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CHAPTER 1

A Comparative View on the Execution of Judgments of the European Court of Human Rights

*Tom Barkhuysen and Michiel L van Emmerik*¹

I. INTRODUCTION

While the general effect of the European Convention of Human Rights (ECHR or Convention) on national law has been the topic of much research, little attention has been paid to the execution of individual judgments of the European Court of Human Rights (ECtHR or Court). With regard to the execution of judgments, two levels can be distinguished. The first level is the execution of the judgment in the individual case. Which remedies are offered to the applicant who has taken the long road to Strasbourg and has finally—mostly after many years—won his or her case? Does the applicant see any improvement in his or her legal position? Does he or she obtain real reparation? The second level is State compliance in a more abstract or general sense. What are the more general effects of judgments in which the Court finds a violation of the Convention? In other words: which measures does the contracting State have to take in order to prevent future violations in similar cases?

Proper execution of Strasbourg judgments is highly important; both for the applicant who has won his or her case, and for the development of the national legal order concerned, in order to prevent future violations. The international control over the observance by States of human rights treaties by means of individual applications does not only aim at general effects (*recours objectif*), the control also aims at ‘doing justice’ in individual cases (*recours subjectif*). Therefore the execution of Strasbourg judgments deserves much more structural attention than it has received so far.

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Important questions to be answered are: (a) how Strasbourg judgments are implemented in the various national legal orders of the Member States of the Council of Europe, (b) whether there is a need to improve this implementation, and if so, and (c) how such improvement can be achieved. In this respect, it is also important to determine which remedies are—or must be—available to third parties—that is, those persons whose cases were not decided in Strasbourg but where a violation of the Convention has nevertheless occurred, as may be concluded from a similar or parallel case that has been decided in Strasbourg.

This paper will deal with the execution of Strasbourg judgments, both in individual cases and in a more general sense, where the prevention of future violations is concerned. This will be done from a non-United Kingdom perspective. Without going into the details of the practices of the various Council of Europe States, we will try to outline some general characteristics and trends with regard to the execution of Strasbourg judgments. In doing so—witness our choice of examples used—we put in evidence our Dutch background. Yet the Dutch examples also illustrate the problems and solutions possible in other Council of Europe States.

The aim of this chapter is to provide a basis for further research and, possibly, improvements in (State) practice with regard to the execution of ECtHR judgments.

We will discuss the following subjects:²

- State obligations following the finding of a violation by the ECtHR and the remedies offered at the international level (para 2);
- Remedies in individual cases offered at the national level (para 3);
- A closer look at the practice of other Council of Europe States with regard to the reopening of proceedings before domestic courts as a possible remedy in individual cases (para 4);
- General State compliance: prevention of future violations (para 5);
- Council of Europe enforcement of judgments and proposals for reform (para 6); and
- Concluding remarks (para 7).

² Mainly based on the contributions to T Barkhuysen, ML van Emmerik, and PH van Kempen (eds) *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (Kluwer Legal International/Martinus Nijhoff Publishers The Hague 1999) and PH van Kempen *Heropening van Procedures na Veroordelingen door het EHRM [Reopening of Proceedings after ECtHR Condemnations]*, (PhD thesis Wolf Legal Publishers Tilburg University Nijmegen 2003).

II. STATE OBLIGATIONS FOLLOWING THE FINDING OF A VIOLATION BY THE
ECTHR AND REMEDIES OFFERED AT THE INTERNATIONAL LEVEL

The first question to be answered with regard to the execution of Strasbourg judgments is which State obligations arise from the finding of a violation by the Court.

A. *Restitutio in integrum and Prevention of Future Violations*

Decisions of the ECtHR are declaratory in nature: the ECtHR establishes whether or not a State has violated the Convention in the case at hand. Pursuant to Article 46 ECHR, judgments are only binding to the parties in that particular case.³ From this same article of the Convention the following obligations arise: (a) to terminate the violation with regards to the applicant, (b) to provide the applicant with *restitutio in integrum* (that is restoring the situation prior to the violation), and (c) to take measures to prevent future violations (also with regard to other individuals similarly affected by the violation, for instance by changing the law).⁴

However, the Court is not competent to quash national legislation or decisions which are contrary to the ECHR, nor does it have the power to revise final decisions of national courts. Neither does the ECtHR consider itself to be in a position to issue certain orders to the State party to the Convention. The Court does not even consider it competent to make recommendations to the condemned State as to which steps it should take to remedy the consequences of the treaty violation. According to constant case law of the Court, the condemned State is, pursuant to Article 46 ECHR, free to choose the means by which to comply with the Court's judgment and to offer *restitutio in integrum*. For instance, in the case *Pelladoah v The Netherlands* the ECtHR rejected the applicant's request to order the State to reopen the national criminal proceedings.⁵ This freedom as to the

³ See on this *inter alia* R Ryssdal 'The enforcement system set up under the European Convention on Human Rights' in MK Bulterman and M Kuijer (eds) *Compliance with Judgments of International Courts* (The Hague 1996) 50. Cf, however, J Callewaert, Art 53 in LE Pettiti, E Decaux, and PH Imbert (eds) *La Convention européenne des droits de l'homme, Commentaire article par article* (Paris 1995) 847–56 (855–6), who on the basis of Arts 1 and 57 [52] ECHR presupposes the existence of a certain *erga omnes* effect of these decisions.

⁴ See, eg, G Ress 'The effects of judgments and decisions in domestic law' in R StJ Macdonald, F Matscher, and H Petzold (eds) *The European System for the Protection of Human Rights* (London 1993) 801–51 (803–4); SK Martens 'Individual complaints under Article 53 [46] of the European Convention on Human Rights' in R Lawson and M de Blois (eds) *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G Schermers (vol III)* (London 1995) 253–92 (263–75).

