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TRANSITION FROM COMMITMENT TO COMPLIANCE: THE EFFICACY OF INTERNATIONAL HUMAN RIGHTS TRIBUNALS

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Abstract: The fact that international law is characterized by the lack of unified system of sanctions and central enforcement authorities certainly weakens the normative character of international human rights obligations as well. After a brief description of the theoretical and practical problems relating to compliance with international law, this paper focuses on the contemporary challenges the international human rights mechanisms are confronted with. It is argued that in spite of the lack of centralized enforcement, the last decades witnessed the intensification and diversification of compliance procedures. Nevertheless, the persistent gap between commitment and actual compliance calls into question the efficacy of international human rights bodies. The paper analyses the weaknesses of the execution of the decisions of human rights tribunals, notably at universal level and in the European regional system. It is argued that despite the efforts to strengthen international supervision, all international human rights tribunals rely on national implementation. Thus, compliance ultimately depends on the political will of the States. Despite the relative strength of the oversight mechanism in the field of human rights, compliance has remained a domestic issue.

Keywords: United Nations; human rights; human rights treaties; human rights treaty bodies, compliance; supervision; Human Rights Committee; European Convention on Human Rights; European Court of Human Rights

Resumen: El hecho de que las leyes internacionales se caractericen por la falta de un sistema unificado de sanciones y de unas autoridades centrales encargadas de su ejecución, ciertamente debilita el carácter normativo de las obligaciones internacionales en el ámbito de los derechos humanos. Tras una breve descripción de los problemas teóricos y prácticos relativos al cumplimiento de las leyes internacionales, este artículo se centra en los retos contemporáneos con que se encuentran los mecanismos

internacionales en el ámbito de los derechos humanos. Se dice que a pesar de la falta de aplicación centralizada, las últimas décadas han sido testigos de la intensificación y diversificación de los procedimientos de cumplimiento. Sin embargo, la brecha persistente entre el compromiso y el cumplimiento real pone en duda la eficacia de los organismos internacionales de derechos humanos. El artículo analiza las debilidades de la ejecución de las decisiones de los tribunales de derechos humanos, en particular a nivel universal y en el sistema regional europeo. Se argumenta que a pesar de los esfuerzos para fortalecer la supervisión internacional, todos los tribunales internacionales de derechos humanos se basan en la aplicación nacional. Por tanto, el cumplimiento depende en última instancia de la voluntad política de los Estados. A pesar de la relativa fortaleza del mecanismo de supervisión en el ámbito de los derechos humanos, el cumplimiento ha seguido siendo una cuestión interna.

Palabras clave: Naciones Unidas; derechos humanos; tratados de derechos humanos; organismos de los tratados de derechos humanos; cumplimiento; supervisión; Comité de Derechos Humanos; Convención Europea de Derechos Humanos; Tribunal Europeo de Derechos Humanos.

... a human rights court will truly be successful when there are no more cases to adjudicate.”¹

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I. INTRODUCTION

Since its inception in 1945, the United Nations has been very active in the promotion of human rights. Standard-setting started with the adoption of the Universal

¹ HILLEBRECHT, C. *Domestic Politics and International Human Rights Tribunals. The Problem of Compliance*, Cambridge, 2016, p. 157.

Declaration of Human Rights (1948) and was followed by various treaties which, taken together, are also called as the International Bill of Human Rights. Albeit the Declaration is not technically legally binding, it is regarded as the consensus of global opinion on fundamental rights. At the moment, there are nine core international human rights treaties, focusing on certain sets of rights (civil and political rights; economic, social and cultural rights), expanding on a certain right (prohibition of racial discrimination, prohibition of torture, enforced disappearance) or providing protection to various vulnerable groups (women, children, migrant workers, disabled persons). Each of these treaties has established a committee of experts to monitor implementation of the treaty provisions by its States parties. Some of the treaties are supplemented by optional protocols dealing with specific concerns, or allowing for individual communications.² The provisions of the Covenants (International Covenant on Economic Social and Cultural Rights and International Covenant on Civil and Political Rights) are rather brief, more general and thus granting a relatively wide freedom to Contracting Parties to choose the measures they deem appropriate to realise the goals. The specialised conventions, on the other hand, are more elaborate on States Parties' obligations; nevertheless, they still allow certain room for discretion.³

Similar developments took place at regional level. The European system, developed in the framework of the Council of Europe and arguably the most elaborate of these, has a very sophisticated enforcement machinery with the European Court of Human Rights (hereinafter the Court) as the ultimate arbiter in human rights issues. The main objective of the system set up by the European Convention on Human Rights (1950, hereinafter ECHR or Convention) is that individual citizens be able to fully assert their rights within their own domestic legal system. Human rights in Europe are guaranteed through the balanced combination of a national and an international machinery. In the last two decades, however, this balance has been upset, evidenced by the mass influx of applications lodged with the Court.⁴ One may attribute it to the "success of the Court", but there is an alternative interpretation which is arguably closer to reality: the Court is a victim of a general reluctance of the contracting Parties to take the Convention seriously.⁵

As in Europe, the regional systems in America and Africa were developed in the framework of regional intergovernmental organizations. The American Declaration of the Rights and Duties of Man (1948), adopted simultaneously with the Charter of the

² The text of these core human rights treaties is available at <http://www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf> and <http://www.ohchr.org/Documents/Publications/newCoreTreatiesen.pdf>.

³ E.g. in Art. 4 the CERD imposes an obligation on States Parties to criminalise acts of racial discrimination, in Article 6 the duty to provide effective remedies, but it does not prescribe e.g. the actual severity of the penalties, or the methods of effective remedy.

⁴ In 2015, 40.650 applications were allocated to a judicial formation, an overall decrease of 28% compared with 2014 (56.200). This number was 65.800 in 2013, 65.150 in 2012, and 64.400 in 2011. European Court of Human Rights, *Analysis of Statistics 2012* (January 2016), p. 4; available at http://www.echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf

⁵ "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*." Presentation by LEO ZWAAK in the Working Session on the Implementation of International Human Rights Protections, available at <http://www.internationaljusticeproject.org/pdfs/Zwaak-speech.pdf>, p. 14. See also C. PARASKEVA, *Human Rights Protection Begins and Ends at Home: The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights*, 2006, available at http://www.nottingham.ac.uk/shared/shared_hrlcpub/Paraskeva.pdf, pp. 13-14.

Organization of American States, was followed by the American Convention on Human Rights (1969). The Convention was complemented by two protocols, one dealing with socio-economic rights, and the other aiming at the abolition of death penalty.⁶ In Africa, member States of the Organization of African Unity, replaced in 2002 by the African Union, adopted the African Charter on Human and Peoples' Rights in 1981.⁷

The growth and multiplication of international standards are certainly a welcome development. As far as monitoring is concerned, the spectrum is wide: some of these treaties predominantly rely on states' self-reporting, while a growing number of universal and regional human rights treaties creates a sophisticated system of monitoring where individuals are granted the right to petition, and oversight bodies have the power to issue legally binding judgments.⁸ However, ratification of or accession to these standards are just the first, albeit indispensable, step in the full-scale enjoyment of human rights. The crucial point is whether such commitment to human rights, as evidenced by participation in these treaties, is coupled with compliance on the field.⁹

The framework for ensuring compliance with obligations is problematic in the domestic as well as in the international legal order. However, in comparison to national legal orders, international law lacks those enforcement mechanisms available at national level, including a system of courts and a police. Thus the question may arise whether or not international law qualifies as a true legal order.¹⁰ The debate became more exposed as "the more the international legal obligations binding the subjects of international law have become dense and intense (the phenomenon of 'legalization')"¹¹ For obvious reasons, this paper does not purport to analyse the motivations behind State compliance; the discipline of international relations is better placed to address this point. Rather, it concentrates on the methods of international supervision of State compliance with international human rights obligations, discusses the challenges and offers some suggestions on how to enhance supervision.

With this mind, this paper starts with a brief description of the theoretical and practical problems of compliance with international law. Then it goes on to focus on compliance with human rights obligations. It is argued that the success of compliance and supervision is predominantly conditioned on the political will of the States, while (misconceived interpretation of) State sovereignty still represents an obstacle to the full

⁶ Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, 1988), and the Protocol to the ACHR to Abolish the Death Penalty (1990), respectively. See also the Inter-American Convention to Prevent and Punish Torture (1985), the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará", 1994), the Inter-American Convention on Forced Disappearance of Persons (1994), and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999). <http://www.oas.org/en/iachr/mandate/Basics/intro.asp>

⁷ See also Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), and the African Charter on the Rights and Welfare of the Child (1990). <http://www.achpr.org/instruments/>

⁸ HILLEBRECHT, C. *Domestic Politics*, cit., Cambridge, 2016, p. 4.

⁹ HARRISON, J. and SEKALALA, S., "Addressing the compliance gap? UN initiatives to benchmark the human rights performance of states and corporations", *Review of International Studies*, n° 41, 925-945, pp. 925-26.

¹⁰ See e.g. BOTHE, M., "Compliance", Encyclopedia Entry, *Max Planck Encyclopedia of Public International Law 2010*, para. 1.

¹¹ BOTHE, M., "Compliance", cit., para. 2.

realization of human rights. Apart from such political difficulties, non-compliance is to a large extent due to the complexity of the problem, or to the financial implications the remedies might entail.

II. COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

Louis Henkin argued that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”,¹² which might not totally correspond with the perception of those strictly following world news. Most people would rather have the sensation that international law is violated on a daily basis. This perception is not totally unfounded: the international system does have unique attributes as compared with domestic systems. A leading scholar argues that:

“While the legal structure within all but the most primitive societies is hierarchical and authority is vertical, the international system is horizontal, consisting of over 190 independent states, all equal in legal theory (in that they all possess the characteristics of sovereignty) and recognising no one in authority over them. The law is above individuals in domestic systems, but international law only exists as between the states. Individuals only have the choice as to whether to obey the law or not. They do not create the law. That is done by specific institutions. In international law, on the other hand, it is the states themselves that create the law and obey or disobey it.”¹³

Admittedly, the League of Nations introduced a hierarchical element, which was sustained by its successor, the UN, and which became more of a reality through the re-animation of the Security Council after its paralysis during the Cold War.¹⁴ Nevertheless, the fundamentally horizontal character of international law has been neither challenged nor diminished.

