Strasbourg, 29 November 2013

CDDH(2013) R79 Addendum I

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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CDDH report on whether more effective measures are needed in respect of States that fail to implement Court judgments in a timely manner

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I. INTRODUCTION

1. As noted in the Declaration adopted at the High-level Conference on the future of the European Court of Human Rights, organised by the United Kingdom Chairmanship of the Committee of Ministers (Brighton, 19-20 April 2012), "each State Party has undertaken to abide by the final judgments of the Court in any case to which they are a party. Through its supervision, the Committee of Ministers ensures that proper effect is given to the judgments of the Court, including by the implementation of general measures to resolve wider systemic issues… The Committee of Ministers must therefore effectively and fairly consider whether the measures taken by a State Party have resolved a violation. The Committee of Ministers should be able to take effective measures in respect of a State Party that fails to comply with its obligations under Article 46 of the Convention. The Committee of Ministers should pay particular attention to violations disclosing a systemic issue at national level, and should ensure that States Parties quickly and effectively implement pilot judgments".[1] The Declaration then invited the Committee of Ministers "to consider whether more effective measures are needed in respect of States that fail to implement judgments of the Court in a timely manner".[2] Following the Conference, the Committee of Ministers instructed the CDDH to submit its conclusions and possible proposals for action to follow up paragraph 29.d) of the Declaration. The deadline for this work has been set at 31 December 2013. The present report has been prepared in response to the Committee of Ministers' instruction.

2. The Committee of Ministers' Annual Reports on the supervision of execution of judgments contain statistics indicating the scale of the problem and its evolution over recent years. The following figures run from 2010, the year of entry into force of Protocol no. 14, which, as noted in that year's Annual Report, was associated with an important number of new types of case, mainly clone or repetitive, due to the fact that the Court began issuing committee judgments in repetitive cases and the Committee of Ministers began supervising implementation of friendly settlements. Most repetitive cases concern a few recurring systemic issues.[3]

i. In 2010, the total number of pending cases increased by 14% over 2009 (from 8,667 to 9,922); the number of pending 'leading' cases, by 8% (1,194 to 1,286).[4] The total number of new cases increased by 13% (from 1,511 to 1,710); the number of new 'leading' cases remained stable (234 to 233). The total number of cases closed by adoption of a final resolution increased by almost 90% over 2009 (from 239 to 455); the number of 'leading' cases closed, by 107% (67 to 141).
ii. In 2011, the total number of pending cases increased by 8% over 2010 (to 10,689); the number of pending 'leading' cases, by 4% (to 1,337). The total number of new cases decreased – for the first time in ten years – by 6% (to 1,606); the number of new 'leading' cases increased by 8% (to 252). The total number of cases closed by adoption of a final resolution increased by almost 80% (to 816); the number of 'leading' cases closed, by 128% (to 322).