⁵ ECtHR 22 Sept 1994, *Pelladoah/The Netherlands*: the conviction of an applicant *in absentia* without offering his legal representative the opportunity to defend the applicant by addressing the court orally, is in contravention of Art 6 ECHR.

choice of means is, however, not unlimited, as the *Vermeire* case has made clear. In this case the Court, briefly stated, deemed it necessary for the national court to act when the legislator would take too long in implementing a Strasbourg decision.⁶

B. Just Satisfaction if restitutio in integrum is Not Possible (In Full)

After having established that a Convention violation has taken place, the ECtHR has the power to award the victim 'just satisfaction', where appropriate, on the basis of Article 41 ECHR. This alternative, consisting of compensation, only applies if the domestic legal system does not allow for full *restitutio in integrum*. The Court gives priority to *restitutio in integrum*, which in practice, however, will often be impossible, either because the damage caused is irreversible or because the ECtHR lacks the power to quash national decisions or to issue certain orders. If the Court awards damages on the ground of Article 41 ECHR, the obligation on the basis of Article 46 is clear: the condemned State has to pay the amount awarded to the applicant.

According to the wording of Article 41, a condition for the award of just satisfaction is that the national law of the State party to the Convention does not allow for full reparation of the consequences of the treaty violation. The Court has, however, interpreted its competence on the basis of Article 41 very broadly and considers it free to award damages whenever these are claimed by the applicant, irrespective of the national means for reparation. The ECtHR awards damages on grounds of equity and has used this power numerous times. The Court awards financial compensation for both material and non-material damage. The award of a sum of money is the most frequently used form of compensation in the Court's practice. This sum may also include compensation for costs incurred by the applicant, both in the national procedure and in Strasbourg. However, research into the Court's practice pursuant to Article 41 ECHR shows that the Court often does not award any damages at all. In fact, the Court often only states, without giving reasons and without regard to the national possibilities for reparation that the mere finding of a violation of the Convention constitutes sufficient satisfaction in cases where damage is of a non-pecuniary nature. Besides, claims for compensation of non-pecuniary damage are often rejected with the consideration that the Court cannot enter into speculation as to whether the national procedure would have ended differently if the conditions imposed by the Convention had been complied with.

⁶ ECtHR 29 Nov 1991, *Vermeire/Belgium*. This case concerns the implementation of ECtHR 13 June 1979, *Marckx/Belgium*.

C. Unsatisfactory Practice with Regard to Offering Remedies

It follows from this that many applicants who 'win' their case in Strasbourg will nevertheless feel that they have been left empty-handed by the Court. To date, the insufficiently guaranteed and hardly consistent Strasbourg practice of offering remedies and awarding damages renders acute the demand for proper national possibilities for redress.

III. REMEDIES IN INDIVIDUAL CASES OFFERED AT THE NATIONAL LEVEL

Therefore, let us now look at the remedies that could be offered in individual cases at the national level after the finding of a violation by the ECtHR. A study of the various legal systems of the Council of Europe shows that in theory one can think of a relatively wide range of possible remedies to be offered in national law in order to achieve *restitutio in integrum* or to provide compensation after a condemning judgment by the Strasbourg Court. Four main remedies can be distinguished.

A. Revising or Revoking National Administrative Orders Found to be Violating the ECHR

The first remedy is that national administrative orders found to be violating the Convention are revised or revoked. The authorities in most of the Council of Europe Member States in principle have this power. However, if third party interests are involved, the authorities must in principle refrain from using this power. The protection of legal certainty with regards to these third parties must prevail in such a case. This means that the remedy of revising or revoking orders is most useful in cases in which no third parties are directly involved, such as immigration cases or tax cases. An example of the use of this remedy could be the revocation of an expulsion order after the Strasbourg Court has ruled that this expulsion is contrary to eg Article 3 ECHR because of the real risk of inhuman or degrading treatment in the home country.

B. Pardon (Acquittal) or Sentence Reduction in Criminal Cases

In criminal cases a remedy could be the pardoning of a convicted person leading to his/her acquittal, for instance, after the ECtHR has found a violation of Article 6 of the Convention because of the use of improper evidence. Sentence reduction can also be used in response to a Strasbourg judgment. A Dutch lower court has, for instance, ruled that the sentence imposed on a convicted criminal had to be reduced by 10 per cent because according to

the ECtHR he was subjected to a prison regime that was not in conformity with Article 3 of the Convention. This judgment was recently upheld by the Dutch Supreme Court.

The acquittal of convicted criminals following a Strasbourg judgment can meet with a lot of criticism, both from the applicants concerned and from society. Let us explain this by an example. As a reaction to the Strasbourg condemnation in the *Van Mechelen* case concerning the use of anonymous witnesses in criminal proceedings where the Court held this to conflict with Article 6 ECHR,⁷ the applicants whose petition was upheld were (provisionally) set free. Apart from that, they received compensation—fairly modest in comparison to their claim—on the basis of Article 41 ECHR, an outcome which was not satisfactory for the applicants as they were unable to show their innocence and therefore could not receive reasonable damages for the sentence already served. Furthermore, their criminal record was left unchanged. For others who were still convinced of the applicants' guilt this outcome was also unsatisfactory because they believed that there were no grounds for the release and considered even modest damages to be out of place. As a result of this case, arguments were raised in favour of a new remedy to follow a Strasbourg 'conviction', consisting of the reopening of closed criminal proceedings, so as to revise the national decision with due regard for the Strasbourg judgment. This brings us to the next remedy.

