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COMPLIANCE WITHOUT REMANDS: The Experience Under the European Convention on Human Rights

John Cary Simst

Those familiar with practices followed in the federal and state courts within the United States are well aware of the central role played by "remands" from appellate courts in achieving compliance with their judgments. In the run-of-the-mill case, the reviewing court does not direct the disposition of the matter, but rather remands the case to a lower court for further handling in accordance with whatever guidance is to be found in the appellate ruling.

The topic that this article will address sits well outside the familiar world of remands. Without, I hope, imposing any inappropriate diversion on those participating in this symposium with the intention of deliberating on the remand process, I intend to acquaint the participants with an alternative judicial universe in which remands are not utilized—in which, in fact, remands are not even possible. Examination of this distinctive arena in which appellate judgments are enforced without remands, and identification of the strengths and weaknesses of such an approach, may help us to understand our own system more thoroughly and plan reforms more confidently.

My attention will be focused on the judgments of the European Court of Human Rights (sometimes referred to here as the "European Court" or the ECHR).¹ This court, the judicial arm of the Council of Europe, is responsible for interpreting the European Convention on Human Rights (the "Convention"),² and it rendered 844 judgments in the year 2002,³ many

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1. For a history of the European Court of Human Rights see REGISTRAR OF THE EUROPEAN COURT OF HUMAN RIGHTS, INFORMATION DOCUMENT, at <http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm> (Sept. 2003).

2. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (modified Nov. 1, 1998) [hereinafter European Convention on Human Rights], available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (last visited March 22, 2004). The Convention entered into force on September 3, 1953, and was extensively modified by Protocol 11, effective November 1, 1998. Unless otherwise specified, the Article numbers used here are those of the current convention text, although some Articles were previously identified by a different number.

times the number of judgments handed down by the Supreme Court of the United States.⁴ However, unlike the Supreme Court, which can and usually does remand cases to the federal and state courts whose judgments have been reviewed, the ECHR is a supranational tribunal that is entirely without power to remand a case to a national court.

What makes the enforcement process for ECHR judgments so interesting is that the court announces nearly one thousand judgments a year, often in high-profile cases on which emotions run high, yet it has no remand mechanism at its command. Nonetheless, there is a broad consensus that the level of compliance with ECHR judgments is very high, even if compliance is not always cheerfully and quietly carried out by the affected states. The achievement of such remarkable success in enforcement, without resort to the method traditionally relied upon in the United States, commands our attention and analysis.

THE ECHR AND ITS MILIEU

The European Court of Human Rights is provided for in Article 19 of the Convention.⁵ It is an organ of the Council of Europe, which comprises forty-five nations within Europe, with a population of over 800 million.⁶ The Council of Europe has a much more extensive membership than the European Union, which presently has fifteen members, with ten additional members entering in 2004.⁷ Not surprising in light of the large number of member states, the Council of Europe includes states with quite diverse political processes, economic circumstances, social structures, languages, religious traditions, and legal systems.

The number of judges on the ECHR is equal to the number of High Contracting Parties, that is, the states that have ratified the Convention.⁸ Each High Contracting Party nominates three candidates to serve "with respect to" it, and the Parliamentary Assembly of the Council of Europe

3. See SUBJECT-MATTER OF JUDGMENTS DELIVERED BY THE COURT IN 2002 63, at <http://www.echr.coe.int/JEng/EDocs/subjectmatter2002table.pdf> (last visited March 22, 2004).

4. *The Supreme Court, 2002 Term: The Statistics*, 117 HARV. L. REV. 480, 487 (2003) (in the 2002 Term, ninety-two cases were disposed of on review and fifty-three others were decided summarily).

5. European Convention on Human Rights, *supra* note 2, at article 19.

6. See, e.g., Council of Europe, available at <http://www.coe.int/DefaultEN.asp> (last visited March 22, 2004).

7. For example, Russia, Turkey, and Switzerland are each members of the Council of Europe, but will not be members of the European Union even after the 2004 expansion. See Council of Europe, *supra* note 6.