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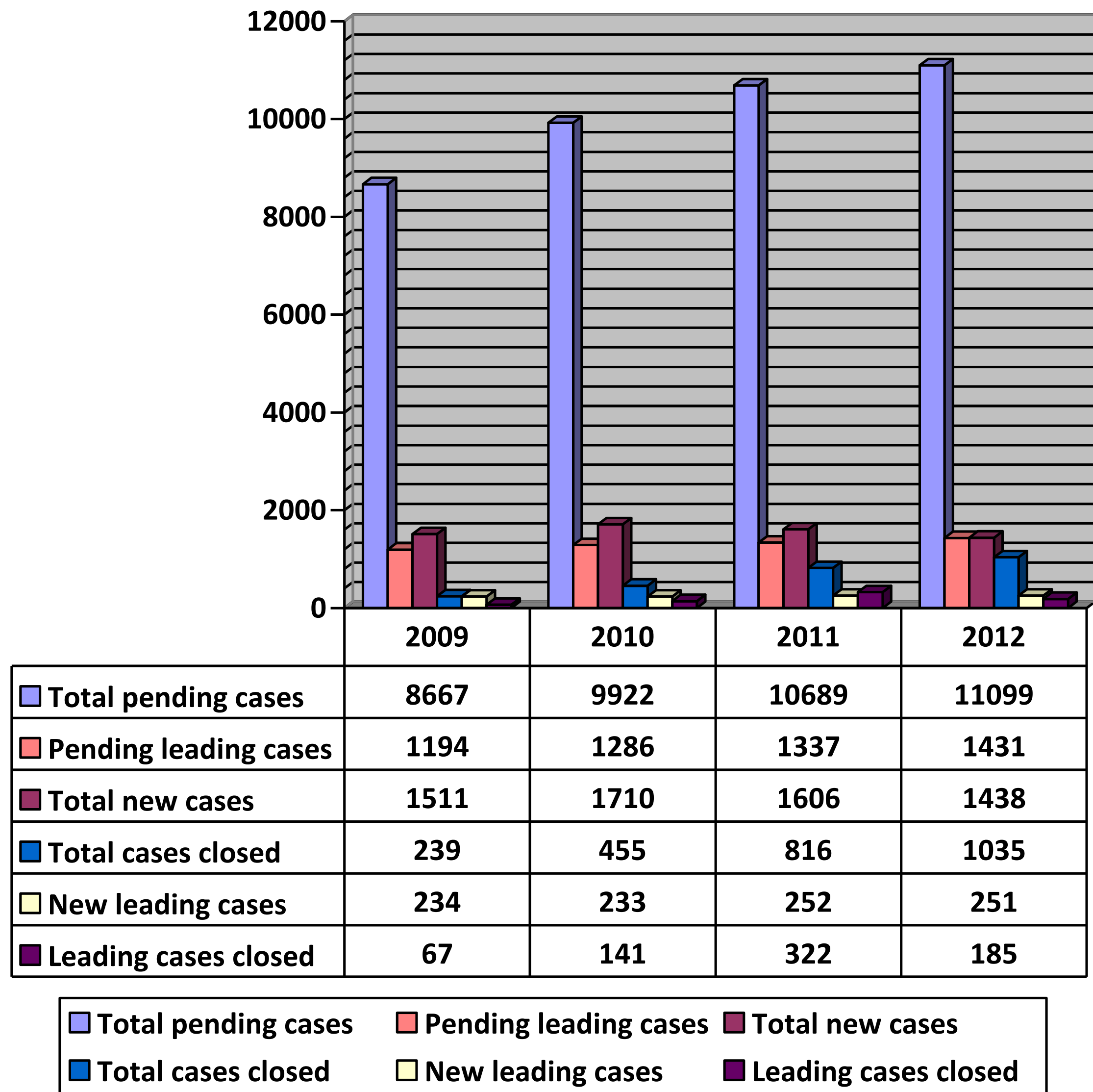
[1] Paras. 26 & 27.
[2] Para. 29.d)
[3] The 6th Annual Report of the Committee of Ministers on supervision of the execution of judgments and decisions of the Court (2012) indicates that repetitive applications mainly arise from the following categories of systemic issue: excessive length of domestic proceedings; non-enforcement of final judicial decisions; poor detention conditions; various issues concerning property rights; and problems concerning pre-trial detention/ detention on remand.
[4] For these purposes, a 'leading' case is defined in the Annual Reports as one which has been "identified as revealing a new structural or general problem in a respondent state and which thus may require the adoption of new general measures more or less important according to the case".

iii. In 2012, the total number of pending cases increased by 4% (to 11,099); that of pending ‘leading’ cases, by 7% (to 1,431). The total number of new cases again decreased, by 10% (to 1,438); that of new ‘leading’ cases remained stable (251). The total number of cases closed by adoption of a final resolution increased by almost 27% (to 1,035); the number of ‘leading’ cases closed decreased by 43% (to 185, still higher than the figure for 2010).



	2009	2010	2011	2012
Total pending cases	8667	9922	10689	11099
Pending leading cases	1194	1286	1337	1431
Total new cases	1511	1710	1606	1438
Total cases closed	239	455	816	1035
New leading cases	234	233	252	251
Leading cases closed	67	141	322	185

Although these figures do not give a complete picture of the situation, the CDDH in particular notes that each year, the number of new cases continues to exceed the number of cases closed.

3. The present report will examine the issue raised in the terms of reference from the following perspectives:

i. What constitutes execution of a judgment and what is failure to execute in a timely manner? As a preliminary point, the CDDH observes that this is a relative issue that depends on the nature and complexity of the measures required. It may be necessary to take into account delays in the treatment of information received from the respondent State, such as the evaluation of a proposed action plan and the time taken to close a case following submission of an action report.

ii. Are more effective measures needed? A first reflection on the data provided above would certainly seem to suggest that an increasing number of judgments are clearly taking a long time to execute in full or to close. Hence there may be a need for further efforts at the level of both member States and the Council of Europe.
iii. What such measures could be introduced? These measures will be examined in detail in Sections III-V below.

4. The CDDH would also recall its work on issues relating to repetitive applications, given the fact that once the Court has given judgment, repetitive applications to the Court may represent a flow of related cases whose continuation is indicative of a failure to execute general measures intended to resolve the underlying systemic issue. In this connection, the CDDH has since the Brighton Conference transmitted to the Committee of Ministers a report on the advisability and modalities of a 'representative application procedure' and another containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court.[5] The latter report in particular underlined the importance of execution of judgments and looked forward to more detailed treatment of the issue in the present report.[6]

5. In the course of preparing the present report, the CDDH has, through the activities of Drafting Group "E" on the reform of the Court (GT-GDR-E), had the advantage of input from other parts of the Council of Europe, including the Committee of Ministers' Ad-hoc working party on reform of the Human Rights Convention system (GT-REF.ECHR) and the Parliamentary Assembly,[7] as well as extensive exchanges with representatives of civil society organisations and other independent experts, both in the course of meetings, including an initial half-day exchange of views,[8] and through written contributions.[9] The CDDH also recalls its earlier "practical proposals for the supervision of the execution of judgments of the Court in situations of slow execution", which had included an invitation to a more in-depth reflection that it had declared itself ready to undertake.[10] It further notes the on-going work of the Committee of Ministers, which covers also aspects going beyond the context of the present report.