C. Reopening of Proceedings that have been Closed with a Decision having res judicata Power

As research shows, a considerable number of Council of Europe Member States nowadays provide for the possibility of reopening proceedings that have been closed with a decision having *res judicata* power. This with a view to revising the decision concerned, with due regard for the judgment of the ECtHR, both in respect of material and procedural matters following from it.⁸ In the case of *Van Mechelen v The Netherlands*, mentioned earlier, this remedy would have meant that the criminal proceedings would have been reopened, but then without the use of anonymous witnesses (as its use was found to be contrary to Article 6 ECHR). We will deal with this remedy in more detail later. As in many cases it seems to be an ideal means for the execution of Strasbourg judgments. However, problems could arise in cases where third party interests are involved.

⁷ ECtHR 23 Apr 1997, *Van Mechelen ao/The Netherlands*.

⁸ Van Kempen 2003; Committee of Experts for the improvement of procedures for the protection of human rights 'Reopening of proceedings before domestic courts following findings of violations by the ECtHR' DH-PR (99)10 Strasbourg 9 Aug 1999.

D. Suing the State for Tort

A fourth remedy is the instigation of tort proceedings against the State. The State could be obliged to pay damages because of wrongful judicial acts or because of other wrongful acts of State authorities. This remedy might also be a good alternative in cases that cannot be reopened because of the third party interests just mentioned. Such a claim is indeed merely directed against the State and does not have the *direct* consequence of altering the legal position of a party involved in the original proceedings. The legal force of the original judgment remains intact. As far as we are concerned, this is a new kind of procedure in which the *correctness* of the original judgment is not primarily at issue.

Tort liability for wrongful (judicial) acts would not only fit in well with the developments in Council of Europe Member States, but also with the increasing liability of the State for legislative and administrative failure. In this respect, a kind of no-fault State liability is also assumed in many States for failings of the legislative and executive powers resulting from an error at law. Similar developments can be discerned in European Community law. It obliges Member States to compensate damage which can be attributed to them and which has been suffered by individuals as a result of breaches of Community law, whereby it is immaterial which State body has committed the violation. In this respect the ruling of the Luxembourg Court of Justice in the case *Köbler v Austria* is of interest. In this case, the Court of Justice ruled that EC law obliges States to provide for the possibility to sue the State for tort on the national level because of a breach of EC law by the highest national courts.⁹ Moreover, State liability could lead to national courts paying more attention to the obligations laid down in the ECHR (including Strasbourg case law) in order to prevent claims for damages.

A condition for making this remedy effective would be that liability is in principle assumed when Strasbourg finds a violation of the ECHR. However, this condition is not met in all Council of Europe Member States (eg until now, Dutch case law shows a great reluctance to this).¹⁰

⁹ ECJ 19 Nov 1991, joint cases C-6/90 and C-9/90, *Francovich and Bonifaci*, *Jur* 1991 I-5357. Further specified in ECJ 5 Mar 1996, joint cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame III*, *Jur* 1996, I-1029; ECJ 26 Mar 1996, C-392/93, *British Telecommunications*, *Jur* 1996 I-1631. See with regard to violations of EC-law by the judiciary, ECJ 30 Sept 2003, C-224/01, *Koebler*.

¹⁰ See for proposals with regard to this T Barkhuysen and ML van Emmerik 'Legal Protection Against Violations of the European Convention on Human Rights: Improving the (Co-)operation of Strasbourg and Domestic Institutions' [1999] *Leiden Journal of International Law* 833-45.

IV. A CLOSER LOOK AT THE PRACTICE OF OTHER COUNCIL OF EUROPE STATES
WITH REGARD TO THE REOPENING OF PROCEEDINGS BEFORE DOMESTIC COURTS
AS A POSSIBLE REMEDY IN INDIVIDUAL CASES

One of the possible remedies just described, the reopening of closed proceedings, deserves special attention as the Committee of Ministers has recommended Member States to implement this possibility in their national legal systems.¹¹ According to the Committee of Ministers this possibility is in some cases the most efficient, if not the only, means of achieving *restitutio in integrum*.

In this context it should be stressed that the Convention does not oblige States to act upon this recommendation (the recommendations of the Committee of Ministers are not binding). There is only a legal obligation to remedy the violation found, but the Convention does not prescribe the means by which this should be achieved. Nevertheless, in our opinion, the reopening of proceedings seems in many cases the ideal means to fulfil the *restitutio in integrum* obligation unless third party interests were prejudiced by the reopening of the case.

However, some important questions have to be discussed when introducing a reopening procedure. Such as:

- in which field or fields of law should reopening be possible?
- how to deal with third party interests?
- with regard to what type of violation of the ECHR (procedural rights only or also material rights) should reopening be possible?
- time limits?
- who can ask for reopening?
- which authority should decide on a reopening request?
- what to do with similar cases that have not been brought to Strasbourg?; etc.

Research by the Council of Europe (1999) and, more recently by van Kempen (2003), shows that State practice with regard to the reopening possibility and its various features is by no means uniform.¹² Some countries do not have any reopening possibility at all. Several countries—a majority of the Council of Europe Member States—have provisions that can be used in the field of criminal law. Provisions in the field of civil and administrative law are less common, which to a certain extent can be explained by the involvement of non-State third parties in many cases in

¹¹ Recommendation R (2000)2 of 19 Jan 2000.

¹² Van Kempen 2003; Committee of Experts for the improvement of procedures for the protection of human rights, 'Reopening of proceedings before domestic courts following findings of violations by the ECtHR', DH-PR (99)10, Strasbourg 9 Aug 1999.

these fields of law for whom legal certainty needs to be protected. In countries where such a reopening is a possibility, it can be based on a provision specially focussing on ECtHR judgments, or on a general provision that also covers other grounds for reopening proceedings such as new facts that are decisive for the outcome of the case (*nova*). Some countries have one special provision, covering criminal, civil, and administrative law (like Switzerland and Malta). In Norway, a case can be reopened (on the basis of a general provision) in reaction to a—formally non-binding—finding of the Human Rights Committee that monitors the Covenant on Civil and Political Rights. With regard to some other countries the situation is unclear as these countries do not have reopening provisions specially focussing on ECtHR judgments, but have instead general reopening provisions and it is unclear whether these can be used in reaction to a Strasbourg judgment.