The lack of unified system of sanctions and central enforcement authorities inevitably weakens the legal character of international law. In such a scenario, like in other primitive systems of law, the actors, here the States, are entitled to take action to defend their rights. The unilateral enforcement of obligations is deeply rooted in international law, in its previous form as “sanction” or “reprisal”, and its modern form as laid down in the Draft Articles of the International Law Commission on State responsibility. Article 22 of the ILC Draft Articles provides that the wrongfulness of an act is precluded if and to the extent that the act constitutes a countermeasure.¹⁵ The inherent problem of escalation in the case of countermeasures can be decreased or foreclosed if they are embedded in a multilateral dispute settlement system and/or subject to some kind of multilateral supervision. In any case, the ILC Draft Articles set

¹² HENKIN, L., *How Nations Behave: Law and Foreign Policy*, New York, 1968, p. 47.

¹³ SHAW, M. N., *International Law*, Cambridge, 6th ed., 2008, p. 8.

¹⁴ During the East-West confrontation, the Council was blocked by what was called the automatic veto. – In the years after 1990, the Security Council has played an active role as a law enforcement agency e.g. in the fight against terrorism, fight against the proliferation of weapons of mass destruction, and the enforcement of human rights and international humanitarian law (see the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (UNSC Res. 827[1993]) and the International Criminal Tribunal for Rwanda (ICTR) (UNSC Res 955 [1994] in relation to the latter). BOTHE, M., “Compliance”, *cit.*, para. 26.

¹⁵ Commentary to the Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001, p. 75: “In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury.”

out a system securing that certain fundamental values of the international community are not affected by countermeasures.¹⁶

The constraints had been identified earlier by the International Court which stated in the *Gabčíkovo–Nagymaros Project* case that,

In order to be justifiable, a countermeasure must meet certain conditions ... In the first place it must be taken in response to a previous international wrongful act of another state and must be directed against that state ... Secondly, the injured state must have called upon the state committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. ... In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question ... [and] its purpose must be to induce the wrongdoing state to comply with its obligations under international law, and ... the measure must therefore be reversible.¹⁷

Furthermore, the “hard” as opposed to “soft” law character of international law is further weakened by the fact that in most cases, international norms are limited to setting the goals or defining results to be attained, thus requiring national law measures of implementation.¹⁸

In spite of the lack of centralized enforcement and the relatively flexible and soft formulation of international obligations, the last decades have witnessed the intensification and diversification of compliance procedures. Such multilateral regimes tend to multilateralize countermeasures in order to avoid unilateral action,¹⁹ and are numerous in the field of environmental law, international economic relations, arms control and disarmament, the law of the sea, international humanitarian law,²⁰ and last, but not least, in the field of human rights law, which serves as the focal point of this paper.²¹

III. EFFECTIVENESS OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS IN NATIONAL LEGAL ORDERS

Human rights law is unique among the various branches of public international law inasmuch as it governs the vertical relationship between States and constituents, not the horizontal relationship between States.²² The last decades have witnessed the multiplication of human rights instruments, at universal as well as regional level,

¹⁶ ILC Draft Articles, Art. 50.

¹⁷ *Gabčíkovo–Nagymaros Project* case (*Hungary/Slovakia*) ICJ Reports, 1997, paras. 83-87.

¹⁸ “... certain international legal regimes systematically rely on national legislation and national enforcement to achieve the goals of the former.” BOTHE, M., “Compliance”, *cit.*, para. 31. See e.g. the European Charter for Regional or Minority Languages (1992, CETS No. 148), where States Parties have a relatively wide discretion as to the minority languages they grant protection and the obligations they undertake to apply to the regional or minority languages spoken within their territory; or Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (1966) providing that “[e]ach State Party to the present Covenant undertakes to take steps ... to the maximum of its *available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant ...” [emphasis added]. See also the framework character of various environmental treaties.

¹⁹ BOTHE, M., “Compliance”, *cit.*, para. 20.

²⁰ See e.g. KOMANOVICS, A., “Strengthening Respect for International Humanitarian Law: Challenges and the Way Forward”, in n: Zs. Csapó (ed.), *Emlékkötet Herczegh Géza születésének 85. évfordulójára. A ius in bello fejlődése és mai problémái*, Pécs, 2013, pp. 157-176.

²¹ BOTHE, M., “Compliance”, *cit.*, para. 21.

²² HILLEBRECHT, C. *Domestic Politics*, *cit.*, Cambridge, 2016, p. 3.

coupled by a high level of ratification.²³ However, commitment to international human rights norms does not by itself lead to compliance. Due to the UN's weak institutional mechanisms for the enforcement of human rights protection, it largely has to rely on dialogue and persuasion.²⁴ The regional systems have established more sophisticated systems, the European one being by far the most successful. But even in Europe, the fundamental challenge of compliance remains the same: it depends on States' political will and capacity to comply with the rulings.²⁵

The prevailing argument in the literature of international relations and international law is that "States join international agreements under two circumstances: when they expect to be compliant with the provisions of the agreement and/or when they are confident that their international obligations will not be enforced."²⁶ In other words, States only join treaties if they expect to comply with them and/or they do not expect them to be enforced. Thus, for States committed to human rights, compliance with the treaties does not entail new or unwanted obligations, while States with poor human rights practices have little to lose but much to gain inasmuch as they can expect that human rights treaties will not be enforced and, at the same time, joining these conventions can be accompanied by foreign aid or increased domestic and international legitimacy.

With this in mind, Hillebrecht distinguishes three motivations behind compliance with human rights treaties and the rulings of international human rights tribunals. First, it is argued that, as a reaction to the increasing demand about the protection of human rights made by domestic and international partners, compliance can signal a commitment to human rights.²⁷ Second, governments can use compliance as a way to advance their own domestic agendas, to promote domestic policy reforms.²⁸ Finally, compliance may provide political cover for contentious or politically divisive policies. States often disagree with the rulings of human rights courts, but they comply anyway.²⁹ From a human rights perspective, the first motivation might be the most welcome; nevertheless, from a more utilitarian perspective any three motivations might just as well be good insofar as human rights are in fact observed.

Along with the driving force behind compliance, effectiveness of the international human rights system is largely influenced by issues such as *the method of recognition of international treaties*, their rank in the domestic legal order, and their actual enforcement. In States following the *monist* approach, international human rights treaties, just as other treaties, are automatically part of the national law as a result of their ratification. Domestic courts can, however, rely on a treaty only if it is self-executing, i.e. if the treaty is effective without the need for additional legislation. Even

²³ See <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en> for the current information.

²⁴ HARRISON and SEKALALA, "Addressing the compliance gap?...", *cit.*, p. 926.

²⁵ HILLEBRECHT, C. *Domestic Politics*, *cit.*, Cambridge, 2016, p. 8.

²⁶ HILLEBRECHT, C. *Domestic Politics*, *cit.*, Cambridge, 2016, p. 33; DOWNS, G.W., ROCKE, D.M. and BARSOOM, P.N., "Is the Good News About Compliance Good News About Cooperation?", *International Organization*, 30, no. 3, 1996, pp. 379-406.

²⁷ HILLEBRECHT, C. *Domestic Politics*, *cit.*, Cambridge, 2016, pp. 25-29.

²⁸ HILLEBRECHT, C. *Domestic Politics*, *cit.*, Cambridge, 2016, p. 29.

²⁹ HILLEBRECHT, C. *Domestic Politics*, *cit.*, Cambridge, 2016, pp. 31-33.

then, national courts might be reluctant to make use of what is seen as ‘foreign’ law.³⁰ In States following the *dualist* approach, further legislative action is needed following the ratification of treaties to be enforceable in the national legal order. The rank of the treaty, and other related issues must be set out in the legislation incorporating the treaty in the national legal order.³¹

The crucial *role of national authorities* in securing human rights is clear from the wording of the various human rights instruments. Article 2(1) of the ICCPR provides that each State Party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”. Pursuant to Article 1 of the European Convention on Human Rights, States Parties undertake to *secure* the rights and freedoms in the Convention to persons within their jurisdiction. In *Belgian Linguistics*³² and *Handyside*,³³ the Court pointed out that the primary responsibility for the protection of human rights lies with the Contracting Parties. The Convention machinery is subsidiary to the national systems in safeguarding human rights. This is justified by the fact that, by reason of their direct and continuous contact with the vital forces of their countries, national authorities are seen better placed to judge certain situations.³⁴ This argument is valid in relation to the universal regime as well.

In practice, both the monist and the dualist approach could provide a robust basis for compliance with international obligations. Shaw argues that

“In fact, the increasing scope of international law has prompted most states to accept something of an intermediate position, where the rules of international law are seen as part of a distinct system, but capable of being applied internally depending on circumstance, while domestic courts are increasingly being obliged to interpret rules of international law.”³⁵

In any case, Article 27 of the Vienna Convention on the Law of Treaties (1969), reflecting customary international law, stipulates that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.³⁶

³⁰ Local courts prefer to rely upon the catalogue of rights stipulated in national constitutions. HARRIS, D. J., O’BOYLE, M., BATES, E.P. & BUCKLEY, C.M., *Law of the European Convention on Human Rights*, 2nd ed., Oxford, 2009, p. 24.

³¹ HARRIS et al., *Law of the European Convention*, cit., p. 24.

³² Case ‘relating to certain aspects of the laws on the use of languages in education in Belgium’ (*Belgian Linguistics Case*) (Merits), Series A, no. 6 (1968), p. 34.

³³ *Handyside v. The United Kingdom*, Appl. no. 5493/72, judgment of 7 December 1976, para. 48.

³⁴ This is the so-called margin of appreciation doctrine. See e.g. HARRIS et al., *Law of the European Convention*, cit., pp. 11-14; MURDOCH, J., *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights*, Council of Europe human rights handbooks, Council of Europe, Strasbourg, 2012, pp. 41-43.

³⁵ SHAW, M. N., *International Law*, cit., p. 133.