II. ORIGINS OF THE PROBLEM

6. Broadly speaking, it can be said that there are three general causes of failure to execute judgments in a timely manner:
i. Reluctance on the part of either the executive to propose measures or parliament to adopt legislation.
ii. Technical complexity, e.g. need for a wide range of measures requiring co-ordination or extensive legal reforms.

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[5] See docs. CDDH(2013)R77 Addendum IV and CDDH(2013)R78 Addendum III respectively.
[6] See in particular Sections VII and X.
[7] See in particular the working document "Measures to improve the execution of judgments and decisions of the Court (doc. GT-REF.ECHR(2013)2 rev2) and the "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" (doc. GT-GDR-E(2013)002).
[8] See doc. GT-GDR-E(2013)001.
[9] See in particular the Open Society Justice Initiative briefing paper on supervision of execution of judgments of the Court (doc. GT-GDR-E(2013)005), the proposals by Professor Antonio Bultrini concerning supervision by the Committee of Ministers of execution of judgments (doc. GT-GDR-E(2013)006) and the observations by the European Trade Union Confederation (doc. GT-GDR-E(2013)3).
[10] See doc. CDDH(2008)014 Addendum II.

iii. Substantive impediments, e.g. uncertainty about what the judgment requires or the refusal of the applicant or another private party to co-operate in the execution of the judgment.
iv. Inertia (being a simple failure to take action not linked to any particular political or technical consideration but e.g. to a shortage of staff).

Financial difficulties may be relevant to some of the above: for instance, general budgetary problems may lead to a reluctance to take political decisions allocating scarce resources to executing a judgment; or a particular body may have difficulty, due to lack of resources, in finding technical solutions or giving sufficient attention to a problem.

7. Identification of the most suitable tool for responding to a problem depends on its cause. National authorities' reluctance to take action, for example, will require a response on the political level or which contains a political component. The provision of a Council of Europe technical assistance programme would be indicated in response to a technical problem.

8. The following sections group the various proposals into three categories, although it should be borne in mind that some proposals may have effects relevant to more than one category; they are included below in the category to which they are most relevant:
i. tools to facilitate supervision by the Committee of Ministers;
ii. tools to encourage full execution;
iii. tools to enhance interaction between the Committee of Ministers and non-Council of Europe actors.

III. TOOLS TO FACILITATE SUPERVISION

9. ***The Committee of Ministers working in smaller groups during the supervision process.*** The CDDH recalls an earlier proposal that "groups of Deputies, either of their own motion or at the instigation of their Government Agents, confronted with similar problems could meet to seek together solutions and elaborate draft resolutions for submission to the plenary Committee, in collaboration with the Department for the Execution of Judgments and other relevant bodies of the Council of Europe".[11] It notes the reluctance for the Committee of Ministers to address questions relating to supervision of execution of Court judgments in anything other than plenary composition but considers that there may be scope, in certain situations and/ or at certain stages of the procedure, for certain tasks to be performed by smaller groups.

10. ***More extensive/ systematic use of other bodies inside & outside the Council of Europe,*** for instance the European Commission for Democracy through Law (Venice Commission) and the European Commission for the Efficiency of Justice (CEPEJ). It was noted that some developments were already under way, notably in relation to provision of technical assistance.[12] In addition, the Council of Europe Commissioner for Human Rights could also contribute to the formal supervision process before the Committee of Ministers. It was also recalled that the Convention gives the role of supervising execution of Court judgments to the Committee of Ministers, which has a dedicated secretariat for this task. This latter brings to the attention of the Committee of Ministers all information about positions and potentialities of other Council of Europe bodies that could be useful in the framework of the

[11] See the CDDH Final Report on measures that result from the Interlaken Declaration that do not require amendment of the ECHR, doc. CDDH(2010)013 Addendum I, para. 8.iii.
[12] For further details, see doc. CDDH(2013)R78 Addendum III, Section VIII.

execution of judgments, and to which the Committee of Ministers is always free to have recourse. This would have to be done without introducing new elements into the obligations flowing from a particular judgment. Nevertheless, certain bodies could become involved 'by default' in relation to certain categories of cases, for example the European Committee for the Prevention of Torture (CPT) for relevant cases involving article 3 of the Convention. Lacking to date has been a detailed concrete plan, co-ordinated across the bodies concerned, which would provide the impetus necessary to institute these reforms. It has also been suggested that there be periodic meetings between the Committee of Ministers, the Parliamentary Assembly (in particular its Committee on Legal Affairs and Human Rights) and the Council of Europe Commissioner for Human Rights to discuss issues relating to execution of judgments.[13] (See also Section VI below.)

11. ***Appointment of ad hoc experts by the Committee of Ministers***. This proposal should be distinguished from the practice of recourse to outside experts as part of the technical assistance provided by the Department for the Execution of Judgments. It was noted that this could be a useful tool in exceptional circumstances. Such an expert would not audit or evaluate measures taken by a respondent State but conduct a needs assessment, evaluation of measures taken being the essence of the role of the Committee of Ministers. It was noted that the added value of a Committee of Ministers-appointed expert was uncertain, in the light of the fact that the practice of providing technical assistance had grown considerably in recent years.