For further information on a country-by-country basis we refer to the following overview prepared by means of the research mentioned.

**OVERVIEW OF THE NON-UK STATE PRACTICE WITH REGARD
TO THE REOPENING OF PROCEEDINGS BEFORE DOMESTIC
COURTS FOLLOWING FINDINGS OF VIOLATIONS BY THE
EUROPEAN COURT OF HUMAN RIGHTS¹³**

1. Special provisions with regard to ECtHR judgments

Criminal law

Germany, Greece, France, Luxembourg, Austria, Netherlands, Belgium, Italy (limited), Bulgaria, Croatia, Lithuania, Norway, Poland, Slovenia

Civil Law

Bulgaria, Lithuania, Norway

Administrative law

Bulgaria, Lithuania, Norway

All fields of law (one provision)

Malta, Switzerland

¹³ Based on the research of van Kempen 2003; Committee of Experts for the improvement of procedures for the protection of human rights, 'Reopening of proceedings before domestic courts following findings of violations by the ECtHR', DH-PR (99)10, Strasbourg 9 Aug 1999.

2. General reopening provisions that can also be used with regard to ECtHR judgments

Criminal law

Denmark (probably), Finland, Sweden, Andorra (probably), Estonia (probably), Albania (probably), Moldova (probably), Ukraine (probably), Macedonia (probably)

Civil Law

Denmark (probably), Germany (probably), Finland, Luxembourg (probably), Sweden (probably), Croatia, Poland (probably), Andorra (probably)

Administrative law

Denmark (probably), Germany (probably), Finland (probably), Austria, Sweden (probably), Croatia, Poland (probably), Estonia (probably)

All fields of law

Iceland (probably), Hungary (probably), Russia (probably), Slovakia (probably), Czech Republic (probably), Turkey (probably), Romania (probably),

3. No reopening possibilities

Criminal law

Liechtenstein

Civil Law

Belgium, France, Greece, Italy, Austria, Netherlands, Estonia, Albania, Moldova

Administrative law

Belgium, France, Greece, Italy, Luxembourg, Andorra, Netherlands, Albania, Moldova

All fields of law

Ireland, Spain, Cyprus, Latvia

4. Unclear

Civil law

Slovenia, Ukraine, Macedonia, Liechtenstein

Administrative law

Slovenia, Ukraine, Macedonia, Liechtenstein

All fields of law

Portugal, Armenia, Azerbaijan, Bosnia, Georgia, San Marino

The Netherlands has recently introduced a reopening possibility specially directed at ECtHR judgments in criminal cases. A request for reopening can be filed with the Supreme Court within a period of three months after the ECtHR judgment. A request can be filed by the applicant who has won his/her case in Strasbourg, but also by the Procurator General. The latter can also use this power against the will of the applicant, a feature of the Dutch regulation that has met with a lot of criticism. Third parties—that is, persons whose cases were not decided in Strasbourg but in which a violation of the Convention has occurred, as may be concluded from a similar or parallel case as decided in Strasbourg—cannot file a request for reopening. A proposal with regard to Dutch civil law will be discussed in the near future. A proposal for the reopening of administrative law cases is also being prepared in the Netherlands.

V. GENERAL STATE COMPLIANCE: PREVENTION OF FUTURE VIOLATIONS

A. The ECHR and the Legislative Process

Now we turn to general State compliance. In dealing with this subject we will focus in particular on the perspective of the Dutch legislator.

It is undeniable that the importance of the ECHR in the legislative process in the Netherlands has grown, especially in the last two decades, with the expanding case law of the Strasbourg Court. Throughout the first 20 years of its existence, the Court only delivered a few judgments per year (and sometimes no judgment at all). Nowadays, the Court is almost buried under its caseload.

A good and early example of the influence of Strasbourg case law on Dutch legislation is the 1982 Act on the equalization of illegitimate and legitimate children in Dutch succession law. This Act is a reaction to the 1979 judgment of the European Court of Human Rights in the case *Marckx v Belgium* in which the Court found that Belgian family law, which discriminated between legitimate and illegitimate children, constituted a violation of Article 8 (right to family life) in conjunction with Article 14 (prohibition of discrimination). This Dutch Act received retroactive effect from 13 June 1979, the date of the *Marckx* judgment. This is an example of a case in which the Dutch government followed a rather expeditious way to implement a Strasbourg Court judgment, even though the judgment was directed against another State (the Belgian State only altered its legislation in 1987). But it has to be admitted that the Dutch government showed less willingness

in other cases where the Netherlands had been condemned by the European Court.

Only in the last few years the influence of the ECHR on the legislative process has become increasingly significant. You only have to search for the word 'ECHR' (of-course in Dutch you will have to look for 'EVRM') in the Dutch database for official governmental documents, including proposals of law and all kinds of parliamentary documents (the website is <<http://www.Overheid.nl>>), to find numerous hits. Let us just mention some proposals of law in which the requirements of the ECHR played an important role:

- Project of law concerning administrative detention. This proposal was made because of Euro 2000, the European Soccer Championships in Belgium and the Netherlands, and it made it possible to detain so-called 'soccer fans' in order to prevent them from committing offences. In the Explanatory Memorandum of the government to the proposal of law and in the parliamentary debates—especially in the Upper House—the requirements of Article 5 ECHR (the right to liberty), played an important role;
- Project of law concerning the insertion of a section on administrative penalties in the General Administrative Law Act: The requirements of Article 6 ECHR are very relevant in this respect as administrative penalties constitute 'criminal charges' within the meaning of this article;
- Project of law regarding the obligation to identify oneself: Article 8 (right to privacy). This proposal of law was recently sent to parliament;
- Project of law regarding camera surveillance: Article 8 (right to privacy).