³⁶ See also Article 46(1) of the Vienna Convention providing that a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent.

IV. SUPERVISION OF COMPLIANCE AT UNIVERSAL LEVEL: CHALLENGES AND THE WAY FORWARD

The UN treaties, set out in Table 1, all establishing international committees of independent experts, provide for a variety of compliance mechanisms. Thus, the mandate of these treaty bodies includes the review of periodic reports and, depending on the treaty and its optional protocol, the consideration of individual or inter-State communications,³⁷ or the conduct of country-visits. For practical reasons, further analysis will be restricted to the reporting system and the individual communications. In both cases, supervision of compliance is vested with the treaty body. Since there is no other body directly involved in this task, what will follow is the brief description of the main weakness of the composition, working methods and substantive output of the treaty monitoring bodies.

Table 1: Core human rights treaties

Date of adoption	Core human rights treaties
1965	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
1966	International Covenant on Economic, Social and Cultural Rights (ICESCR)
1966	International Covenant on Civil and Political Rights (ICCPR)
1979	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
1984	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
1989	Convention on the Rights of the Child (CRC)
1990	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)
2006	Convention on the Rights of Persons with Disabilities (CRPD)
2006	International Convention for the Protection of All Persons from Enforced Disappearance (CPEd)

³⁷ So far, no inter-State complaint has been lodged with a treaty body, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (30 June 2016).

Table 2: Activities and functions of treaty bodies³⁸

Activities and functions of treaty bodies	Treaty bodies									
	CERD	CESCR	HRC	CEDAW	CAT	SPT	CRC	CMW	CRPD	CED
Examination of State reports / Concluding observations	✓	✓	✓	✓	✓		✓	✓	✓	✓
Individual communications	✓	✓	✓	✓	✓		✓	✓	✓	✓
Inter-State complaints	✓	✓	✓	✓	✓		✓			✓
General comments	✓	✓	✓	✓	✓		✓	✓	✓	✓
Inquiry procedure through country visits*		✓		✓	✓	✓	✓		✓	✓
Follow-up procedure	✓	✓	✓	✓	✓	✓				

* To investigate well-founded allegations of systematic violations of human rights

4.1. The independence of the experts

Probably the most fundamental requirement of any supervision mechanism is that in carrying out their functions, members of the supervisory body act independently and impartially. Self-regulatory guidelines have been adopted by the Human Rights Committee as early as 1999, to safeguard the perception of independence and impartiality.³⁹ This was followed in 2011 by the adoption of guidelines on the independence and impartiality of treaty body members (“the Addis Ababa guidelines”) by the Chairs of the United Nations treaty bodies.⁴⁰ The HRC Guidelines recall that States parties to human rights treaties “should abstain from engaging in any functions or activities which may appear to be not readily reconcilable with the obligations of an independent expert” of a treaty body.⁴¹ In the case of the Human Rights Committee, most of the members have had no formal connections to the governments that have nominated them. Unfortunately, this is not true with regard to other treaty bodies where a lot of members have been officials of the executive of their country (typically in the

³⁸ Based on International Service for Human Rights (ISHR), *Simple Guide to treaty bodies*, 2010, p. 34. <http://www.ishr.ch/guides-to-the-un-system/simple-guide-to-treaty-bodies?task=view>. – SPT denotes the Subcommittee on Prevention of Torture, established pursuant to the provisions the Optional Protocol to the Convention against Torture (2002). The SPT has two primary operational functions. First, it may undertake visits to States Parties, during the course of which it may visit any place where persons may be deprived of their liberty. Second, it has an advisory function which involves providing assistance and advice to States Parties on the establishment of National Preventive Mechanisms (“NPM”). <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx>

³⁹ A/53/40, vol. I, annex III, 1999.

⁴⁰ Guidelines on the independence and impartiality of members of the human rights treaty bodies (“the Addis Ababa guidelines”), A/67/222 Annex 1.

⁴¹ Most treaty bodies have such provisions in their respective rules of procedure, while the Human Rights Committee adopted a separate set of guidelines. The passage quoted appears in para. 9 of the Guidelines for the exercise of their functions by members of the Human Rights Committee, Annex III of A/53/40, vol.I, 1999.

Foreign Service).⁴² Treaty body members should not only be impartial, but should appear to be so. Furthermore, a member shall not participate in the examination of the report presented by his/her country, and shall take no part whatsoever, formally or informally, in the discussion of communications from his or her own country, either at the admissibility or merits stage.⁴³

The major findings of the Addis Ababa Guidelines can be summarized as follows.

Treaty body members should not only be independent and impartial, but should also be seen by a reasonable observer to be so.

A treaty body member shall not be considered to have a real or perceived conflict of interest as a consequence of his or her race, ethnicity, religion, gender, disability, colour, descent, or any other basis for discrimination.

Treaty body members are accountable only to their own conscience and the relevant treaty body and not to their State or any other State.

The fact that a treaty body member is a national of one or more States shall not result in, or be thought to result in, more favourable treatment of any of those States.

Treaty body members shall avoid any action in relation to the work of their treaty body that might lead to, or be seen by a reasonable observer to lead to, bias against States.⁴⁴

The attitude of treaty body experts are influenced by numerous factors, such as the member's nationality, place of residence, current and past employment, membership of or affiliation with an organization, or family and social relations. As regards the composition and membership of treaty bodies, a survey carried out in 2012 established the following.

Taken together, the treaty bodies have 172 members. Analysis of their composition shows: (a) frequent affiliation to the executive branch in members' professional backgrounds; (b) gender imbalance; and (c) uneven geographic representation. Fifty-five members have an affiliation to the executive in their state of origin and one quarter of those also occupy official functions – Chairperson, Vice-Chairperson, or Rapporteur – in their respective treaty body.

Only 39% of the elected members are women. The highest rates of gender imbalance are found in the Committee on the Elimination of Discrimination against Women (22 out of 23 members are women) and the Committee on Enforced Disappearance (nine out of ten members are men).

Members from European states occupy 35% of all the seats. All other regions have a significantly lower proportion.

Overall, if the number of states parties to a particular treaty is compared to the representation of that region in the membership of the treaty bodies, states from Africa and Asia and Pacific are under-represented, while states from Europe and the Middle East and North Africa are over-represented.⁴⁵

The actual situation was summarised by Rodley as follows: “it is this author's experience that some holders of national office have been able to evince more evident and rigorous independence, not to mention genuine expertise, than some of those not formally holding any such office. It nevertheless remains desirable that states avoid presenting as candidates persons holding public office in the executive branch of government.”⁴⁶

⁴² RODLEY, N., “Role and Impact of Treaty Bodies”, in Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford, 2013, p. 624.

⁴³ Paras 2, 4 and 6 of the Guidelines of the Human Rights Committee, respectively.

⁴⁴ Thus summarized in the UN OHCHR, Handbook for Human Rights Treaty Body Members, 2015, p. 32. http://ohchr.org/Documents/Publications/HR_PUB_15_2_TB%20Handbook_EN.pdf

⁴⁵ Geneva Academy In-Brief No. 1: The Independence of UN Human Rights Treaty Body Members, 2012, p. 6.

⁴⁶ RODLEY, N., “Role and Impact of Treaty Bodies”, cit., p. 624.

4.2. The working arrangements

Working conditions and the conduct of meetings have various aspects. First of all, it must be kept in mind that the Committees are not permanent bodies, and Committee members do not receive salary for their work.⁴⁷ That means that the UN only covers the travel costs of members as well as a daily subsistence allowance to cover accommodation and other costs, such as board, local transport, communications, etc., when members travel to Geneva or elsewhere for sessions or other official tasks, for instance country visits, or attend mandated meetings. Unfortunately, the regular budget remains insufficient to cover all the resources needed to support the treaty bodies.⁴⁸ The General Assembly is frequently requested by the treaty bodies to increase their capacity through the granting of additional meeting time and related resources. These requests have sometimes been granted fully or partly, while in other cases they have not been acted upon.⁴⁹

Apart from the issue of resources, treaty bodies meet relatively infrequently, at least as compared with the tasks imposed upon them. A treaty body member attends treaty body sessions for 3 to 12 weeks a year and has responsibilities at other times, e.g. preparing and undertaking country visits.⁵⁰ Even this limited time might require significant commitment from treaty body members and genuine effort to reconcile with other (job) obligations.⁵¹

4.3. State reports: Availability of independent information

It comes as no surprise that State reports tend to be self-congratulatory, mostly concentrating on the description of the relevant legal rules and programmes, without mentioning the weaknesses and challenges, and how these rules are applied in practice. Consequently, information provided by civil society organizations is a key element in the protection of human rights. One author goes as far as to say that “[a]lmost all the human rights procedures of the United Nations rely heavily, or even exclusively, upon information and arguments that NGOs supply.”⁵² After the original “allergy to unofficial (critical) information”⁵³ of the Soviet camp during the Cold War era, it is now common practice that the Secretariat makes available to treaty body members information that non-governmental or civil society organizations specifically submit on the reports, as well as other relevant information, notably that from within the UN system itself.⁵⁴

⁴⁷ RODLEY, N., “Role and Impact of Treaty Bodies”, cit., pp. 630-631

⁴⁸ UN OHCHR: Handbook for Human Rights Treaty Body Members, 2015, p. 52. http://ohchr.org/Documents/Publications/HR_PUB_15_2_TB%20Handbook_EN.pdf

⁴⁹ Comprehensive Cost Review, April 2013, p. 10 / “Comprehensive cost review of the human rights treaty body system”, Background note, Geneva, April 2013.

⁵⁰ UN OHCHR, Handbook for Human Rights Treaty Body Members, 2015, p. 1. See also Table 7: Overview of treaty body sessions, ibid. p. 42

⁵¹ Further information on workload and specific responsibilities can be found in the OHCHR: Handbook for Human Rights Treaty Body Members, 2015, pp. 37-44.

⁵² WEISSBRODT, D., “Roles and Responsibilities of Non-State Actors”, in: D. Shelton (ed.): *The Oxford Handbook of International Human Rights Law*, Oxford, 2013, p. 723. The most notable NGOs are Anti-Slavery International, Amnesty International, Human Rights Watch and the International Committee of the Red Cross.