8. There are currently forty-four judgeships, one of which is vacant. See European Court of Human Rights, *supra* note 1.

then elects a judge off the list by majority vote.⁹ There is no formal limit on the number of judges who may be elected from a given state, but under this system each High Contracting Party generally nominates its own citizens, with the final composition of the court naturally tending to be one in which each High Contracting Party sees one of its nationals sitting as a judge.¹⁰ Although nationality figures prominently in the election process, the judges serve in their individual capacity, not as governmental representatives. The court sits in Strasbourg, France.¹²

Although the jurisdiction of the ECHR originally extended only to complaints lodged by one High Contracting Party against another, complaints filed by individuals and organizations against a High Contracting Party have long constituted the main work of the court.¹³ Especially in light of the fact that almost any judgment determining that a High Contracting Party has violated the Convention involves just one of the state's own nationals, it is easy to see why issues of compliance abound. No government finds it pleasant to be declared to be in violation of its legal obligations, even by its own courts, and it is not unusual for the affected state to manifest certain distaste for the outcome, and perhaps even a reluctance to carry out a court's decision. Whatever may be the obstacles to compliance within a given state, however, the rendition of an unfavorable judgment by a supranational court is much more likely to be controversial and to trigger resistance to compliance, at least among some elements of the state's political leadership.

Because of the natural and quite predictable (if somewhat uneven) reluctance of states to comply fully and promptly with some adverse decisions coming from Strasbourg, the Convention itself sets out the obligation to comply, and establishes a mechanism for bringing about compliance. Article 46 states:

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

9. *Id.*

10. The rare exceptions are where a very small state nominates a candidate from outside its borders. Thus, Judge Lucius Cafilisch, who is Swiss, was elected by Liechtenstein. See European Court of Human Rights, *supra* note 1.

11. See European Convention on Human Rights, *supra* note 2, at article 21(2).

12. See European Court of Human Rights, available at <http://www.echr.coe.int> (last visited March 22, 2004).

13. See European Convention on Human Rights, *supra* note 2, at article 34. See also *id.* at article 33.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.¹⁴

The Committee of Ministers (the "Committee") is made up of the Ministers of Foreign Affairs of the Member States of the Council of Europe, although the functions of the Committee with respect to human rights judgments are normally carried out by the deputies of the ministers, acting as the Committee.¹⁵ The Committee meets six times a year to carry out its duties under the Convention, and the deliberations take place behind closed doors, although the agendas for the meetings are now made public, as are the actions taken.¹⁶ The procedures followed by the Committee regarding its supervision of the execution of ECHR judgments are set out in rules that were adopted on January 10, 2001.¹⁷

The judgments of the ECHR are transmitted to the Committee pursuant to Article 46 of the Convention, and the case is then placed on the Committee's agenda "without delay."¹⁸ Where there has been a violation of the Convention, "the Committee shall invite the State concerned to inform it of the measures which the State has taken in consequence of the judgment, having regard to its obligation to abide by it under Article 46, paragraph 1, of the Convention."¹⁹

While neither a detailed knowledge of the substantive rights protected by the Convention nor an intimate familiarity with the case law developed by the ECHR is necessary for the discussion of enforcement which follows, there is a need to perceive the range of remedies available under the Convention. Article 41 of the Convention provides:

If the court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High

14. *Id.*

15. Prior to the far-reaching revisions of the Convention that took effect on November 1, 1998, the Committee of Ministers *decided* some cases arising under the Convention, but it no longer has that authority. P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 267-68 (3d ed. 1998).

16. A very useful description of the operation of the Committee is to be found in CLARE OVEY & ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, 420-36 (3d ed. 2002) [hereinafter OVEY & WHITE]. For a succinct and informative summary, see a monograph published by the Council of Europe. ELISABETH LAMBERT-ABDELGAWAD, *THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS* (2002) [hereinafter LAMBERT-ABDELGAWAD]. My description of the functions of and procedures followed by the Committee of Ministers draws on both of these sources.