Furthermore, it is noteworthy that in recent years the right to property, contained in Article 1 of Protocol 1 to the ECHR, seems to have been discovered in legal practice, and that this article is gaining more attention in the legislative process. In different proposals of law, ranging from the Pig Breeding Act to acts in the field of social security, the government refers to the obligations arising from the right to property. That is not to say that this always leads to the conclusion that there is a possible violation of the requirements of Article 1 of Protocol 1, but at least there is attention to this right. On the other hand, the possible preventive effect of these requirements must not be underestimated. For example, the Dutch government accepted an amendment from an opposition party relating to the proposal of law regarding the reimbursement of costs in administrative proceedings. The proposal was meant to reduce the possibilities of cost reimbursement in administrative proceedings as the original government proposal aimed to give retroactive effect to the Act for already pending cases. The amendment aimed at deleting this retroactive effect and was motivated by the requirements of Article 1 of Protocol 1 of the ECHR, as interpreted in the case law of the European Court of Human Rights.

B. Implementation of Judgments of the ECtHR

In general, the implementation of decisions of the ECtHR in the Netherlands is not a problem. When damages are awarded, the Dutch State always pays the sums awarded by the Court in a timely fashion. The same holds true for settlements agreed before the Court between the Netherlands and the applicant. In such settlements the payment of a certain sum of money may be agreed upon in combination with other measures.

As regards to the general effects of Strasbourg decisions, Dutch practice is also acceptable. The rapidity with which legislation is amended may differ from case to case, but the conclusion may safely be drawn that there is a willingness to bring legislation and practice in line with Strasbourg standards, even in cases where another State party is condemned. We will give some examples of the implementation of judgments against the Netherlands.¹⁴

Winterwerp

Mr Winterwerp suffered from a mental illness, which resulted in his compulsory confinement to a psychiatric hospital, where his confinement was extended to several years. After considering the merits of the case the Court found a breach of Article 5 § 4:

the various decisions ordering or authorizing Mr Winterwerp's detention issued from bodies which either did not possess the characteristics of a 'court' or, alternatively, failed to furnish the guarantees of judicial procedure required by Article 5 § 4; neither did the applicant have access to a 'court' or the benefit of such guarantees when his requests for discharge were examined, save in regard to his first request which was rejected by the Regional Court . . .¹⁵

As a result of the *Winterwerp* case, the Dutch Minister of Justice issued a set of 'guidelines' by way of interim response; the relevant Dutch legislation was already under review when the *Winterwerp* case was decided. However, changing the law proved to be a long-term process. In fact, the new legislation did not enter into force until 1994, when the Netherlands had been condemned in Strasbourg in two more cases for having violated the rights of mental patients under Article 5 of the Convention.

¹⁴ The description of these examples is derived from C Engering and N Liborang 'Judgments of the European Court of Human Rights against the Netherlands and their effects: an overview 1960–1997' in T Barkhuysen, ML van Emmerik, and PH van Kempen (eds) *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (Kluwer Legal International/Martinus Nijhoff Publishers The Hague 1999) 29–61.

¹⁵ ECtHR 24 Oct 1979, *Winterwerp/The Netherlands*.

X and Y

Miss Y was living in a home for mentally handicapped children. At the age of 16 she was sexually assaulted by Mr B. Her father Mr X filed a complaint with the police, since Miss Y was mentally ill and therefore unable to complain by herself. The public prosecutor did not prosecute because the complaint had not been filed by the victim herself as required under the Dutch Criminal Code. Mr X and Miss Y complained to the European Court stating that their rights to respect for their private lives under Article 8 of the Convention had been breached.¹⁶ The Court agreed, finding that the Netherlands had a positive obligation to assure Miss Y adequate means to obtain a remedy.

As a result of the *X and Y* case the Dutch Criminal Code was amended: a complaint can now be lodged by the victim's legal representative if the victim is mentally handicapped to such an extent as to be incapable of deciding for him/herself whether it is in his/her interest to lodge a complaint.

Bentham

In the *Bentham* case the Dutch system of administrative justice proved not to be in accordance with the right to a fair and public hearing by an independent and impartial tribunal within the meaning of Article 6 § 1 ECHR.

Mr Bentham, a garage owner, applied for a licence to operate an installation for the delivery of liquid petroleum gas (LPG). Initially the municipal authorities granted the licence. However, after the Regional Health Inspector advised them to refuse the licence, they ordered Mr Bentham to cease operating his installation. Mr Bentham lodged an appeal against this decision, but it was confirmed by the Crown, ie the Queen and the Minister issued a Royal Decree. Mr Bentham complained to the European Court that Article 6 § 1 of the Convention had been breached because his case was not decided by an independent and impartial tribunal. After judging the merits of the case the Court indeed found a breach of Article 6 § 1 of the Convention:

the Royal Decree (*Koninklijk Besluit*) by which the Crown as head of the executive rendered its decision constituted from the formal point of view an administrative act and it emanated from a Minister who was responsible to Parliament in this respect. Moreover, the Minister was the hierarchical superior of the Regional Health Inspector, who had lodged the appeal, and of the Ministry's Director General, who had submitted the technical report to the Division. Finally, the Royal Decree was not susceptible to review by a judicial body as required by Article 6 § 1.

¹⁶ ECtHR 26 Mar 1985, *X and Y/The Netherlands*.

Two years later, as a result of the Court's judgment in the *Benthem* case, the system of Appeal to the Crown (*Kroonberoep*) was abolished and temporarily replaced by the Crown Appeals (Interim Measures) Act (*Tijdelijke Wet Kroongeschillen*). In 1994, a new General Administrative Law Act came into force.