⁵³ RODLEY, N., “Role and Impact of Treaty Bodies”, cit., p. 627.

⁵⁴ RODLEY, N., “Role and Impact of Treaty Bodies”, cit., p. 627.

4.4. State reports: Quality of the concluding observations

In order to improve the efficiency of constructive dialogue, the High Commissioner for Human Rights in her report of 2012 recommended better time management, increased discipline, stronger chairing and strict limitations on the number and length of interventions. Furthermore, treaty bodies were called to show restraint in formulating recommendations and focus on priority issues.⁵⁵

It was suggested that treaty bodies formulate (more) focused concluding observations in order to make compliance simpler and more realistic. From a quantitative perspective, reduced number as well as reduced length of the concluding observations would contribute to achieve greater efficiency and impact.⁵⁶ As far as the substance of the concluding observations is concerned, it was suggested to make them country specific and targeted; and to avoid recommendations of a general nature, the implementation of which cannot be measured, and give concrete guidance instead.⁵⁷

4.5. State reports: Lack of effective follow-up procedures

The importance of effective follow-up procedures cannot be overestimated. In the UN system, treaty bodies have no means of enforcing their recommendations. Nevertheless, various treaty bodies⁵⁸ have adopted follow-up procedures to encourage compliance with recommendations formulated in their concluding observations. Thus, these bodies request, in their concluding observations, that States report back to the country rapporteur or follow-up rapporteur within one or two years on the measures taken in response to specific recommendations or “priority concerns” that are rapidly implementable. The rapporteur then reports back to the committee.⁵⁹

All committees require States to address follow-up in their periodic reports. Some members of treaty bodies have undertaken visits to State parties, at their invitation, in order to follow up on the report and the implementation of concluding

⁵⁵ Report of the United Nations High Commissioner for Human Rights on the strengthening of the human rights treaty bodies. A/66/860, 26 June 2012, p. 56.

⁵⁶ E.g. maximum 20 recommendations and/or 2,500 words. Intergovernmental process on strengthening the Human Rights Treaty Body System. Thematic discussions and informal-informal meetings. 11-17 April 2013, available at <http://www.ohchr.org/Documents/HRBodies/TB/HRTD/ConsolidatedDocumentApril2013.pdf>, p. 5.

⁵⁷ Report of the United Nations High Commissioner for Human Rights on the strengthening of the human rights treaty bodies. A/66/860, 26 June 2012, pp. 8-9.

⁵⁸ Five treaty bodies, the Human Rights Committee, the Committee against Torture (CAT), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee on Enforced Disappearances (CED) have adopted formal procedures to monitor more closely the implementation of specific concluding observations.

⁵⁹ While there is nothing in the treaties contemplating follow-up activities, States made no challenges and most of them seem willing to comply with these procedures. RODLEY, N., “Role and Impact of Treaty Bodies”, cit., pp. 638-639.

observations. Parliaments, the judiciary, NHRIs, NGOs and civil society, all have an important role to play in follow-up.⁶⁰

The Human Rights Committee has developed the following qualitative criteria in order to assess the information on follow-up provided by States parties.⁶¹

Table 3: Follow-up assessment criteria of the Human Rights Committee

Follow-up assessment criteria of the Human Rights Committee

<i>Assessment criteria</i>	
Reply/action satisfactory	
A	Reply largely satisfactory
Reply/action partially satisfactory	
B1	Substantive action taken, but additional information required
B2	Initial action taken, but additional information required
Reply/action not satisfactory	
C1	Reply received but actions taken do not implement the recommendation
C2	Reply received but not relevant to the recommendation
No cooperation with the Committee	
D1	No reply received within the deadline, or no reply to any specific question in the report
D2	No reply received after reminder(s)
The measures taken are contrary to the recommendations of the Committee	
E	The reply indicates that the measures taken go against the recommendations of the Committee

4.6. Individual communications

Before turning to the issue of compliance with individual communications, the question arises whether the views adopted by the treaty bodies on such complaints create legal obligations. While most UN treaty bodies have the mandate to adopt “views”, these are devoid of binding force.⁶² Nevertheless, there are a number of arguments in support of the view that States are required to respect and enforce the views issued by these Committees. These include the basic obligation of *pacta sunt servanda*,⁶³ the more specific obligation “to respect and to ensure” the rights recognized in the relevant human rights treaty (see e.g. ICCPR Article 2), and finally the implicit

⁶⁰ OHCHR: The United Nations Human Rights Treaty System. Fact Sheet No. 30/Rev.1, pp. 28-29. Available at <http://ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>

⁶¹ See Other activities of the human rights treaty bodies and participation of stakeholders in the human rights treaty body process. Note by the Secretariat. Geneva, 24–28 June 2013, HRI/MC/2013/3, pp. 3-4.

⁶² “The types of decision differ between treaty bodies and courts. Proceedings before UN treaty bodies and regional human rights commissions are quasijudicial and such bodies adopt decisions. There is a continuing debate about the legal nature of these decisions, which some bodies refer to as ‘views’ or ‘opinions’. Some observers, and frequently states parties or domestic courts ... claim that they are purely recommendatory. The formal arguments put forward in support of this position are not very convincing. While there is general agreement that they are not binding as such, it is appropriate to see these decisions as ‘authoritative interpretations’ of the respective treaties that determine to what extent, if any, a state has failed to comply with its obligations. As a consequence, states parties are required to take the necessary measures to remedy any violations found and bring their conduct in conformity with their obligation to give effect to treaties, such as required under article 2 ICCPR.” (References omitted.) BANTEKAS, I. & OETTE, L., *International Human Rights Law and Practice*, Cambridge, 2013, pp. 296-97.

⁶³ The United Nations Convention on the Law of Treaties (VCLT), reflecting customary international law, provides in Article 26 that once consent to be bound has been expressed and the treaty has entered into force, the treaty shall be kept by the parties in good faith.

obligation that a State Party having accepted the possibility of individual communications also accepted the obligation to comply with the recommendations formulated during their consideration.⁶⁴ It is argued that rejection of the “views” is “good evidence of a State’s bad faith attitude towards its ICCPR obligations”.⁶⁵

This approach is supported by various judgments of the International Court of Justice. Thus, in the *Wall* case, the Court cited the Human Rights Committee’s ‘constant practice’, both in earlier Optional Protocol cases and its concluding observations on Israel, to support its own interpretation of the extra-territorial applicability of the Covenant. It also invoked the Committee’s General Comment No 27 in support of its interpretation of Article 12(3).⁶⁶ In *Diallo*, the Court said that

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its ‘General Comments’.

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.⁶⁷

With this in mind, if the treaty body finds that the State Party has violated the complainant’s rights, the Committee formulates its views as well as recommendations, and calls upon the State to give effect to its recommendations. The treaty bodies stipulate a period of either 90 or 180 days within which the State party is requested to provide information regarding implementation of the relevant decision. As with State reports, scarce human resources lead to considerable backlogs in the consideration of

⁶⁴ Article 5(4) of ICCPR-OP1 provides that the Committee shall forward its views to the State Party concerned and to the individual. – “However, it would be wrong to categorize the Committee’s views as mere ‘recommendations’. They are the end result of a quasi-judicial adversarial international body established and elected by the States Parties for the purpose of interpreting the provisions of the Covenant and monitoring compliance with them. It would be incompatible with these preconditions of the procedure if a state that voluntarily has subjected itself to such a procedure would, after first being one of the two parties in a case, then after receiving the Committee’s views, simply replace the Committee’s position with its own interpretation as to whether there has been a violation of the Covenant or not. ... the presumption should be that the Committee’s views in Optional Protocol cases are treated as the authoritative interpretation of the Covenant under international law.” HANSKI, R. & SCHEININ, M., *Leading Cases of the Human Rights Committee*, 2nd revised edition, Turku, 2007, p. 23. See also KELLER – ULFSTEIN, *UN Human Rights Treaty Bodies. Law and Legitimacy*, Cambridge 2012, pp. 92-100

⁶⁵ JOSEPH, S. & SCHULTZ, J. & CASTAN, M., *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed, Oxford 2004, p. 24. See also STEINER, H. J., & GOODMAN, R. & ALSTON, P., *International Human Rights in Context: Law, Politics and Morals*, 3rd ed, Oxford 2008, p. 915; and TOMUSCHAT, C., *Human Rights: Between Idealism and Realism*, 2nd ed, Oxford 2008, p. 220.

⁶⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Case), paras 109–111, and 136. UNHRC, ‘General Comment No 27: Freedom of Movement (Art 12)’ (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9.

⁶⁷ *Diallo (Guinea v. Democratic Republic of the Congo)*, ICJ Reports, 2007, para. 66.

individual communications, which is complicated by the fact that certain States do not cooperate with the Committees despite frequent reminders to submit their comments.⁶⁸

In many cases, the HRC merely concludes that the State has violated its obligations flowing from the ICCPR, but there are decisions where the Committee identified specific remedies that the state should afford to the victim, such as compensation, release, retrial, medical care, permission to leave the country, and bringing to justice those responsible for a disappearance; and, though less frequently, it also called for changes in legislation. Contrary to the practice of the European Court of Human Rights, the HRC does not attempt to calculate the amount of compensation to be paid.⁶⁹

By way of conclusion of this section, it must be noted that UN treaty bodies lack a fixed enforcement mechanism. Nor the Office of the High Commissioner for Human Rights fully follows the implementation by States Parties of the recommendations formulated by the treaty bodies. Notwithstanding the weakness of enforcement, a stronger mechanism is unlikely, because States are generally opposed to stricter review.⁷⁰ In a similar vein, despite the call for a world Human Rights Court by Nowak,⁷¹ the proposal has fallen on barren soil.

V. COMPLIANCE WITH THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Article 1 of the European Convention on Human Rights sets out the legal obligation on the High Contracting Parties to respect and protect the Convention rights of those within their jurisdiction. Based on State responsibility, Contracting Parties are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. The Convention system provides for the right of individual applications, while applications alleging violation of the Convention rights may also be referred to the Court by other High Contracting Parties.⁷² States Parties are bound by the final judgments of the Court.⁷³ The major challenges in the European system are the following.