12. ***The Court being more directive in its judgments on the measures needed.*** It should first of all be noted that the Court has stated that "exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, [it] will seek to indicate the type of measure that might be taken in order to put an end to a violation it has found to exist. In such circumstances, it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned. In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure".[14] An example of the former is the pilot judgment in the case of *Broniowski v. Poland*, concerning the need for a domestic remedy providing compensation for property lost as a result of border changes following the Second World War.[15] As to the latter type of case, in *Oleksandr Volkov v. Ukraine*, the Court directed the respondent State to ensure that the applicant be restored to his judicial post.[16]

13. It was noted that the Court has, in exceptional cases, already developed its practice in this sense. Some welcomed this as helpful in providing greater clarity as to what Convention standards required, thereby assisting States in executing judgments. Others opposed it on the basis that it exceeds the Court's role under the Convention, arguing that it fundamentally alters the relationship between the Court and the States Parties. The essential role of the Court is to determine whether or not protected rights and freedoms have been violated and, where necessary, to decide on just satisfaction. States are then free to choose the means by which to give effect to the Court's judgments, subject to the supervision of the Committee of Ministers,

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[13] A decision to this effect has in fact already been taken: see the 'Declaration of the Committee of Ministers on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels', adopted at the 116th Ministerial Session, 19 May 2006, para. X.c.

[14] See e.g. *Fatullayev v. Azerbaijan*, App. no. 40984/07, judgment of 22 April 2010, para. 174; in this case, the Court ordered the respondent State to release the applicant from detention.

[15] App. no. 31443/96, Grand Chamber judgment of 22 June 2004, para. 194.

[16] App. no. 21722/11, judgment of 9 January 2013, paras. 202 & 208. The Court in this judgment also indicated that the respondent State should implement certain general reforms of its legal system.

in accordance with the principle of subsidiarity. Questions were also raised as to the extent to which directives on specific measures required for execution would be binding, including where circumstances change and the measures directed are no longer appropriate/ adequate. It has been suggested that problems in determining the measures necessary fully to execute a judgment are due not to a lack of precision in the judgment but to the fact that the judgment is based upon a specific case and may be open to different readings, depending on one's perspective. Also, where there is uncertainty concerning the consequences of a judgment that depends on its interpretation, the CDDH recalls that article 46(3) of the Convention allows the Committee of Ministers to refer the matter to the Court for a ruling on the question of interpretation (see also below). In any case, the Committee of Ministers' expectations of a satisfactory outcome to the process of implementation of a particular judgment must remain consistent with the judgment itself and preferably should be clear from the outset.

14. ***More interaction between the Court and the Committee of Ministers***, including through keeping one another informed of relevant developments (notably concerning systemic issues and repetitive applications, or introduction of an effective domestic remedy), taking synergistic actions (e.g. further Court judgments to clarify the legal/ factual situation concerning particular systemic issues, including pilot judgments) and co-ordination (e.g. where certain aspects of a case have already been transmitted to the Committee of Ministers whilst others remain pending before the Court). Such interaction already exists but it could usefully be further developed. Taking account of a subsequent Court judgment could however only be justified in exceptional cases and should not involve suspending closure of a case, at the risk of unduly prolonging the process. Any interaction must respect the fact that the Convention gives to the Committee of Ministers competence to determine whether the measures proposed and subsequently taken by a respondent State are adequate (subject only to the possibility of referral to the Court under article 46(4)).

15. ***Appointment of a 'special rapporteur'*** who would act, in direct partnership with the Department for the Execution of Judgments (which would become autonomous within the Council of Europe), as an independent advisor to the Committee of Ministers on the measures needed for execution of a judgment and on possible action in response to particular situations.[17] As originally made, this proposal would involve an official appointed by the Committee of Ministers from amongst a list of personalities fulfilling the usual requirements of competence, impartiality and high moral character. This official would be auxiliary to the Committee of Ministers, providing an independent and objective assessment of the specific circumstances of judgments whose implementation is subject to supervision. This assessment would be accompanied by proposals to the Committee of Ministers, including on measures that may be required as part of effective implementation of a judgment and on measures that could be taken to promote and encourage full implementation. The official could also decide which cases should be given publicity; for example, Committee of Ministers' decisions, examples of good practice or instances of particularly unsatisfactory implementation. Deciding whether a judgment had been effectively implemented would, however, remain the exclusive competence of the Committee of Ministers.

16. Issues requiring further examination include whether or not the official would have a status analogous to the various United Nations' Special Rapporteurs/ Representatives; whether the function should be a new office within the Council of Europe or be discharged by an existing one; and whether or not its creation would require amendment of the Convention

[17] See "Proposals by Prof. [Antonio] Bultrini concerning supervision by the Committee of Ministers of execution of judgment", doc. GT-GDR-E(2013)006.