Judgments against other States

It is not only judgments against the Netherlands that might be of relevance for Dutch legislation, but also judgments delivered against other State-parties may be very relevant, as illustrated by the example of the *Marckx* case. The Supreme Court case law uses the so-called 'incorporation construction' relating to Strasbourg judgments whereby the authoritative interpretations of the Court are considered part of the individually binding treaty provision to which they apply. On a national level the judgments have therefore a certain *erga omnes* effect, not only for the judiciary but also for the legislator. However, it is often very difficult to discern the exact implications of Strasbourg judgments for the national legal system. Due to the growing number of Strasbourg judgments, it is becoming increasingly difficult to follow and analyse the actual state of the case law let alone the possible importance of admissibility decisions, which can also be very important for the interpretation of ECHR obligations.

Let us give some examples of judgments against other State-parties with possible effect on Dutch (draft-)legislation

In the case *Colas Est v France*, the applicants were road construction companies. In 1985, they were investigated as part of an administrative inquiry in which investigators from the Directorate General for Competition, Consumer Affairs and Repression of Fraud investigated 56 companies at the same time and seized several thousand documents from which they ascertained that illicit agreements had been made concerning certain contracts. The investigating officers entered the premises of the applicant companies pursuant to the provisions of an order dating from 1945. On the basis of the seized documents, the Minister for Economy, Finance and Privatisation referred the matter to the Competition Council, which fined the applicants for engaging in illegal practices. The applicants appealed to the Paris Court of Appeal, challenging the lawfulness of the searches and seizures, which had been executed without a warrant. The Court of Appeal fined the first applicant five million francs, the second applicant three million francs, and the third applicant six million francs. The Court of Cassation dismissed their appeals. Relying on Article 8 of the Convention (right to respect for private and family life) the applicants submitted that the searches and seizures, which had been conducted by the investigating officers without any supervision or restriction, amounted to

trespass against their 'home'. The Court held that the time had come to acknowledge that in certain circumstances the rights guaranteed by Article 8 of the Convention could be construed as including the right to respect for a company's head office, branch office or place of business. The Court found that the investigators had entered the applicants' premises without a warrant, which amounted to trespass against their 'home'. The relevant legislation and practice did not provide adequate or sufficient guarantees against abuse. The Court considered that at the time the relevant authority had very wide powers and that it had intervened without a magistrate's warrant and without a senior police officer being present. The Court held unanimously that there had been a violation of Article 8.¹⁷

At present there is a legal debate in the Netherlands as to what effect the *Colas Est* judgment should have for Dutch legislation in the field of competition law. According to Dutch competition law it is possible to conduct inquiries at companies without permission or prior approval by a judicial authority. This is in contrast to the investigation of the 'home' of a natural person, which enjoys stronger protection in Dutch (constitutional) law. It is important that the government examines thoroughly what the exact meaning of the *Colas* judgment is for the guarantees that companies can derive from the right to respect for private life/home as contained in Article 8. Our impression is that the Ministry of Economy (responsible for legislation in the field of competition law) only took notice of this judgment and its possible relevance for Dutch law after some publications in Dutch legal doctrine.

Earlier, the case of *Procola v Luxembourg*, in which the Court held that the Supreme Administrative Court's successive performance of advisory and judicial functions relating to the same decisions could cast doubt on that institution's structural impartiality,¹⁸ led to much debate in the Netherlands about the position of the Council of State. In a governmental note sent to Parliament in 1997, the position was taken that there was no problem with the status of the Dutch Council of State in regard to the *Procola* judgment. In the recent case *Kleijn v The Netherlands*, the Court held that the question before the Court was whether, in the circumstances of the case, the Administrative Jurisdiction Division had the requisite appearance of independence or the requisite objective impartiality.¹⁹ The Court found nothing in the manner and conditions of appointment of the Netherlands Council of State's members or their terms of office to substantiate the applicants' concerns regarding the independence of the Council of State. Nor was there any indication of any personal bias on the part of any member of the bench that had heard the applicants' appeals against the Routing Decision.

¹⁷ ECtHR 16 Apr 2002, *Colas Est/France*.

¹⁸ ECtHR 28 Sept 1995, *Procola/Luxembourg*.

¹⁹ ECtHR 6 May 2003, *Kleijn/The Netherlands*.

The Court was not as confident as the Government that the internal measures taken by the Council of State, with a view to giving effect to the *Procola* judgment in the Netherlands, were such as to ensure that in all appeals the Administrative Jurisdiction Division constituted an impartial tribunal under Article 6 § 1. However, it was not the Court's task to rule in the abstract on the compatibility of the Dutch system with the Convention in this respect. The issue before the Court was whether, in regard to the applicants' appeals, it was compatible with the requirement of objective impartiality that the Council of State's institutional structure had allowed certain of its councillors to exercise both advisory and judicial functions.

At present the government is preparing its answer to this judgment. A note on the position will soon be sent to parliament. Our expectation is that the *Kleijn* judgment will also lead to some legislative changes.

Finally we mention the case *JB v Switzerland*, in which the applicant alleged that the criminal proceedings against him were unfair and contrary to Article 6 § 1 (right to a fair trial) in the sense that he was obliged to submit documents which could have incriminated him. The applicant, who had had tax evasion proceedings instituted against him, was requested on various occasions to submit all the documents concerning the companies in which he had invested money. He failed to do so on each occasion and was fined four times.

The European Court of Human Rights noted that the right to remain silent and the right not to incriminate oneself were international standards at the heart of the notion of a fair procedure under Article 6 § 1 of the Convention. It appeared that the authorities had attempted to compel the applicant to submit documents which would have provided information as to his income in view of the assessment of his taxes. The applicant could not exclude that any additional income which transpired from these documents from untaxed sources could have constituted the offence of tax evasion.