17. Rules adopted by the Committee of Ministers for the application of article 46, paragraph 2, of the European Convention on Human Rights, *available at* <http://cm.coe.int/intro/e-rules46.htm> [hereinafter Committee of Ministers].

18. *Id.* at Rule 2.

19. *Id.* at Rule 3a.

Contracting Party concerned allows only partial reparation to be made, the court shall, if necessary, afford just satisfaction to the injured party.²⁰

The recent case *Lustig-Prean v. United Kingdom*²¹ provides an illustration of the ECHR's approach in calculating just satisfaction. The applicants were two former members of the British armed forces who had been discharged because of their homosexuality.²² The ECHR found a violation of Article 8 of the Convention, which guarantees a right to respect for one's private life.²³ Just satisfaction, in this context, was found to encompass: (1) non-pecuniary loss, such as psychological damage; (2) pecuniary loss resulting from the disruption of the applicants' careers, including past loss of earnings, future loss of earnings, and loss of pension benefits; (3) costs and expenses of the litigation; and (4) interest, payable beginning three months after entry of the award. What is most pertinent to this discussion is that "just satisfaction" represents a direction to pay a certain amount of money, and thus "it is an obligation capable of direct and clear performance."²⁴ The only enforcement issue- that is likely to arise as to such relief is whether the payment ordered has in fact been made by the state responsible for the violation.

"Just satisfaction is the only measure that the European Court can order a state responsible for a violation of the Convention to take."²⁵ As will be described more completely in the discussion below, however, final resolution of a case before the court in which a violation has been found often depends upon the state's implementation of both "individual measures" and "general measures" designed to put the injured party in the same position as enjoyed prior to the violation, and to prevent new violations of a similar nature. Individual measures can take many forms, such as reopening domestic legal proceedings; vacating a judgment or preventing it from being enforced; modification of police records to expunge a conviction; or issuing an entry or residence permit to a non-citizen. General measures may assume even a greater variety of forms, including most prominently: amending the offending Constitutional provision, statute, or rule; changing administrative practices; altering case

20. European Convention on Human Rights, *supra* note 2.

21. 29 Eur. Ct. H.R. 548, 548 (2000), *available at* <http://hudoc.echr.coe.int/hudocNiewRoot.asp?Item=1&Action=Html&X=327235130&Notice=O&Noticemode=&RelatedMode=O> (last visited March 22, 2004).

22. *Id.* 2.

23. *Id.* 62-105.

24. LAMBERT-ABDELGAWAD, *supra* note 16, at 13.

25. *Id.*

law to conform to the principles announced by the ECHR; publicizing the court's ruling or issuing a circular letter alerting relevant officials to the law declared by the court; or executive action to conform to the newly-announced principles, or a declaration or solemn undertaking by the officials concerned of what actions they will take in the future to assure compliance.

Once the court's judgment has been transmitted to the Committee of Ministers, the role of the ECHR is at an end?⁶ As described above, the Committee promptly puts the matter on its human rights agenda, and continues to revisit the case at regular intervals, both to determine whether the award for just satisfaction has been paid, and to decide whether appropriate individual and general measures have been taken. Interim resolutions may be adopted,² and this is particularly likely to occur when a case languishes for long periods without the state involved taking actions which are considered to constitute full compliance with the court's judgment. Ultimately, when the Committee determines that full compliance has been achieved, it adopts a formulaic resolution reciting the history of the case and stating that the Committee "has exercised its functions under Article 46, paragraph 2, of the Convention in this case."²⁸