(the proposal provisionally concluded that this would not be the case). More detailed consideration would have to be given to the precise criteria and procedure for appointment and functions of the new official, and their exact position in the organisation and role in the supervision process.

17. The proposal argued that the introduction of such an official would give an autonomous dynamic thrust to the otherwise essentially inter-governmental process; the absence of such an independent, pro-active institutional actor hindered the Committee of Ministers' capability to adopt incisive decisions, especially in cases of doubt over a State's compliance with a judgment. Experience with such organs as the committee of experts of the European Charter for Regional or Minority Languages or the Advisory Committee of the Framework Convention for the Protection of National Minorities shows how the Committee of Ministers may exercise its political competence more incisively when supported by the independent assessment of a dedicated official. The existence of such an official could help avoid confrontation between States over controversial issues, by allowing an independent actor to take initiatives. The very fact of establishment and existence of such an official would underline the importance of execution of judgments and the political priority attached to it by the Committee of Ministers. The costs involved would be relatively small, being limited to the expenses connected to the post itself; this would represent excellent value for money when set against the cost of delayed or incomplete execution of judgments in both financial, including for the Court and the Committee of Ministers, and human terms. There was some support for the proposal.

18. There were, however, widespread doubts about the added value of such a mechanism and, relatedly, concerns also about the possible high budgetary consequences of its implementation. It was underlined that Respondent States remain free to choose the most appropriate means to give effect to a particular judgment. It was felt that the Department for the Execution of Judgments, along with technical assistance programmes and, potentially, a more systematic recourse to the expertise of other Council of Europe bodies (see further below), had sufficient competence and qualifications as sources of support to the work of the Committee of Ministers. Concern was expressed that a new official could create uncertainty as to the different responsibilities of the various actors and complicate the supervision process, with the risk of delay: it was suggested that a better approach would be to reinforce the capacity of the Department for the Execution of Judgments to support States through close bilateral co-operation. The need was expressed for greater clarity of the proposal and a better understanding of how it was supposed to work in practice. Even for some supporters of the proposal, it was felt that it would not be appropriate for such an official to decide on giving publicity to what this latter considered to be instances of particularly unsatisfactory implementation.

19. As a variation on the proposal, it was suggested that whilst any 'special rapporteur' should not duplicate existing functions, there could be added value in a role as a conduit by which the views of and information from civil society and other external actors would be distilled and transmitted to the Committee of Ministers, which would also continue to receive all communications concerning a particular case. This could facilitate the work of national delegations in digesting the varied mass of information available on the very large number of cases on the Committee of Ministers' agenda. Such a post could be located within the Department for the Execution of Judgments, or, with greater autonomy, the Office of the Council of Europe Commissioner for Human Rights. In response, it was felt that the Committee of Ministers should continue to examine all communications on an equal footing;

that the basis on which a special rapporteur would select communications to bring to the Committee of Ministers' attention would be difficult to define; and that the aim of the proposal could be achieved by a better presentation of relevant information within the existing frameworks.

IV. TOOLS TO ENCOURAGE FULL EXECUTION

20. ***Recognition of good practice*** in the execution of judgments could be further developed, including, for example, by giving publicity to resolutions or decisions when a State has particularly effectively or rapidly executed a judgment, or even when it has made notable progress towards full implementation, while good cooperation with states could also be further reflected in the Annual Reports. There should also be readily accessible information on the current state of progress in implementing both individual and general measures. Procedurally, full execution of a judgment should rapidly be followed by closure of the execution process and reflection of this in the relevant statistics. It is also important that decisions and resolutions be effectively disseminated to domestic authorities, in accordance with Committee of Ministers' Recommendation CM/Res(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights.

21. ***Use of proceedings under article 46(4) of the Convention***, made possible upon the entry into force of Protocol no. 14 in June 2010. This mechanism has not yet been used by the Committee of Ministers, although it is understood that occasional requests have been made by applicants for the Committee of Ministers to consider using it. A possible practical obstacle to use of the provision may be the fact that delegations in the Committee of Ministers could be reluctant to call for a vote, given the need for a two-thirds majority decision. In order to dispel any uncertainty about the exact meaning of the provision, the CDDH recalls that the Explanatory Report to Protocol no. 14 clarifies that the expression "a High Contracting Party refuses to abide" covers refusal whether "expressly or through its conduct".[18]

22. The CDDH recognises the potential of the Article 46(4) procedure, which is intended to assess whether a judgment has been implemented: the response to non-implementation would remain a matter for the Committee of Ministers. At the same time, the CDDH appreciates that its use must be considered with especial caution.

23. With a view to exploring different approaches to the use of this provision, it has been suggested that it could be made one of a (formalised) series of steps in response to failure to execute (see *Graduated set of tools* below). The procedure may be particularly suitable where there is dispute as to the efficacy of measures taken; in which case, it should be recalled that proceedings could also culminate in a finding that the State in question has in fact adequately implemented the judgment, so that the Committee of Ministers would then close its supervision.