The Court held unanimously that there had been a violation of Article 6 § 1.²⁰

This judgment is very relevant for the preparation of the project of law concerning the insertion of a section on administrative penalties into the General Administrative Law Act. This proposal contains an article concerning the right to remain silent and in the Explanatory Memorandum to this article much attention is paid to Strasbourg case law, in particular to the judgment in the case *Saunders v United Kingdom*²¹ and to the *JB* judgment.

It is often very difficult to discern the precise meaning and scope of Strasbourg judgments. Generally, the Court takes a very casuistic approach

²⁰ ECtHR 3 May 2002, *JB/Switzerland*.

²¹ ECtHR 17 Dec 1996, *Saunders/United Kingdom*.

and it elucidates its findings very briefly. Therefore, it can be very difficult to draw conclusions that apply beyond the specific case in question. It is advisable for the Court to give more concrete guidelines in its case law (eg by giving a more elaborate motivation for its decisions), although we are aware of the fact that the Court already has an enormous case load. Such guidelines may help to prevent future Strasbourg applications in similar cases.

C. Monitoring Cases Before and Judgments of the ECtHR

At present, the Dutch government is not able to monitor Strasbourg judgments on a structural basis. The governmental 'system' of monitoring Strasbourg judgments is in contrast with the present structure of monitoring the judgments of the EC Courts in Luxembourg (Courts of First Instance and Court of Justice of the European Communities). There exists an Inter-Departmental Commission on European Law (ICER). This Commission, composed of civil servants of all departments, examines on a structural basis what are (or will be) the effects of (future) judgments of the EC Courts in Luxembourg. In this way it is possible to identify at an early stage the possible effects of these judgments for Dutch legislation. It also makes it possible to anticipate future judgments.

In our opinion a similar structure should be set up for the monitoring of judgments and admissibility decisions of the European Court of Human Rights in order to provide the government with adequate expertise on the ECHR and the Strasbourg case law. The government should invest in sufficient facilities (time and money), especially civil servants with expertise in the field of the ECHR, and in particular persons who are able to extract the possible consequences of Strasbourg decisions for particular branches of Dutch law. In this way, it can be assured as best as possible that Dutch legislation complies with the requirements of the ECHR and that future condemnations by Strasbourg are prevented. In our opinion this positive human rights result is well worth the investment!

As shown, it is very important that States keep a constant eye on the developments in Strasbourg case law and try to be pro-active. This also means that States have a direct interest in the outcome of cases against other States. The possibility of intervening as a third party (Article 36 ECHR) could be used to serve these interests as, for instance, many countries have done in the case *A v United Kingdom* on parliamentary immunities.²² However, there is no policy of structural use of this possibility as the case *Colas Est/France* shows. In this case, none of the other Member States intervened even though it concerned the very important question of whether

²² ECtHR 17 Dec 2002, *A/United Kingdom*.

companies were also protected under Article 8 ECHR against seizure of company documents, which question the Court answered in the affirmative. Since this decision of the Court has a large impact, third party intervention would have been worthwhile.

D. Conclusions on General State Compliance

Apart from executing ECtHR judgments in the individual cases concerned, States also have the obligation to prevent future violations of the Convention in similar cases. This can mean that legislation or a standing administrative practice has to be changed. Likewise, ECtHR rulings can lead to a change in national case law with regard to a certain topic. The ECtHR judgment in the case *Goodwin v United Kingdom*,²³ for instance, led to a change in the case law of the Dutch Supreme Court with regard to the protection of the journalistic privilege, ie the right of journalists not to name their sources.

Although a judgment of the Court formally binds only the State which is a party to the proceedings in question, it frequently happens that other States nevertheless draw legislative or other consequences from it. In our opinion, this should be welcomed because the general rules that can be drawn from judgments can be seen as part of the treaty obligations of all Member States. Furthermore, not taking into account judgments against other States would force individuals to bring cases before the Court even when it is clear from the start that the Convention has been violated. Taking into account the time and energy that the individuals concerned and the already overloaded Court have to spend on such cases, it is clear that this should be prevented if and when possible. Furthermore, it could be argued that not taking into account judgments against other States in certain cases could run against the State obligation to fulfil treaty obligations in good faith.

At the same time it must also be concluded that it is not always clear from a judgment which abstract measures should be taken to prevent future violations. Most Court judgments are very much based on the specific facts of the case, which makes it difficult to infer general rules from them. This is made even more difficult by the fact that extensive grounds are lacking in many judgments. At this point the Court could change its practice in order to enhance the impact of its judgments. Finally, the State concerned could also ask (more frequently) for an interpretation of a judgment by the Court in order to clarify its exact meaning.

²³ ECtHR 27 Mar 1996, *Goodwin/United Kingdom*.

VI. COUNCIL OF EUROPE ENFORCEMENT OF JUDGMENTS AND PROPOSALS FOR REFORM

Now that we have dealt with the execution of Strasbourg judgments both in individual cases and in the abstract, we can have a closer look at the supervision of the execution process. Who checks whether the State concerned fulfils its obligations under the ECHR and—if it fails to do so—are there any possibilities to enforce the judgment? We will first concentrate on the current supervision and enforcement system (6.1) and then review in brief the most important proposals for reform of this system, recently put forward (6.2).

A. Current Supervision and Enforcement System

Under Article 46 ECHR the Committee of Ministers supervises the execution of the Court's judgments. This supervision takes the form of monitoring whether the State has executed the judgment in the individual case by *restitutio in integrum* and/or payment of damages on the basis of Article 41 ECHR. The Committee also monitors whether the necessary legislative or administrative reforms have been instituted in order to prevent future violations. The Committee does not regard its supervising role with regard to a certain case as finished until it has satisfied itself—on the basis of information supplied by the State—that the State has fulfilled its obligations arising from the judgment. The conclusion that a judgment has been properly implemented will be formalized by the adoption of a resolution by the Committee in which the information supplied by the State is also mentioned. This resolution is made public and can be a good source for research with regard to the execution of judgments. If a State fails to execute a judgment, the Committee may decide on the measures to be taken against this State (for instance: a political condemnation, suspension of the right to vote at the Committee of Ministers, or expulsion from the Council of Europe).