THE UNCONVENTIONAL NATURE OF THE CONVENTION'S ENFORCEMENT PROCESS

Judged from an American perspective, the process described above is decidedly irregular. For example, when the Supreme Court of the United States decides a case, it has the power to remand the case to the federal or state court from which it came. The Supreme Court can make its instructions to the lower court as specific as necessary to assure that the correct path is followed on remand, but the Court usually feels no need to be heavy-handed, perhaps because its power to control future proceedings is so apparent. Hart and Wechsler offer this crisp summary:

Normally the Supreme Court, when reversing a state court judgment, remands the case for proceedings "not inconsistent" with the Court's opinion. The state court is thus free to resolve

26. Sometimes the European Court issues an opinion finding a violation but reserves the remedial issues for further consideration. In such cases, it is only the second decision addressing remedy that is subject to supervision by the Committee of Ministers as to its execution, since the first opinion does not constitute the "final judgment" necessary to trigger the enforcement process under article 46.

27. Committee of Ministers, *supra* note 17, at Rule 7.

28. See Committee of Ministers, *supra* note 17, at Rule 8.

any undecided questions or even alter its determination of underlying state law. The reversal may not, therefore, be decisive of the final judgment.²⁹

If the prevailing party before the Supreme Court considers the lower court's response to the remand to be unfaithful to the Supreme Court's decision, a new petition for review provides a ready mechanism for obtaining full compliance. The key element of this enforcement system is that the Supreme Court itself can decide how to structure the remand to achieve its purpose and can even decide to forgo a remand which is not likely to be effective. Thus, in *Martin v. Hunter's Lessee*,³⁰ the first round of litigation produced a remand with instructions to the Virginia Court of Appeals that judgment be entered in accordance with the original ruling of the trial court.³¹ The Court of Appeals declined to do so, however, taking the view that the matter was not one which could, under Article III of the Constitution, properly be heard at all by the Supreme Court of the United States. The second time around, the Supreme Court acted forcefully to implement its decision without further involvement, or possible interference, by the Virginia Court of Appeals: "It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester, be, and the same is hereby affirmed."³²

Compare to this commanding position occupied by the Supreme Court of the United States, that of the ECHR. The review conducted in Strasbourg, in which an international tribunal reviews allegations that the matters considered by national courts have been disposed of in a manner that conflicts with the European Convention, is not part of the work of the national court systems from which the cases arise. There is no mechanism for remand from the ECHR to any national court.³³ The ECHR is not empowered to give any direction at all to the national courts.

Even more intriguingly, the ECHR cannot even order a state that has been held to have violated the Convention to take any action other than the payment of just satisfaction as determined by the court.³⁴ There is absolutely no authority for the court to enjoin a state from taking any

29. RICHARD H. FALLON, JR., ET. AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 481 (5th ed. 2003). Federal courts would be at least as likely to give full effect to a ruling by the Supreme Court, and perhaps even more so.

30. 14 U.S. 304, 323 (1816).

31. *Id.* at 323-24.

32. *Id.* at 362.

33. Article 46 provides the only enforcement mechanism under the Convention.

34. See text accompanying notes 60-84.

particular action (such as continuing to enforce a Constitutional provision or statute that has been held by the court to violate the Convention) or to order it to take any particular acts to undo the harm caused by the violation or to bring itself into compliance for the future. Even the one tangible obligation that the court can impose-payment of just satisfaction-is entirely out of its hands as to execution. The court has no means to itself bring about the attachment of assets or the use of other means of execution of judgment, much less the contempt power that American courts have available to bring about compliance with their orders.

The real-world issues presented by efforts to bring about compliance with decisions of the ECHR will be developed below. However, as a foundation for that discussion it is critical to understand that the court is entirely without power to enforce its decisions itself. If enforcement is to be achieved, it must be rendered by the states involved, brought about by the Committee of Ministers, or achieved through some other mechanism. The standard approach used by American courts-remands to the lower courts with instructions to act consistently with the opinion, backed up by the prospect of further review or even use of the contempt power-is not available.

