, for how long will human rights language be used as the EU's scapegoat, compromising the Council's efforts? Arguably, if Turkey was to join the EU in its current state, it would have to be excluded from the organisation the next day since it would fall below the EU's internal human rights standards. Turkey might be unique in this respect today, but this will not be the case for long. Numerous applications from Bosnians being discriminated against by Eastern European States are going through the ECtHR at the moment. In five to seven years, the human rights records of these States will resemble Turkey's current record, but unlike Turkey they will be full Members of the EU. If the EU is genuinely interested in protecting human rights, it will have to react to this – either through exclusion or strong public criticism of their record. Had the Copenhagen criteria been properly followed, both organisations would have avoided this situation.

Judge Loukaides[92] suggested that a mechanism should exist whereby if a Member State falls below ECtHR standards, it should automatically be excluded from both organisations, creating a direct link between the EU and the Council and encouraging States to work towards improving their human rights record even after they join the Council. Penalties will range from a simple interim report to non-participation in the Committee and

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[89] *Xenides-Arestis v Turkey*, (App no 46347/99).
[90] Opinion of AG Kokott para 101.
[91] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)(ECHR) Protocol 14 art 17.
[92] Interview with ex- ECtHR Judge Loukaides, Nicosia (2 February 2009).

finally exclusion from the organisations. However, this seems not only an unattainable but also an undesirable suggestion. The two organisations are distinct and separate and should remain as such, especially for such deeply political and controversial decisions. For example, the EU cannot be expected to exclude Italy, due to article 6 violations, especially since Italy also has a poor EU Directive enforcement record, yet this has never led to suggestions for its exclusion from the EU. Clearly, part of the solution for ECtHR compliance is making the EU adopt a more robust stand towards human rights violations. However, this can be achieved through subtler means instead of a direct (and unequal) relationship of dependence between the organisations. For example, at the moment, the Fundamental Rights Agency produces a report of violations from Members States, yet this report has not received considerable attention by the media. Instead, the report could be published by the European Commission, generating enough publicity to motivate States into action, through the usual national pressure mechanisms.

D CONCLUSION

The Council is the most effective human rights organisation worldwide; this does not necessarily mean that it is good enough. Its failure to notice that in the last decade its jurisdiction has expanded considerably, has led to inadequate steps for reform. The Explanatory Report's conclusion that supervision generally works well[93] is not based on any empirical data. In fact, in 2003, 520 new cases were sent to the ECtHR and 3540 decisions were pending consideration in the Committee; in 2007, the numbers went up to 718 and 6017 respectively.[94] Since 'the acid test of any judicial system is how promptly and effectively judgments are implemented,'[95] effectiveness should not be determined by how many cases are being tried every year, but how many of these result in the stopping of a violation. Responsibility for this rests with the Committee, yet it receives minimal attention compared to the ECtHR. We must stop paying lip service to the effectiveness of the court and look at the organisation as a whole.

Over the years, the Council's judicial branch has developed to such an extent that it can only be compared with the ECJ and national supreme courts. Yet, its political branch remains largely underdeveloped, failing to keep up with the responsibility the court's success has imposed on it. The inconsistency in these two branches' development, what has been termed 'the legal/political gap', has grave consequences for the organisation's future. As a matter of political reality however, the workings of the Committee cannot change considerably and arguably this is for the better. Ultimately, international law, especially human rights, comes down to politics and diplomacy and the Committee should remain the forum where these come into play. However, although the Committee is the protagonist in the implementation procedure, it cannot lift the entire burden on its own. If a more robust approach is impossible, then some of the responsibilities which traditionally fell within its ambit should be allocated to other Council bodies. A more coordinated approach, both within the Council and internationally can adequately overcome the Committee's limitations while maintaining its advantages.

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[93] Explanatory Report of Protocol 14 para 17.

[94] Council of Europe 'Human Rights and Legal Affairs.' <http://www.coe.int/t/e/human_rights/execution/04_statistics/StatisticsExecutionJudgments_July07.asp#TopOfPage> (26 February 2010).

[95] Steering Committee for Human Rights 'Guaranteeing Long-Term Effectiveness of the Control System of the European Court of Human Rights' (Report) (April 2003) CDDH 2003/006, 34 para 1.

History has shown that either international organisations become stronger and acquire their position in the world scene or they become victims of their stronger Members' whim. Fifty years after its creation, the Council is at its crossroads: unless it takes a step forward soon, events will supersede it and it will inevitably be left a step back. Arguably a change in a single working mechanism will be politically impossible to agree to and ineffective due to the range of different problems it will have to address. A more in depth understanding of the incompliance of Member States, shows that systematic violators have diverse reasons for their attitudes, which require different solutions. Only by adopting this seemingly fragmented approach can vastly different States be effectively united under a single organisation.