⁶⁸ Report of the United Nations High Commissioner for Human Rights on the strengthening of the human rights treaty bodies pursuant to Assembly resolution 66/254, GA/66/860, 26 June 2012, p. 23.

⁶⁹ NEUMAN, G. L., "Subsidiarity", in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford, 2013, pp. 373-374. See also SCHEININ, M., "The Human Rights Committee's Pronouncements on the Right to an Effective Remedy – An Illustration of the Legal Nature of the Committee's Work under the Optional Protocol", in Nisuke Ando (ed), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee*, Leiden 2004, p. 102; MÖLLER, J. T. & ZAYAS, A. de, *United Nations Human Rights Committee Case Law 1977–2008: A Handbook*, Kehl/Strasbourg 2009, pp. 499–500.

⁷⁰ HILLEBRECHT, C. *Domestic Politics*, cit., Cambridge, 2016, p. 141

⁷¹ NOWAK, M., "The Need for a World Court of Human Rights", *Human Rights Law Review*, 7, no. 1, 2007, pp. 251-259.

⁷² Arts. 33 and 34 ECHR.

⁷³ It must be noted, however, that the original mechanism was rather different. The current system was introduced by Protocol no. 11, and modified by Protocols no. 14, 15 and 16. On the evolution of the Convention system, see e.g. paras. 27 to 33 of CDDH(2015)R84 Addendum I.

5.1. Quality, cogency and consistency of the judgments

With a view to maintaining the authority of the Court, and to ensure the quality, cogency and consistency of the judgments, the authority of the Court is of paramount significance.⁷⁴ To facilitate compliance, and supervision thereof, in its judgments the Court should identify what it considers to be the underlying problem, and indicate more clearly which elements are actually problematic and can be regarded as the direct source of the violation.⁷⁵ It can be argued, however, that by giving specific indications as to the type of individual and/or general measures, the Court would exceed its mandate under the Convention, circumscribing States' freedom to choose the means they think most appropriate. Furthermore, it is by no means clear whether such directions by the Court are binding, or to what extent they are binding.⁷⁶

5.2. The judges

Generally speaking, the independence and authority of the judges are guaranteed through the strict criteria set out in Article 21 ECHR.⁷⁷ Nevertheless, in recent years various measures have been taken to strengthen the authority of the Court,⁷⁸ and thereby its caselaw. These measures relate to the selection of candidates at national level, with growing emphasis on practical (judicial) experience in national law and the knowledge of general international law, and to the identification of the factors that might discourage possible candidates. Such factors relate to the election process, the conditions of employment as well as the post-retirement status.⁷⁹ In his report, Boriss Cilevičs, member of the Council of Europe's Parliamentary Assembly notes that

... a number of former judges of the Court have experienced difficulties in finding employment. In some extreme cases, these difficulties may, purportedly, be caused by an 'insufficiently patriotic' position of judges taken on prominent cases against their own states. To put it plainly, an 'overly principled stand' by a judge may entail an element of 'revenge' by national authorities

⁷⁴ Para 96, CDDH(2015)R84 Addendum I.

⁷⁵ Para. 144, CDDH(2015)R84 Addendum I.

⁷⁶ Paras. 12-13 of CDDH report on whether more effective measures are needed in respect of States that fail to implement Court judgments in a timely manner, CDDH(2013) R79 Addendum I, 29 November 2013.

⁷⁷ The criteria require judges to be of high moral character, possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence, sit in their individual capacity, and not to engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office.

⁷⁸ See the 2012 Committee of Ministers Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights (as amended on 26 November 2014), and the establishment of the Advisory Panel (<http://www.coe.int/en/web/dlapil/advisory-panel>). The Panel's mandate is to advise the States Parties whether candidates for election as judge to the Court meet the criteria stipulated in Article 21(1) of the Convention. See also the new general Committee on the Election of Judges of the European Court of Human Rights within the Parliamentary Assembly (Procedure for electing judges to the European Court of Human Rights, Information document prepared by the Secretariat of the Committee on the Election of Judges to the European Court of Human Rights, AS/Cdh/Inf (2016) 01 Rev 3, 29 April 2016, <http://website-pace.net/documents/1653355/1653736/ProcedureElectionJudges-EN.pdf/e4472144-64bc-4926-928c-47ae9c1ea45e>).

⁷⁹ The factors identified are as follows: (i) the lack of transparency and/or visibility of the national selection procedure; (ii) the public nature of the selection procedure and/or election by the Parliamentary Assembly, including the risk of harming professional reputations; (iii) the length of the overall process; (iv) the attractiveness of the post, including the conditions of employment; (v) the difficulties of finding suitable re-employment at the end of the term of office. CDDH(2015)R84 Addendum I, para. 107.

upon the judge's retirement. The risk of similar treatment for a serving judge may compromise judicial independence.⁸⁰

5.3. Character of ECHR judgments

The judgments issued by the Court are legally binding and the respondent State is obliged to abide by the final judgments of the Court. While judgments are binding only on the respondent State,⁸¹ other Contracting Parties facing similar problems as the respondent State are encouraged to draw the necessary conclusions from judgments finding a violation of the Convention.⁸²

Originally the Court limited itself to declaring whether a particular domestic law, measure or practice was compatible with the Convention, and to deciding on just satisfaction. Later, however, it departed from its stance on judgments being exclusively declaratory. Its original insistence on the declaratory nature of the judgments stems from the principle subsidiarity, which stipulates that States retain main responsibility for finding the most appropriate measures to ensure compliance with the Convention, having regard to the national circumstances.⁸³ In this vein, the operative part of a judgment of the European Court of Human Rights typically looks like this, taken from *Castells v. Spain*:⁸⁴

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that it has jurisdiction to consider the Government's preliminary objection, but dismisses it;
2. Holds that there has been a violation of Article 10;
3. Holds that it is not necessary to consider the case also under Article 14, taken together with Article 10;
4. Holds that, as regards the non-pecuniary damage alleged, the present judgment constitutes sufficient just satisfaction for the purposes of Article 50;
5. Holds that the Kingdom of Spain is to pay to the applicant, within three months, 3,000,000 (three million) pesetas for costs and expenses;
6. Dismisses the remainder of the applicant's claims

This extract shows that, apart from the possibility to award just satisfaction under Article 41, the Court's judgment is "essentially declaratory".⁸⁵ In *Assanidze*, the Court

⁸⁰ Report of the Committee on Legal Affairs and Human Rights of PACE, Reinforcement of the independence of the European Court of Human Rights (Rapporteur: Boriss Cilevičs, Latvia). AS/Jur (2014)17, para. 27. Apart from the post-retirement situation of judges, he also notes the problems relating to the privileges and immunities of judges, the social security system and the organisation of the Court Registry's work. See <http://website-pace.net/documents/10643/110596/Reinforcementajdoc17150514EN.pdf/fa92a607-7b04-403d-9920-fb6507a18469>

⁸¹ Article 46(1) provides that "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." Thus, judgments have no *erga omnes* effect.

⁸² CDDH(2015)R84 Addendum I, para. 37.

⁸³ See e.g. CDDH(2015)R84 Addendum I, para. 17.

⁸⁴ Appl. no. 11798/85, Judgment of 23 April 1992.

⁸⁵ See e.g. para. 58 of *Marckx*: "Admittedly, it is inevitable that the Court's decision will have effects extending beyond the confines of this particular case, especially since the violations found stem directly from the contested provisions and not from individual measures of implementation, but the decision cannot of itself annul or repeal these provisions: the Court's judgment is essentially declaratory and leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation under Article 53." *Marckx v. Belgium*, Appl. no. 6833/74, judgment of 13 June 1979. The application related to certain rules of Belgian law relating to inheritance rights of children born out of wedlock.

added that “it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment.”⁸⁶ There is a similar formulation in *Broniowski*,⁸⁷ but here the Court indicated that notwithstanding this principle, and “in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected”.⁸⁸ *Broniowski* clearly shows a more active role adopted by the Court: while previously the Court generally refrained from specifying the action it expected to be taken by the respondent State to comply with its judgment, recently it has slightly modified its position, particularly in cases which disclosed a structural problem and which could give rise to a high number of similar cases.⁸⁹ In the same vein, when mere monetary compensation cannot adequately erase the consequences of a violation, the Court may indicate certain individual measures. Thus, in *Del Río Prada v. Spain*,⁹⁰ the Court held that the respondent State was to ensure that the applicant was released at the earliest possible date.

5.4. Supervision of the execution of the Court’s judgments by the Committee of Ministers

In the European system, supervision of the execution of judgments is vested in the Committee of Ministers, the executive organ of the Council of Europe, made up of representatives of the governments of the 47 Member States, assisted by the Department for the Execution of Judgments of the Court (Directorate General of Human Rights and Rule of Law).⁹¹ This work is carried out mainly at four regular meetings (DH/HR meetings) every year.⁹² The quality, clarity, cogency and consistency of the judgments

⁸⁶ *Assanidze v. Georgia*, Appl. no. 71503/01, judgment of 8 April 2004, para. 202, *Scozzari and Giunta v. Italy* [GC], Appl. nos. 39221/98 and 41963/98, judgment of 13 July 2000, para. 249; *Brumărescu v. Romania* (just satisfaction) [GC], Appl. no. 28342/95, para. 20; or *Öcalan v. Turkey* [GC], Appl. no. 46221/99, judgment of 12 May 2005, para. 210.

⁸⁷ *Broniowski v. Poland*, Appl. no. 31443/96, judgment of 22 June 2004, para. 193: “it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State’s obligations under Article 46 of the Convention”.

⁸⁸ *Ibid.*, para. 193. See also *Scozzari and Giunta v. Italy*, para. 249.