Plainly, there have been cases, sometimes even entire classes of cases, in which even *with* remands and close supervision of enforcement American appellate courts have found it difficult to get their decisions followed. The Supreme Court and the United States Court of Appeals for the Fifth Circuit certainly faced great challenges in achieving integration of the public schools following *Brown v. Board of Education*.³⁵ Those cases, however, stand out as relatively rare exceptions to a general pattern of compliance. The question to which this paper now turns is whether, lacking the remand power or any other tool of direct enforcement, the European court has been successful in garnering respect for and compliance with its judgments.

COMPLIANCE BY STATES FOUND TO HAVE VIOLATED THE EUROPEAN CONVENTION

Imagine for a moment that some international tribunal (for instance, the International Court of Justice, or some similar body whose jurisdiction the United States had accepted) ruled that the "don't ask, don't tell" policy

35. 347 U.S. 483 (1954). For an engaging description of the arduous process by which the *Brown* principle was implemented, see JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES WHO TRANSLATED THE SUPREME COURT'S *BROWN* DECISION INTO A REVOLUTION FOR EQUALITY (1981).

being implemented by the United States military violated the international obligations of the United States and therefore needed to be abolished. Judging by the political furor that gave rise to the policy in the first place, in which President Clinton's campaign promise to end the exclusion of gays from the United States military was swamped by a wave of congressional, military, and public opposition, it is easy to contemplate the harsh denunciations that would be issued. It would be extremely likely that United States compliance with the international court's decision would be frustrated, perhaps indefinitely, by withdrawal from the treaty commitment on which the ruling was based, a statutory enactment prohibiting any alteration of United States policy to bring about compliance with the ruling, or perhaps even serious consideration of a Constitutional amendment.

The hypothetical scenario set out above is, of course, not really hypothetical as applied to the United Kingdom. Britain had excluded gays from its armed forces, and yet in the *Lustig-Prean*³⁶ case described above and in *Smith v. United Kingdom*,³⁷ also decided on September 27, 1999, the ECHR determined that the exclusion violated the Convention. The response? The United Kingdom Ministry of Defence abandoned its exclusionary policy, and gays were allowed to serve, effective January 12, 2000.³⁸

While the United Kingdom's compliance with the ECHR's interpretation of the Convention as applied to the treatment of homosexuals was a dramatic event, that illustration of the effective enforcement of ECHR judgments is by no means anomalous. For example, Professors Helfer and Slaughter, declared that "[S]upranational adjudication in Europe is a remarkable and surprising success," and recognized that the "rate of compliance by states with the ECHR's rulings is extremely high" in a comprehensive law review article addressing the "central question" of whether the success of supranational adjudication in Europe can be transplanted to other regions of the globe.³⁹ Professor Kay has observed that the states found to have violated the Convention routinely "both pay the

36. See *supra* note 21.

37. 29 Eur. Ct. H.R. 493 (2000), available at <http://hudoc.echr.coe.int/hudocNiewRoot.asp?Item=1&Action=Html&x=326193754&Notice=O&Noticemode=&RelatedMode=O> (last visited March 22, 2004).

38. Sarah Lyall, *British, Under European Ruling, End Ban on Openly Gay Soldiers*, N.Y. TIMES, Jan. 13, 2000, at A1.

39. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 276, 296 (1997).

compensation ordered by the Court and also adjust their laws and governmental practices to conform to the Court's interpretations."⁴⁰

Some sense of the sweeping changes that have been accepted by states in order to respect and implement the judgments of the ECHR can be obtained by reviewing the compilation available at the court's website:⁴¹

[Ireland:] The Criminal Law (Sexual Offences) Act 1993, which entered into force on 7 July 1993, decriminalised homosexual acts conducted in private between consenting male adults of or over the age of 17.⁴²

[Spain:] In a judgment of 16 December 1991 the Constitutional Court ordered the reopening of criminal proceedings against the applicants. They were later acquitted.⁴³