24. It was also argued that any introduction of measures even stronger than article 46(4) should only be after the Committee of Ministers has actually used its existing powers, including under article 46(4).

25. ***Astreintes/ financial penalties/ punitive damages***. A proposal to introduce a system of *astreintes* was originally made by the Parliamentary Assembly in 2000 and reiterated in 2002

[18] See para. 98 of the Explanatory Report.

and 2004,[19] during the process involving the Rome Conference and the preparation of the 2004 reform package. In its reply to the 2000 Recommendation, the Committee of Ministers considered that "the idea of a system of financial penalties ("astreintes") … and, in particular, the practicalities of such a proposal, merit very thorough examination", whilst noting that "the introduction of such a system into the control mechanisms instituted by the Convention raises a number of questions… 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."[20] The Assembly's 2004 proposal was not retained in Protocol no. 14.

26. A proposal to introduce financial sanctions imposed by the Committee of Ministers did not attract consensus prior to the Brighton Conference; opinions in the CDDH are also clearly divided for and against proposals of this type (i.e. for measures whether ordered by the Committee of Ministers or the Court), as follows.

27. Amongst the concerns and objections that have been expressed are the following:
- States Parties did not sign up to a system involving punitive measures. To introduce such unusual and radical measures for non-timely execution of judgments now would change the nature of the Convention system.
- Any system of astreintes etc. would have to be effective in rectifying underlying systemic problems, not merely in requiring States to pay compensation/ damages.
- It could be said that the money involved would be better spent on resolving the underlying systemic problems. Indeed, financial difficulties may be a reason for non-execution of certain judgments; financial sanctions or punitive damages may only exacerbate this situation.
- The Committee of Ministers may find it difficult to decide to apply a financial penalty, were it to be competent for doing so, given that it has not so far made use of article 46(4) (see further above).
- It would be premature to consider the introduction of coercive measures before the effectiveness in practice of article 46(4) had been tested.

28. Positive reaction to the proposal varies from interest in further exploration to strong support of some. It has been argued that financial incentives would be the strongest to ensure execution of judgments. It has been said that in some situations, it is 'cheaper' for the respondent State to pay successive sums of just satisfaction than to resolve the underlying systemic issue: a financial penalty could help rebalance this calculation in favour of the latter and compliance with Convention obligations.

29. Issues requiring further exploration would include the following. It would be hard to quantify the potential efficacy of financial penalties, which would have to be set at a level high enough to be an effective incentive but not so high as to impair the State's ability to implement the judgment, especially in situations of budgetary difficulty. It may also be necessary to accommodate the fact that not all States are equally wealthy, in order to equalise the impact of any penalty. For all these reasons, there would need to be an element of

[19] See PACE Recommendations 1477 (2000) on execution of judgments of the European Court of Human Rights, para. ii and 2546 (2002) on implementation of decisions of the European Court of Human Rights, para. 4, and Opinion No. 251 on draft Protocol No. 14, para. 5.
[20] See doc. CM/Del/Dec(2000)779/4.2. The Committee of Ministers' reply to the 2002 Recommendation referred back to the earlier reply.

discretionary decision-making as to the amount of a penalty, begging the question as to who would exercise this discretion. The Court may have the necessary impartiality, but such a competence would to some extent change the nature of its relationship with the States Parties. There is, moreover, currently no legal provision for the Court to take punitive measures against States: it has never been competent to take such decisions and would have to be, in an appropriate manner, empowered to do so. In the present context, this would require an amendment of the Convention and not merely a Committee of Ministers resolution, as was the case for introduction of the pilot judgment procedure. Were the Court to be given competence to take punitive measures, it could at the same time be given greater competence to be directive in its judgments (see para. 12 above). Even were decisions on application of financial penalties to be taken by the Court, it is unclear how the process would be initiated, given that the Committee of Ministers is responsible for supervision of execution of judgments but has not so far made use of article 46(4).

30. It was suggested that the Court could pass on its costs incurred in processing repetitive applications to the respondent State as an additional charge through a system ensuring that victims of such violations obtain redress without any significant additional administrative burden on the Court. Another option could be a requirement to pay civil-type damages to the Committee of Ministers as compensation for resources expended on prolonged supervision of execution of judgments in cases of persistent systemic issues. Such measures would not, however, strictly speaking be punitive but rather of a reparative nature, although some of the effects may be similar. In response, it was pointed out that the Court could not be considered as suffering 'damage' on account of having to deal with repetitive applications, as it exists and is financed by the member States to deal with all individual applications regardless of their nature; a similar consideration would apply to the proceedings before the Committee of Ministers. It was also suggested that both measures would require amendment of the Convention.

31. Overall, the CDDH did not envisage the possibility of consensus on the issues of astreintes/ financial penalties/ punitive damages in the foreseeable future but did not exclude all possibility of its being further discussed should the situation change in future.