⁸⁹ See the so-called pilot judgment procedure: the need to deal with the large number of applications lodged with Strasbourg arising from the same systemic problem led to the introduction by the Court of the so-called pilot judgment procedure (PJP) in 2004. By a pilot judgment the Court purports to address a general problem by adjudicating a specific case; thus combining individual remedy with general redress. The PJP is aimed at identifying the dysfunction under national law that is at the root of the violation; to give clear indications to the respondent State as to how it can eliminate this structural problem, and to assist the respondent State in the creation of an appropriate domestic remedy capable securing adequate solution to similar pending cases. See e.g. C. PARASKEVA, *Human Rights Protection...*, cit., at http://www.nottingham.ac.uk/shared/shared_hrlcpub/Paraskeva.pdf; BUYSE, A., “The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges”, *Nomiko Vima* (Greek Law Journal), November, 2009; electronic copy available at: <http://ssrn.com/abstract=1514441>; or the file on Pilot judgment prepared by The Open Society Justice Initiative, 2012, available at <http://www.opensocietyfoundations.org/sites/default/files/chr4-pilots-20120227.pdf>.

⁹⁰ Appl. no. 42750/09), Grand Chamber, judgment of 21 October 2013

⁹¹ Pursuant to Article 46 of the Convention as amended by Protocols No. 11 and No. 14, the Committee of Ministers supervises the execution of judgments of the European Court of Human Rights.

⁹² The DH meetings in 2016 are scheduled as follows: 8-10 March; 7-9 June; 20-22 September and 6-8 December. See <http://www.coe.int/en/web/cm/execution-judgments>

inevitably influence execution, and thus the supervision responsibility of the Committee of Ministers. Clearly, there is a link between clarity and ease of execution.⁹³

Until recently the rate of compliance with judgments was relatively satisfactory, lately, however, there has been a certain setback.⁹⁴ While outright defiance to comply or deliberate obstruction is exceptional, there may be a wide range of reasons for non-compliance. Compliance rate also depends on the type of measure required by a judgment. While monetary payments for compensation or costs are, with few exceptions, paid within the time required, the situation is more complicated in the area of general measures.⁹⁵

There are various reasons behind non-compliance.⁹⁶ States might be reluctant to abide by the judgments for *political reasons*, like the lack of political will on the part of the executive or the legislator. In relation to the *Vajnai*, then the *Fratanoló* case, both relating to the provision of the Hungarian Criminal Code on the offence of the display of a totalitarian symbol in public,⁹⁷ the Hungarian Government maintained that having regard to the country's history, the use of totalitarian symbols, including the five-pointed red star, was inevitably associated with Communist dictatorship, whether or not possessing multiple meaning.⁹⁸ Thus, for quite a long while, the Government displayed no intention whatsoever to change the relevant provision.⁹⁹

Non-compliance with the judgments may also be due to the *complexity of the execution*, e.g. in the case of deeply-rooted prejudices of a social nature. In *Horváth and Kiss v. Hungary*, the Court addressed the issue of discriminatory assignment of Roma children to special schools for children with mental disabilities during their primary education. In this case, the Court considered that "in light of the recognised bias in past placement procedures, ... the State has specific positive obligations to avoid the

⁹³ CDDH(2015)R84 Addendum I, para. 111. – On the evolution and reform of the Convention system see the the outcomes of the conferences held in Interlaken (2010), Izmir (2011), Brighton (2012) and Brussels (2015). Available at <http://www.coe.int/en/web/execution/political-declarations> See also 9th Annual Report of the Committee of Ministers 2015, Strasbourg 2016, paras. 6 and 20.

⁹⁴ HARRIS et al., *Law of the European Convention*, cit., p. 27; COUNCIL OF EUROPE COMMITTEE OF MINISTERS, *Supervision of the execution of judgments and decisions of the European Court of Human Rights. 6th Annual Report of the Committee of Ministers 2012*, Strasbourg 2013, pp. 9-14, and *9th Annual Report of the Committee of Ministers 2015*, Strasbourg 2016, pp. 10-11.

⁹⁵ HARRIS et al., *Law of the European Convention*, cit., p. 34.

⁹⁶ The Parliamentary Assembly's Committee on Legal Affairs and Human Rights identified the following factors making compliance difficult: political reasons; reasons to do with the scale of the reforms required; practical reasons relating to internal legislative procedures; budgetary reasons; reasons to do with public opinion; casuistical or unclear judgments of the Court; and reasons relating to interference with obligations deriving from other institutions. See Steering Committee for Human Rights: *Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights*; CDDH(2003)006 Addendum final, p. 34.

⁹⁷ A five-pointed red star was publicly worn by the applicants at various demonstrations.

⁹⁸ *Vajnai v. Hungary*, Appl. no. 33629/06, 8 July 2008, *Fratanoló v. Hungary*, Appl. no. 29459/10, judgment of 3 November 2011.

⁹⁹ See e.g. the Government's recommendation to the Parliament dating from April 2012 maintaining their disagreement with the amendment of the relevant Hungarian law; available (in Hungarian) at <http://www.parlament.hu/irom39/06854/06854.pdf>. The relevant provision was, however, challenged by Mr Vajnai before the Hungarian Constitutional Court, which in its judgment of IV/2478/2012 decided to quash it. In 2012, the Hungarian Parliament adopted a new version of this provision, by inserting that display of totalitarian symbols constitutes a criminal offence only if it is capable to breach public peace – specifically in a way to offend the dignity of victims of totalitarian regimes and their right to sanctity. See Section 335 of the Criminal Code (Act C of 2012).

perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests.”¹⁰⁰

Finally, non-compliance might be attributed to the *financial implications* of the judgment. The *Manushaqe Puto and Others v. Albania* case¹⁰¹ related to the restitution of, or compensation for properties nationalised under the communist regime, and the lack of effective remedies. Obviously, the compensation therefor, or return of property to the former owners have very severe financial implications. Another example can be the issue of prison conditions in many Member States of the Council of Europe. While the Court has consistently maintained that the most appropriate solution to tackle the problem of overcrowding in detention facilities would be the reduction of the number of prisoners by more frequent use of non-custodial punitive measures and minimising recourse to pre-trial detention; failing this, States are required to solve the issue of detrimental prison conditions by the construction of new prisons and/or the refurbishing of prisons.¹⁰²

In the course of its supervision of the execution of a judgment or of the terms of a friendly settlement, the Committee of Ministers may adopt interim resolutions, including encouragements, criticism and suggestions with respect to the execution.¹⁰³ Cases are closed by the adoption of a final resolution. Both types of resolutions are public.

A. Supervision of individual and general measures

In the case of *just satisfaction*, the execution conditions are usually laid down with considerable detail in the Court’s judgments, including issues like deadline, recipient, currency, default interest. Payment may nevertheless raise complex issues, e.g. as regards the acceptability of the exchange rate used, the incidence of important devaluations of the currency of payment, and taxation of the sums awarded.¹⁰⁴ Arguably, it is not entirely clear how damages are calculated, thus more transparency would be a welcome development.¹⁰⁵ Nevertheless, problems relating to the payment of just satisfaction are rare.¹⁰⁶

¹⁰⁰ *Horváth and Kiss v. Hungary*, Appl. no. 11146/11, judgment of 29 January 2013, para. 116. See also para. 127, where the Court speaks about “the positive obligations of the State to undo a history of racial segregation”.

¹⁰¹ Pilot judgment, Appl. nos. 604/07, 43628/07, 46684/07 and 34770/09, judgment of 31 July 2012

¹⁰² A serious problem in many Council of Europe states. See e.g. *Varga and Others v. Hungary*, Appl. nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, judgment of 10 June 2015; *Vasilescu v. Belgium*, Appl. no. 64682/12, judgment of 20 April 2015; *Orchowski (group) v. Poland*, Appl. No. 17885/04, judgment final on 22 Oct 2009, enhanced supervision; *Bragadireanu (group) v. Romania*, Appl. No. 22088/04, judgment final on 06 March 2008, enhanced supervision; *Mandic v. Slovenia*, Appl. No. 5774/10, judgment final on 20 Jan 2012, enhanced supervision.

¹⁰³ Interim resolutions of Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, 10 May 2006, Rule 16.

¹⁰⁴ Para. 14 of 9th Annual Report of the Committee of Ministers 2015, Appendix 8 – The Committee of Minister’s supervision of the execution of judgments and decisions – scope and procedure.

¹⁰⁵ CDDH(2015)R84 Addendum I, para. 148.

¹⁰⁶ CDDH(2015)R84 Addendum I, para. 151. This was certainly was not the case *Loizidou v. Turkey* (Article 50) [GC], Appl. no. 15318/89, judgment (just satisfaction) of 28 July 1998. The dispute related to the denial of access to property in Northern Cyprus, where the applicant was awarded cost and expenses, pecuniary damage and non-pecuniary damage. Turkey, however, refused to comply, thus the CM adopted a series of strongly worded interim resolution between October 1999 and November 2003. Turkey paid the required sums in 2003. See HARRIS et al, *Law of the European Convention*, cit., p. 874.

As regards other *individual measures*, their objective is “to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention”.¹⁰⁷ These measures include the re-opening of unfair criminal proceedings, the destruction of information gathered in breach of the right to privacy, the enforcement of an unenforced domestic judgment or the revocation of a deportation order issued against an alien despite a real risk of torture or other forms of ill-treatment in the country of destination.¹⁰⁸ There are certain groups of cases where enforcement is especially problematic. Re-establishing parental visiting rights, the reopening of domestic judicial proceedings where those have been found to be unfair,¹⁰⁹ cases where the Court has found that the State failed to conduct an effective investigation in breach of its positive obligation under Article 2 proved to be particularly complicated. Repetitive cases pose logistical problems, while providing redress in relation to “new” human rights, such as environmental rights included in Article 8¹¹⁰ may require the adoption of more profound measures.¹¹¹

Execution of judgments may also require the respondent State to take *general measures* to prevent further violations of the Convention or putting an end to continuing violations, including legislative or regulatory amendments, changes of case law or administrative practice or publication of the Court’s judgment in the language of the respondent state and its dissemination to the authorities concerned.¹¹² In this regard, States with a monist system are theoretically better placed in securing compliance with the Court’s judgment.