[Italy:] The new Code of Criminal Procedure, which entered into force on 24 October 1989, stipulated that an indictment should be drafted in the language of the accused if it does not appear from the file that the accused knows Italian.⁴⁴

[United Kingdom:] The system for the administration of legal aid was reformed by the Legal Aid (Scotland) Act 1986 which came into effect on 1 April 1987.⁴⁵

[Norway:] On 16 January 1991 the Norwegian authorities distributed a circular letter to all courts describing the implications of the Court's judgment. It was stressed that measures should be taken to ensure that decisions in cases of preventive detention were taken "speedily."⁴⁶

[Austria:] In a judgment of 18 May 1993 the Supreme Court changed the case-law of the Austrian courts regarding the interpretation of Article 111 of the Criminal Code (defamation) in order to comply with the requirements of the Convention.⁴⁷

[Denmark:] In a decision of 28 October 1994 the Supreme Court referred to the judgment of the European Court in acquitting a

40. Richard S. Kay, *The European Convention on Human Rights and the Authority of Law*, 8 CoNN.J. INT'L L. 217, 218 (1993) (footnote omitted).

41. The following examples, identified by item number, are drawn from a list of more than 300 cases that appear on the court's website, available at <http://www.echr.coe.int/Eng!EDocs/EffectsOfJudgments.html> (last visited March 22, 2004).

42. *Id.* at item number 64.

43. *Id.* at item number 67.

44. *Id.* at item number 79.

45. *Id.* at item number 82.

46. *Id.* at item number 91.

47. *Id.* at item number 121.

journalist who was charged with invasion of privacy in relation to a minister. This judgment is one of a number in which the Supreme Court and the Appeal Courts applied the jurisprudence of the European Court.⁴⁸

As will be discussed below, compliance with judgments of the ECHR is not always prompt and complete. There have been, and remain, cases and even large groups of cases where efforts at execution of the judgments have been met with delay or even obdurate resistance. However, what is striking, especially in light of the court's lack of enforcement power and its inability to remand cases for further action, is the generally high level of compliance that has been demonstrated. On the surface, the institutional structures available under the Convention do little to generate confidence that full implementation of judgments will be the norm, yet actual compliance has consistently been achieved at a very high level. That experience prompts further inquiry into why the ECHR's interpretations of the Convention are enforced so much more successfully than one might predict based on an examination of the organizational structures alone.

ENFORCEMENT WITHOUT REMANDS

Some of the judgments of the ECHR, even if highly controversial, can be enforced without difficulty simply because compliance does not require much of the state involved. While payment of the fixed sum set by the ECHR as just satisfaction may on occasion stimulate controversy, that usually does not occur. Even a state that vigorously objects to the court's holding may pay the amount owing and end, once and for all, that stage of the controversy.

For example, few actions taken by the ECHR have ever outraged the British to the degree that the September 27, 1995 judgment in the *McCann v. United Kingdom* case did.⁴⁹ Three IRA terrorists were shot dead in Gibraltar on March 6, 1988 by members of the United Kingdom's Special Air Service (SAS).⁵⁰ The British government took the position that the shootings were justified, being attributable to the soldiers' efforts to prevent the terrorists from pushing a button that would detonate a large bomb.⁵¹ The representatives of the estates of the three individuals who were killed

48. *Id.* at item number 228.

49. 21 Eur. Ct. H.R. 97 (1996), available at <http://hudoc.echr.coe.int/fhudocNiewRoot.asp?Item=O&Action=Html&X=326192922&Notice=O&Noticemode=&RelatedMode=O> (last visited March 22, 2004).

50. *Id.* 59-67, 77-81.