32. ***'Naming and shaming'*** as a form of pressure: the Committee of Ministers could adopt a practice of being more critical and publicise its findings to that effect. The CDDH notes that in other contexts, Council of Europe bodies – for example, MONEYVAL (see further below) and the CPT – do use publicity as a response to failures in compliance. Concern was expressed that this was not necessarily the best way of obtaining execution: it does not help to identify solutions, which is better achieved by providing effective support to States, and tends to block discussion with the authorities, who if they feel stigmatised may defend their position. Certainly it should not be used indiscriminately, without regard to the consequences; it may be more suitable to clear procedural failings – e.g. non-presentation of an Action Plan – than to contestable substantive matters. There was no consensus in support of a use of publicity that would amount to 'naming and shaming'. In the past, the Committee of Ministers has used publicity not to 'name and shame' but to inform the public about problems in execution and in its own supervisory work (through e.g. press releases, Annual Reports): this has had some results on the domestic political level and should be encouraged and developed (see *'recognition of good practice'* above). Some aspects of the supervision process can be and, in fact long have been made public by administrative initiative, e.g. statistics and lists of long-pending cases: these resources could in future be made more accessible. A more effective approach may for this to be done following a transitional period during which

outstanding procedural failures could be corrected. 'Naming and shaming' may have a part to play in the more political processes of the Parliamentary Assembly, when acting to promote execution of judgments.

33. ***Graduated use of tools according to an agreed, pre-determined sequence*** could clarify the relative significance of particular measures taken by the Committee of Ministers in response to delay in execution. The CDDH notes the efforts already undertaken by the Committee of Ministers to this effect, and that the Council of Europe's Committee of experts on Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) employs graduated steps as part of 'compliance enhancing procedures' with respect to States found not to be in compliance with reference standards or the committee's recommendations. It has been suggested that, in the context of supervision of execution of judgments, application of each successive tool or measure could be triggered automatically in accordance with a specified time-frame – which could be set, at least in part, by reference to that indicated in the respondent State's action plan – subject to any decision to the contrary. Even if cases are different and the responses to them may need to differ, there could nevertheless be an established sequence of responses, subject to a certain flexibility, with no more than a rebuttable presumption that after a certain period of time, consideration will be given to taking the next measure. The importance of flexibility and the adaptability of responses to particular circumstances has, however, been underlined, and some expressed doubts that the same sequence of responses would always be appropriate in respect of every judgment. It was therefore considered that the available measures could rather constitute a 'toolkit' (or list of tools/ measures), which could be based on the measures examined by the GT-REF.ECHR (see para. 5 and footnote 6 above).

34. The use of ***peer pressure to overcome persistent difficulties to execute*** has been a constant part of Committee of Ministers' practice and a certain number of tools have been developed in response to concrete situations. A certain number of additional measures have been discussed but never implemented by the Committee of Ministers.[21] In the opinion of the CDDH these measures should remain in the toolkit available to the Committee of Ministers. Nevertheless, there may be doubts as to their appropriateness for obtaining acceleration of execution measures, as such a potentially confrontational approach may undermine the dialogue between the Committee of Ministers and a respondent State.

35. On a more positive note, encouragement or support could be given to bilateral co-operation between a State faced with a particular systemic issue and another that has already successfully executed a judgment involving a similar issue (see also para. 9). This could also be considered a part of the Council of Europe's technical assistance (see Section VI below).

36. ***Role of national parliaments.*** Similarly, the CDDH recalls that national parliaments have an important role to play in the process of execution of judgments and could be encouraged to intervene in appropriate cases. The CDDH takes note of the Parliamentary Assembly's efforts to this end.

V. TOOLS TO ENHANCE INTERACTION BETWEEN THE COMMITTEE OF MINISTERS AND NON-COUNCIL OF EUROPE ACTORS

37. ***Involvement of national human rights institutions and Ombudsmen, and relevant international bodies.*** National human rights institutions and Ombudsmen already have the

[21] See doc. GT-REF.ECHR(2013)2 rev2, p.6.

right in principle to submit communications. The CDDH recalled the UN's 'Paris Principles', which state that national human rights institutions "shall co-operate with regional institutions … that are competent in the areas of the promotion and protection of human rights".[22] At the same time, it notes that some such bodies' mandates may not allow them to take such action or may be uncertain on the matter.

38. Following on from the previous two proposals, one could also envisage amendment of Rule 9 to allow for the possibility of comments from other international organisations dealing with human rights, which is not currently explicitly foreseen.

39. ***Formalisation of the process of civil society organisations giving briefings to permanent representations***, building on the existing practice of informal, ad hoc briefings. The CDDH does not consider that it would be advantageous to formalise an existing practice. What is important is that the Committee of Ministers can avail itself of information from a range of sources before reaching its decisions. In this connection, the proposals below, notably those connected to Rule 9, can be considered as a package.