The record of States in executing the Court's judgments can be regarded as relatively good. Although some States need a lot of time to implement appropriate measures, in the end the Committee can conclude in most cases that the judgment has been properly executed. This shows that the judgments of the Court have acquired a highly persuasive status in the various Member States. On the other hand, it has to be said that more and more States are becoming increasingly reluctant to execute judgments against them and try to find ways to minimize the possible impact of these judgments. It is also because of this development that the Parliamentary Assembly of the Council of Europe is trying to gain more control over the

execution of judgments. The Assembly is now informed on a regular basis on the execution records of the Member States and tries to use its (political) influence whenever problems arise.

However, the individual concerned (the applicant who has won his or her case) has no formal role in the supervision procedure, although they could try to draw the attention of the Committee of Ministers to a judgment that has not been properly executed. The *Olsson II v Sweden* case²⁴ shows that so far the ECtHR has not been prepared to deal separately with the complaint that a previous Court judgment has not been (properly) executed. The applicants in this case asked the Court to condemn Sweden for a violation of Article 46, which the Court refused. From this case it can also be deduced that so far, the Court is not willing to override a decision of the Committee of Ministers that a certain judgment has been properly executed, although scholars have argued that it is the Court and not the Committee that should have the last word in this respect. The Court has confirmed this reluctant position in its admissibility decision in the case *Lyons v United Kingdom*.²⁵ In this case, the Court found the complaint of the applicants—that by refusing to reopen a closed national procedure and to take into account the condemnation by the Court in an earlier judgment (19 September 2000, *IJL, GMR and AKP v United Kingdom*), there was a ‘new’ breach of Article 6 § 1 and a breach of Article 13 ECHR—inadmissible. The Court stresses the exclusive role of the Committee of Ministers with regard to the execution of judgments and is of the opinion that there is no new breach of the Convention. In this respect the Court states that the Convention does not give it jurisdiction to direct a State to open a new trial or to quash a conviction.

B. Proposals for Reform

As most of you might know, the large workload of the ECtHR results in most applicants having to wait too long for a decision in their case. The huge number of cases reaching Strasbourg could undermine the position of the ECtHR. It is therefore not surprising that the Committee of Ministers had asked a special committee, the Steering Committee for Human Rights (CDDH), to prepare proposals in order to guarantee the long-term effectiveness of the ECtHR. The Steering Committee’s final report,²⁶ contained proposals on three levels: (a) domestic remedies, (b) the Court’s procedure, and (c) the execution of judgments.

The Committee of Ministers welcomed the proposals with regard to the

²⁴ ECtHR 27 Nov 1992, *Olsson II/Sweden*.

²⁵ ECtHR 8 July 2003, *Lyons and others/United Kingdom*.

²⁶ CDDH, Guaranteeing the long-term effectiveness of the ECtHR, Final report containing proposals of the CDDH, adopted on 4 Apr 2003, CDDH(2003)006 Final.

execution, the Steering Committee produced a draft protocol for the implementation, which was discussed by the Committee of Ministers in May 2004. The proposals aimed to improve and accelerate the execution of judgments and cope with some of the problems that have been mentioned before. The three most important proposals were the following.

Proposal C1 of the Steering Committee recommended that the Court, by a resolution of the Committee of Ministers, should be asked to identify in its judgments what it considers to be an underlying systematic problem and the source of this problem. In this way, the Court could assist States in finding the appropriate solution and the Committee in supervising the execution of judgments. Repetitive applications could be avoided in this way.

Proposal C2 suggested that the supervising procedure before the Committee of Ministers is organized in such a way that it promotes the rapid solution of systematic problems and, where necessary, the problems of violations already committed and qualified for being brought before the Court or already before the Court. It also proposed to strengthen the department for the execution of judgments. This could mean that the execution of pilot judgments would be given priority and much publicity. Furthermore, the Parliamentary Assembly would be more closely involved in the execution process.

Proposal C4 is of a really fundamental nature. According to this proposal, the Convention should be amended to enable the Committee of Ministers to institute proceedings before the ECtHR against a State that clearly refuses to comply with a judgment in order to obtain a finding by the Court that Article 46 ECHR has been violated, possibly combining this with a financial sanction. A comparison can be made with the infraction procedure under EC law that enables the Commission to bring cases against member States before the ECJ.

In our opinion the proposed measures are to be welcomed, although it is a little disappointing that no (formal) role is proposed for the applicant who has won their case and is confronted with execution problems. The fact that no proposals are made with regard to the remedies that should be offered to the applicant who has won his/her case can also be viewed with a critical eye.²⁷ This, however, is not surprising because the proposals of the Steering Committee mainly aim to reduce the workload of the Court. It rests to see whether these important proposals from the Steering Committee will be adopted.²⁸

²⁷ See for proposals with regard to this Barkhuysen and Van Emmerik 1999.

²⁸ For further details on the draft protocol please refer to E Bates 'Supervising the Execution of Judgments Delivered by the European Court of Human Rights: The Challenges Facing the Committee of Ministers' below p 49.

VII. CONCLUDING REMARKS

So far, we have presented our glance at several key aspects of the execution of ECtHR judgments. As said before, the main questions to be answered are: (a) how Strasbourg judgments are implemented, (b) whether there is a need to improve this implementation, (c) if so, how such improvement can be achieved (with measures on the national as well as on the international level), and (d) whether in this respect, lessons can be drawn from the practice in other Member States. We hope this paper will raise the appetite for further discussion on these questions.