51. *Id.* 132.

alleged that the killings were in effect nothing but extrajudicial executions.⁵² A closely-divided ECHR voted 10-9 that there had been a violation of Article 2 (paragraph 2a) of the Convention, with the majority holding that "the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence" ⁵³

Many in Britain reacted to the court's decision with fury. For example, in the House of Commons, Chairman Sir Ivan Lawrence of the Home Affairs Select Committee attacked the ECHR in these terms: "The British people are getting fed up with being told what to do by this interfering foreign court which does not appear to know or care about British culture and tradition."⁵⁴ Home Secretary Michael Howard of the then-Tory cabinet responded that he had considerable sympathy with the view expressed.⁵⁵ It had earlier been reported that Prime Minister John Major had hinted that the Gibraltar case and other setbacks suffered by the United Kingdom before the European Court might cause it to withdraw from the Convention.⁵⁶ The government also "launched a diplomatic offensive across Europe aimed at garnering support to curb the powers" of the court.⁵⁷

For all the controversy surrounding the *McCann*⁵⁸ case, it led to no enforcement problem at all. The court declined to award any damages in the case, and the United Kingdom promptly paid the £38,700 owing for costs and expenses (less the amount previously advanced by the Council of Europe for legal aid).⁵⁹ The fact that there were many in Britain who found the court's ruling that there had been a violation of the Convention offensive was essentially beside the point, since the relief awarded was so modest that Britain was unwilling to make the payment called for by the court's judgment.

As the history of *McCann* demonstrates, enforcement problems are unlikely to prove substantial when the court, while finding that a violation

52. *Jd.*151.

53. *Jd.*213.

54. Rowan Dore, *Howard Under Fire After Tory Attacks "Interfering" European Court*, PRESS ASSOCIATION, Dec. 5, 1996, at Parliamentary News.

55. *Jd.*

56. Michael White, *Ministers Seek Curb on Rights: Europe-Wide Offensive After Embarrassing Rulings*, GUARDIAN, Apr. 2, 1996, at 1.

57. *Id.* See also, Lord Mackay of Clashfem, *UK Success at the European Court and Commission of Human Right is Not a Rare Event*, FIN. TIMES, Dec. 6, 1996, at 18 (Lord Mackay, the Lord Chancellor, describing his effort to promote reform of the ECHR).

58. See *supra* notes 49-57 and accompanying text.

59. *McCann*,222.

has occurred, finds either that no just satisfaction is called for or that a small payment will suffice.

Since *McCann* involved a specific event, rather than an ongoing series of events or the application of a policy, rule, or statute of continuing effect, a payment of just satisfaction was the only relief that was realistically available. In many other situations, at least the consideration of other relief is appropriate, since "individual measures" may be needed to undo the effects of the violations found by the court.

In addition to the payment of compensation, individual measures may be required to ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum*). For example, where the Court has found a violation of Article 8 of the Convention caused by the refusal to allow adequate contact between a parent and a child in public care, the State will be required to facilitate more frequent access visits; in a deportation case under Article 3 or 8, the deportation order should be quashed; and so on.⁶⁰

It is in cases of this sort that distinctive elements of the enforcement system under the Convention begin to emerge. First, under Article 41, "the Court shall, if necessary, afford just satisfaction to the injured party," but such a payment "is the only measure that the European Court can order a State responsible for a violation of the Convention to take."⁶¹ Second, under Article 46, the states who are parties to the Convention have agreed "to abide by the final judgment of the court in any case in which they are parties."⁶² Lastly, Article 46 further provides that the Committee of Ministers "shall supervise" the execution of ECHR judgments.⁶³ The court itself recently provided a succinct summary of the enforcement process:

The Court recalls that a judgment in which it finds a breach imposes on the respondent state a legal obligation to put an end to that breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible the respondent states are free to choose the means whereby they will comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard. It

60. OVEY & WHITE, *supra* note 16, at 425.

61. LAMBERT-ABDELGAWAD, *supra* note 16, at 13.

62. European Convention on Human Rights, *supra* note 2, at article 46.

63. *Id.*

falls to the Committee of Ministers acting under Article 54 of the Convention to supervise compliance in this respect. . . .⁶⁴