Despite the various difficulties, there is a considerably high rate of compliance with the Court’s judgments.¹¹³ Thanks to the new working methods of the Committee of Ministers, to be outlined below, those judgments which became final after 2011 are more rapidly executed than older judgments.¹¹⁴

¹⁰⁷ Rule 6(2)(b)(i) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers’ Deputies (hereinafter Rules).

¹⁰⁸ *9th Annual Report of the Committee of Ministers 2015*, Appendix 8 – The Committee of Minister’s supervision of the execution of judgments and decisions – scope and procedure, para. 9.

¹⁰⁹ See Recommendation Rec(2000)2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted on 19 January 2000 at the 694th meeting of the Ministers’ Deputies.

¹¹⁰ See e.g. KOMANOVICS, A. & MAZUR KUMRIĆ, N., “European Regional Perspective on Environment and Human Rights”, in DRINÓCZI, T. & ŽUPAN, M. (eds.), *Law – Regions – Development*, Pécs-Osijek 2013, pp. 593-622.

¹¹¹ HARRIS et al., *Law of the European Convention*, cit., pp. 875-878.

¹¹² Rule 6(2)(b)(ii) of 2006 of the CM; and footnote 2 of the Rules.

¹¹³ “The system has proved and is proving successful in 98-99% of pending cases ...” Para. 4 of Steering Committee for Human Rights (CDDH), Committee of Experts on the Reform of the Court (DH-GDR), Drafting Group ‘F’ on the Reform of the Court (GT-GDR-F), Presentation to the 3rd meeting by the Director, Human Rights, Strasbourg, 24 September 2014, GT-GDR-F(2014)022. See also para. 169(i) of CDDH(2015)R84 Addendum I: “the overwhelming majority of Court judgments are executed without any particular difficulty.”

¹¹⁴ *Supervision of the execution of judgments and decisions of the European Court of Human Rights. 6th Annual Report of the Committee of Ministers 2012*, available at http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2012_en.pdf, p. 12. See also HARRIS et al., *Law of the European Convention*, cit., pp. 25 and 878.

B. The possibility of imposing financial sanctions

In 2000, the PACE invited the Committee of Ministers to introduce a system of financial sanctions to be imposed on States that persistently fail to execute a Court judgment.¹¹⁵ The Committee of Ministers did not respond directly to the proposal; it simply appended the opinion of the CDDH thereon which is as follows.

The introduction of such a system into the control mechanisms instituted by the Convention raises a number of questions. In particular, would such a system be efficient, would it be so outside certain exceptional situations (such as when a government is persistently refusing to fulfil its obligation to abide by a judgment)? Would, furthermore such a system be at all appropriate when the execution of the judgment requires the adoption of general measures, notably legislative ones, which may require lengthy procedures at the national level? In any event, persistent failure to execute judgments already carries financial consequences: the risk of being obliged to award just satisfaction to other persons affected by a persistent violation of the Convention may already bring with it a considerable economic pressure on the respondent State.¹¹⁶

5.5. Efforts to enhance compliance with the judgments: The new provisions of Protocol No. 14

Originally the Convention provided no sanctions for non-execution. The only retribution can be found in Article 8 of the Statute of the Council of Europe stipulating that any Member State that has committed a serious violation of the principles of rules and human rights might be suspended and, as a last resort, excluded from the Council of Europe.¹¹⁷ By Protocol 14, however, States introduced softer methods to enhance execution of judgments.¹¹⁸

Thus, a new paragraph was inserted providing for the rules on the *referral to the Court for interpretation of a judgment*.¹¹⁹ Since difficulties sometimes arise out of disagreement as to the interpretation of judgments, the Committee of Ministers may refer the question to the Court. This possibility is, however, expected to be used

¹¹⁵ Introduction of a system of financial sanctions or *astreintes* on states who fail to implement judgments of the Strasbourg Court. Recommendation 1477 (2000). The European Union has a similar system, but a financial penalty can only be imposed after a second judicial decision. See Article 260 of Treaty on the Functioning of the European Union.

¹¹⁶ Reply from Committee of Ministers to Recommendation 1477 (2000) (Doc. 9311), 14 January 2002. See also Memorandum on the Parliamentary Assembly's proposal to introduce a system of financial sanctions or *astreintes* on states who fail to implement judgments of the Strasbourg Court, available at [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-E/GT-GDR-E\(2013\)002_Memorandum-APCE.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-E/GT-GDR-E(2013)002_Memorandum-APCE.pdf)

¹¹⁷ "Any member of the Council of Europe which has seriously violated Article 3 [the rule of law and respect for human rights] may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine." Article 8 of Statute of the Council of Europe, CETS No. 001, London, 5 May 1949

¹¹⁸ Protocol No. 14 to the Convention amending the control system of the Convention (CETS No. 194), signed in 2004, entered into force on 1 June 2010.

¹¹⁹ "If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee." Art. 46(3) of the Convention.

“sparingly, to avoid over-burdening the Court”.¹²⁰ The referral decision, requiring a two thirds majority of the Committee members, shall be reasoned and reflect the different views within the Committee of Ministers, in particular that of the High Contracting Party concerned.¹²¹ Normally, it would be for the formation of the Court which delivered the original judgment to rule on the question of interpretation.¹²²

New paragraph 4 of Article 46 contains another innovation, the *infringement proceedings*.¹²³ The initiation of such proceedings requires a two thirds majority decision. Like the interpretation procedure, it is envisaged only in exceptional circumstances, and only six month after a formal notice has been given to the respondent State. The referral decision shall be reasoned and concisely reflect the views of the High Contracting Party concerned.¹²⁴ The infringement proceedings would be heard by the Grand Chamber.¹²⁵ Admittedly, infringement proceedings are seen as a method of exerting a political pressure on respondent States. Should a State refuse to comply with this second judgment, the only sanctions are those previously available, i.e. suspension of voting rights in the Committee; or expulsion from the Council of Europe under Article 8 of the Statute, which is, however, regarded as counter-productive.¹²⁶

As of June 2016, none of these measures have been used by the Committee of Ministers, presumably partly due to the relatively high threshold of two thirds majority.¹²⁷ However, infringement proceedings were seriously considered against Russia in relation to the *Isayeva* judgment,¹²⁸ albeit to no avail.

5.6. Issues of competence in the field of enforcement

While any effort to strengthen compliance with judgments is a positive development, the question remains as to what extent the Committee of Ministers is qualified, as a political body composed of diplomatic representatives, to assess legal issues. Besides the lack of legal expertise, they are government representatives and act

¹²⁰ Para. 96 of the Explanatory Report.

¹²¹ Rule 10 (Referral to the Court for interpretation of a judgment) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (2006)

¹²² Para. 97 of the Explanatory Report.

¹²³ “If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.”

¹²⁴ Rule 11 (Infringement Proceedings) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (2006).

¹²⁵ Article 31(b) ECHR.

¹²⁶ Paras. 99-100 of the Explanatory Report. Para. 100: “Currently the ultimate measure available to the Committee of Ministers is recourse to Article 8 of the Council of Europe’s Statute (suspension of voting rights in the Committee of Ministers, or even expulsion from the Organisation). This is an extreme measure, which would prove counter-productive in most cases ... The new Article 46 therefore adds further possibilities of bringing pressure to bear to the existing ones. The procedure’s mere existence, and the threat of using it, should act as an effective new incentive to execute the Court’s judgments.”

¹²⁷ Concerning the reasons behind this, one commentator argued: “why would a country suddenly abide by a Court decision in an infringement procedure if it previously consistently declined to implement the original judgment at stake.” See ANTOINE BUYSE’s blog, <http://echrblog.blogspot.hu/2012/08/possible-infringement-proceedings.html>

¹²⁸ Aerial bombardment of a village in Chechnya by Russian security forces.

under the direct authority of their internal administration. This is even more controversial, and raises issues of incompatibility, since the very State under scrutiny can participate in the deliberation and can even vote; while the applicant has no such rights of participation.¹²⁹

Despite these concerns, there was no support in the Steering Committee for Human Rights (CDDH) to transfer the current supervisory role of the Committee of Ministers to other organs, notably the Secretariat of the Committee of Ministers and/or the Court. Arguably, transfer would remove the collective character of the enforcement, would not result in the reduction of costs, and could be carried out only by the fundamental restructuring of the Convention system. Most importantly, however, due to the predominantly political character of enforcement, the Committee of Ministers is better placed to explore avenues for settlement.¹³⁰

Cali and Koch argues that even if composed of politically motivated actors, compliance monitoring by the Committee of Ministers through peer review has advantages over independent monitoring by courts or experts. Delegation of powers to the Department for the Execution of Judgments of the European Court of Human Rights¹³¹ serves as an important guarantee against the politicisation of the supervision.¹³² Moreover, the quarterly human rights meetings are often composed of legal experts stationed in permanent representations.¹³³

Even though ambassadors at the Committee admit that they are politically motivated, they are constrained by the institutional framework in which they operate.¹³⁴ First of all, the Committee of Ministers is constrained by the normative authority of the judgments, embedded in the judicial culture of European states and the culture of compliance with human rights law in Europe, second, by the delegation of post-judgment interpretation and monitoring tasks to the Department for the Execution of Judgment and, finally, by procedural constraints including the adoption of general guidelines,¹³⁵ the routine quarterly review of State compliance, and the procedural tools

¹²⁹ In para. 76 of *Ivanțoc*, Romania argued that “the Committee of Ministers’ supervision of the Court’s judgments relied on a political mechanism. It did not have judicial powers allowing it, following a contentious procedure, to take a reasoned, in fact and in law, and binding decision on States’ undertakings under the Convention.” *Ivanțoc and others v. Moldova and Russia*, Appl. no. 23687/05, judgment of 15 November 2011

¹³⁰ CHHD(2015)R84 Addendum I, paras. 166 and 170 .

¹³¹ The Department’s role is to assist and advise the Committee of Ministers in supervising the measures taken by the Respondent States to execute the final judgments of the European Court of Human Rights. When requested, the Department assists the States in their execution efforts. Source: <http://www.coe.int/en/web/execution/home>

¹³² ÇALI, B. & KOCH, A., “Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe”, *Human Rights Law Review*, 2014, pp. 301–325, at p. 304.