40. ***Increasing applicants' understanding of the process,*** including by making them aware that the process continues after adoption of a judgment and that they may still have a role to play. It reflects the fact that the Committee of Ministers is a political organ but supervision is a legal process. One should not, however, create a further adversarial stage nor excessively systematise exchanges of information and submissions before the Committee of Ministers. The purpose of submission of information should be to contribute to better implementation of judgments, in particular to determination of whether a particular judgment is fully executed. This does not extend, however, to the question of how that judgment should be executed: States are free to choose the most appropriate means of effectively achieving the result. When they receive the Court's judgment, applicants and their representatives are informed in general terms about the supervision process and provided with the contact details of the Department for the Execution of Judgments. It was suggested that they could also be informed when supervision is to be closed. Furthermore, applicants could receive copies of all information transmitted by the government to the Committee of Ministers. Applicants should not, however, be systematically invited to respond to every communication from the respondent State; instead, they should be allowed to act as and when they consider necessary – anything more would only create an additional and unnecessary burden for the Department for the Execution of Judgments, whose resources are already limited.

41. Applicants and the general public may not understand the significance of all the procedural terms used: for example, the term 'execution' has an unfortunate, predominant connotation in English, and use of the term 'resolution' for various measures of differing procedural significance may be confusing. A relatively simple step that could promote better understanding of the supervision process would be review and, where necessary, revision of the terminology used, which may also be in the interests of the Committee of Ministers.

42. ***Amending Rule 9[23] to remove the distinction between injured parties (i.e. applicants) and NGOs/NHRIs as regards the possibility of addressing general measures***. This proposal received some support, with certain reservations. It was noted that increasing numbers of

[22] See the 'Principles relating to the Status of National Institutions', adopted by General Assembly resolution 48/134 of 20 December 1993, para. 3.(e).

[23] Rule 9 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

judgments depend on implementation of general measures for their full execution, and that it may be difficult for an individual applicant to comment on the issues involved; indeed, questions were raised as to the competence of individuals to provide an objective assessment of general measures, or even the legitimacy of such interventions. Again, it should be emphasised that in every case, the aim must be to improve implementation of judgments: interaction between the Committee of Ministers and other actors is not an end in itself.

43. ***Encouraging applicants to communicate with the Committee of Ministers (including by raising awareness of Rule 9)*** could be done in exceptional cases but should not become the standard practice. The Secretariat should be encouraged to propose taking this step to the Committee of Ministers where appropriate. Once again, the aim of communications with the Committee of Ministers can only be to improve the supervision process. Also in this connection, it may be that the variant on the 'special rapporteur' proposal, giving any such official a role in channelling information from third parties to the Committee of Ministers, could play a part in appropriately encouraging applicants to submit communications.

VI. COUNCIL OF EUROPE TECHNICAL ASSISTANCE AND ITS TARGETTING

44. The CDDH recalls the importance of Council of Europe technical assistance to facilitate full execution of judgments. In this context, the Secretary General's proposals were discussed at the May 2013 Ministerial Session, and it can be noted that within the Council of Europe, a relative emphasis is currently being given to co-operation activities. The CDDH recalls its examination of this issue in its recent Report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court.[24]

45. Assistance may be of two types, addressing systemic issues (which requires large-scale, lengthy, complex programmes) or specific interventions (involving precise, sometimes very rapid action to help overcome particular technical difficulties; such activities may not require extensive resources).

46. It is clear that there is a need for co-ordination between Council of Europe co-operation activities in order better to target execution problems. It should be made easier to realign projects in response to changing circumstances (e.g. a new judgment of the Court on the issue in question), through increased flexibility in the administration and implementation of projects.

47. The CDDH itself could be deployed as a forum for the exchange of good practices. It has in the past prepared various recommendations and guides to good practice on issues of common interest, including both general capacity for implementing judgments and solutions to specific problems; this could be further pursued in future, with new issues being addressed and existing reports and instruments up-dated. More direct and flexible approaches to exchange of information could also be investigated.

48. The CDDH also considers that further attention should be given to resolving possible differences in priority between donors and the requirements of execution of Court judgments. Whilst technical assistance should follow broad strategic objectives, the central importance of the Convention system to human rights protection in Europe and the States Parties' obligation

[24] See doc. CDDH(2013)R78 Addendum III, paras. 40-43 & 46.

to execute Court judgments suggest that the requirements of execution should be borne in mind when designing and implementing assistance programmes.

49. Similarly, the CDDH reaffirms the importance of cooperation between the Council of Europe and the European Union, in particular to ensure the continued funding and effective implementation of joint programmes and coherence between their respective priorities in this field (see the Brighton Declaration, para. 9.i)).

VII. CONCLUSIONS & POSSIBLE PROPOSALS

50. The situation that confronts the Committee of Ministers in its role supervising the execution of Court judgments, in particular the excessively large and growing number of judgments pending before it, is clearly a cause of serious concern. The CDDH considers that measures must be taken to address this situation. This could include the more effective application of existing measures within the Committee of Ministers' new working methods, or the introduction of genuinely new, more effective measures, or both. Alongside this, the Committee of Ministers could consider whether there is a need to reinforce the staff and information technology capacity of the Department for the Execution of Judgments.

51. Finally, the CDDH recalls that the question of execution of judgments and its supervision will potentially be amongst the issues that it will examine as part of its work on the longer-term future of the Convention system and the Court; in this connection, it also notes that the issue will be on the programme of the Oslo Conference of April 2014.