¹³³ ÇALI, B. & KOCH, A., “Foxes Guarding the Foxes?...”, cit., p. 308.

¹³⁴ ÇALI, B. & KOCH, A., “Foxes Guarding the Foxes?...”, cit., p. 311.

¹³⁵ See e.g. Recommendation No R(2000)2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, 19 January 2000; Recommendation Rec(2002)13 of the Committee of Ministers to member states on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights, 18 December 2002; Recommendation Rec(2004)5 of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, 12 May 2004; Recommendation CM/Rec(2008)2 of the

to increase pressure on non-complying States like the upgrading of cases from the normal to the enhanced procedure.¹³⁶

In any case, the question remains as to whether *the applicant* may lodge a new complaint with the Court based on the respondent State's failure to comply with the judgment, or in the case of insufficient measures. Originally, the Court declined to become involved in the execution process.¹³⁷ Clearly, should a new issue previously not determined by the Court later arise, the Court has the competence to examine it in accordance with the ordinary procedure, as opposed to the examination of whether there has been a distinct violation of Article 46.

The issue has been raised arose in *Ivanțoc and others v. Moldova and Russia*,¹³⁸ where the parties submitted various opinions on the appropriate role of the Court in the supervision of the execution of judgments. The respondent States argued that the Court was not competent to monitor the execution of its own judgments; this function fell to the Committee of Ministers pursuant to Article 46.¹³⁹ In contrast, the applicants and the third-party intervener, Romania, submitted that both the Court's authority and the system's credibility to a large extent depended on the effectiveness of the monitoring process, and only the interpretation granting the Court the jurisdiction to examine complaints concerning the failure to execute its judgments was compatible with the object and purpose of the Convention.¹⁴⁰ Unfortunately, the Court side-stepped the problem and decided that the second application (relating to the measures taken by a respondent State to remedy a violation found by the Court) raised a new issue undecided by the original judgment,¹⁴¹ thus leaving the question unresolved.

5.7. The supervision process¹⁴²

Generally speaking, the Committee of Ministers ensures continuous supervision of the execution of judgments and decisions of the European Court of Human Rights.¹⁴³ The supervision process has two limbs: it consists of the interpretation of the appropriate remedies if not specified by Court in its judgment, as well as the monitoring

Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, 6 February 2008; Recommendation CM/Rec(2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings, 24 February 2010.

¹³⁶ ÇALI, B. & KOCH, A., "Foxes Guarding the Foxes?...", cit., pp. 311-322.

¹³⁷ HARRIS et al., *Law of the European Convention*, cit., p. 880.

¹³⁸ *Ivanțoc and others v. Moldova and Russia*, Appl. no. 23687/05, judgment of 15 November 2011.

¹³⁹ See e.g. the argument of Moldova in *Ivanțoc*, para. 69, or Russia in para. 71

¹⁴⁰ *Ivanțoc*, paras. 74 and 76.

¹⁴¹ *Ivanțoc*, paras. 84 and 88 to 96.

¹⁴² The illustration is taken from <http://www.coe.int/en/web/execution/the-supervision-process>

¹⁴³ In his speech, Zwaak describes the process as follows: "In the great majority of cases, the Committee is able to fulfil its function under Article 46 without difficulty. In some cases, however, problems do arise. ... 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." 2003, pp. 9-10.

of the execution of the remedies.¹⁴⁴ Cases remain under supervision until the required measures have been taken. Supervision is then closed by a final resolution. To make monitoring more effective, the Committee of Ministers introduced a new twin track supervision system in 2011.¹⁴⁵

Monitoring starts with the classification of judgments under one of the two types of procedure. The approach is that more significant cases are dealt with under the enhanced procedure, while all other judgments are supervised under the standard procedure. Under this twin-track system, all cases but for the more significant or specific ones will be examined under the standard procedure. This prioritisation allows the Committee of Ministers to focus on the important cases. The enhanced procedure is used for cases requiring urgent individual measures or revealing important structural problems (in particular pilot-judgments) and for inter-state cases. In addition, the Secretariat or any Member State may request the use of enhanced procedure.¹⁴⁶ This classification is, however, not rigid; the cases might be transferred from one procedure to the other.

In the case of the *standard procedure*, member States are expected to present a document, in the form of either an action report or an action plan, to the Committee of Ministers as soon as possible, but not later than six months after the judgment becomes final. An action report sets out the measures taken by the respondent State to comply with the judgment, or an explanation of why no (further) measures are necessary. Action plans, on the other hand, are required when further measures are necessary to comply with the judgment. Consequently, action plans are evolving documents and should be regularly updated with information on the progress achieved with respect to their implementation.¹⁴⁷

In the case of *enhanced procedure*, the Committee of Ministers entrusts the Secretariat with more intensive and pro-active cooperation with the States involved.¹⁴⁸ Cases can be examined without or with a debate. A request for debate, which request must state clear and concrete reasons, can be made by any Member State or the Secretariat.¹⁴⁹

The rules of the Committee of Ministers provide for the possibility of *transferring* cases from one supervision method to the other by a duly reasoned Committee of Ministers' decision. Transfer *from the enhanced to the standard procedure* can happen, *inter alia*, when the Committee of Ministers is satisfied with the action plan presented

¹⁴⁴ ÇALI, B. & KOCH, A., "Foxes Guarding the Foxes?...", cit., p. 308.

¹⁴⁵ Supervision of the execution of judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Modalities for a twin-track supervision system. Information document CM/Inf/DH(2010)37, 6 September 2010 (hereinafter Information document). See also CM/Inf(2010)28rev. – It must be noted that the role of the injured party is very limited in this procedure; the applicant is limited to send communication to the Committee of Ministers with regard to payment of the just satisfaction or the taking of individual measures. Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, 10 May 2006), Rule 9.

¹⁴⁶ Information document 2010, paras. 8-9.

¹⁴⁷ Information document 2010, paras. 12-19.

¹⁴⁸ Para. 20 of the Information document mentions assistance in the preparation and/or implementation of action plans; expertise assistance as regards the type of measures envisaged; bilateral/multilateral cooperation programmes (e.g. seminars, round-tables) in case of complex and substantive issues.

¹⁴⁹ Information document 2010, paras. 20-23.

and/or its implementation; when obstacles to the execution no longer exist; or when required urgent individual measures have been taken. A case will be transferred *from the standard to the enhanced procedure* in the case of failure to present an action plan or action reports; where there is a disagreement between a Member States and the Secretariat on the measures presented in the action plan/report, or in the case of serious delay in the implementation of the measures announced in the action plan.¹⁵⁰

The data on the distribution of cases between the two supervision tracks show that in 2015, from among the classified cases, 74% was supervised under the standard procedure, and 26% under the enhanced procedure.¹⁵¹ In 2015, six leading cases/groups of cases concerning three States (Albania, Hungary, Turkey), were transferred from standard to enhanced supervision, while five leading cases/groups of cases, concerning four States (Norway, Republic of Moldova, Russian Federation, United Kingdom), were transferred from enhanced to standard supervision.¹⁵²

VI. CONCLUSIONS

Arguably, by the introduction of new and specialized procedures, human rights treaties, at UN as well as regional level, have moved away from the traditional methods of enforcement of treaty obligations. Nevertheless, the UN system is still very weak, due to various factors like the temporary nature of the treaty bodies, the perceived or real bias of treaty body members, the high number and the contentious quality of the recommendations and the constant backlog in the consideration of State reports and individual communications.

In the European system, the decision to entrust a political body, the Committee of the Ministers, with the supervision of the judgments is a recognition that compliance is beyond the confines of mere legal considerations and is a predominantly political decision.¹⁵³ The large number of repeat cases stems from the absence of real commitment and resolve by many States to address structural problems. Even though much has been achieved through the reform of the Convention system,¹⁵⁴ the Brussels Declaration is still dwelling on the importance of the full, effective and prompt execution of judgments and of a strong political commitment by the States Parties in this respect. To enhance compliance, technical support must be complemented with political measures, mainly in cases where violations are committed in the context of complex problems that call for political solutions and peaceful settlement. It must be noted, however, that despite the relative strength of the Committee of Ministers' oversight mechanism, compliance is a domestic issue. To strengthen the supervision process, the Brussels Declaration proposed various measures to further enhance the

¹⁵⁰ Paras. 24-30 of the Information document.

¹⁵¹ *Supervision of the execution of judgments and decisions of the European Court of Human Rights. 9th Annual Report of the Committee of Ministers 2015*, Strasbourg 2016, p. 58.

¹⁵² *Supervision of the execution of judgments and decisions of the European Court of Human Rights. 9th Annual Report of the Committee of Ministers 2015*, Strasbourg 2016, p. 72.

¹⁵³ HILLEBRECHT, C. *Domestic Politics*, cit., Cambridge, 2016, p. 152.

¹⁵⁴ High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration (19 February 2010); High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration (26-27 April 2011); High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (19-20 April 2012), accessible at <http://www.coe.int/en/web/execution/political-declarations>

efficiency of the Human Rights meetings of the Committee of Ministers, including e.g. the length and frequency of meetings, and to increase transparency in the judgment execution process.¹⁵⁵

It is not disputed that international protection of human rights is subsidiary to national protection. Since none of the human rights bodies have the powers to execute their own order, international institutions strive to facilitate protection by various means, but do not replace States as having the primary responsibility for guaranteeing enjoyment of human rights. When an international human rights tribunal finds that a State has violated its obligation, the respondent State enjoy a substantial degree of discretion on the actual means of complying with that duty. International human rights law operates on and through States.¹⁵⁶

The unique character of international law, including the lack of unified system of sanctions and central enforcement authorities is even more prominent in the field of international human rights protection, where the element of reciprocity is missing. While human rights treaties tend to multilateralize countermeasures with a view to enhance compliance, the principles of State sovereignty and subsidiarity represent a limit to further advancement in this field.

¹⁵⁵ Brussels Declaration Point C. / High-level Conference on the “Implementation of the European Convention on Human Rights, our shared responsibility”, Brussels Declaration, 27 March 2015

¹⁵⁶ NEUMAN, G. L., “Subsidiarity”, cit., pp. 360-378.