The fact that the principles that govern the enforcement process remain entirely unarticulated in the Convention has not prevented the achievement of an appropriate outcome in most cases. In *Soering v. United Kingdom*,⁶⁵ for example, the applicant had fled to England after murdering his girlfriend's parents in Virginia, and he resisted extradition to Virginia, where he faced the death penalty.⁶⁶ The ECHR held that due to the extremely difficult conditions which he would experience during a lengthy time on death row if sentenced to death, including the mental anguish imposed by the approach of an execution date, implementation of the United Kingdom Secretary of State's decision to extradite Soering would violate Article 3 of the Convention.⁶⁷ Soering requested that the court give "directions in relation to the operation" of the court's judgment, but the court declined to do so:

No breach of Article 3 has as yet occurred. Nevertheless, the Court having found that the Secretary of State's decision to extradite to the United States of America would, if implemented, give rise to a breach of Article 3, Article 50 [the prior Article providing for just satisfaction] must be taken as applying to the facts of the present case.

The Court considers that its finding regarding Article 3 of itself amounts to adequate just satisfaction for the purposes of Article 50. The Court is not empowered under the Convention to make accessory directions of the kind requested by the applicant. By virtue of Article 54 [the predecessor of Article 46], the responsibility for supervising execution of the Court's judgment rests with the Committee of Ministers of the Council of Europe.⁶⁸

The court's confidence that its judgment in *Soering* would be implemented was fully justified. The United Kingdom informed the United States that it would not extradite Soering so long as he would face capital

64. Orhan v. Turkey, App. No. 25656/94, ¶ 451 (2002), available at <http://hudoc.echr.coe.int/hudocNiewRoot.asp?Item=O&Action=Html&X=328000209&Notice=O&Noticemode=&RelatedMode=O> (last visited March 22, 2004).

65. 11 Eur. Ct. H.R. 439 (1989), available at <http://hudoc.echr.coe.int/hudocNiewRoot.asp?Item=O&Action=Html&X=326195625&Notice=O&Noticemode=&RelatedMode=O> (last visited March 22, 2004).

66. *Id.* ¶¶ 11-15, 76.

67. *Id.* ¶¶ 76-80. Article 3, in addition to outlawing torture, prohibits subjecting anyone to "inhuman or degrading treatment or punishment." European Convention on Human Rights, *supra* note 2.

68. *Id.* ¶¶ 126-27 (citations omitted).

charges, and extradition took place only after the United States gave assurances that the death penalty would not be sought.⁶⁹

Soering is but one of many cases in which the enforcement of the court's judgments is not made ineffective simply because it is somewhat indirect. Under the provisions of the Convention quoted above, it is not at all surprising that the obligation of a state to comply with judgments of the ECHR "has always been interpreted as being purely an obligation to produce a specific result," leaving to the state the choice of the means by which that result will be brought about within the domestic legal system.⁷⁰ The rules adopted by the Committee of Ministers to govern their actions under Article 46 specifically recognize that in deciding what individual or general measures are required, the Committee must take into account "the discretion of the state concerned to choose the means necessary to comply with the judgment"⁷¹ Nonetheless, while the initiative rests with the state found to have violated the Convention, the Committee reserves for itself the ultimate decision on whether "individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention."⁷²

The approach taken by the Committee to bring about compliance with respect to the individual claimant depends upon the critical fact that no case in which the ECHR finds a violation of the Convention is over until the Committee of Ministers concludes that execution of the judgment has been achieved.⁷³ Rule 4a provides as follows: "Until the State concerned has provided information on the payment of the just satisfaction awarded by the Court or concerning possible individual measures, the case shall be placed on the agenda of each human rights meeting of the Committee of Ministers, unless the Committee decides otherwise."⁷⁴ Since the Committee addresses human rights enforcement matters in six meetings each year,⁷⁵ this schedule provides for frequent re-examination of a pending case to determine whether adequate steps have been taken by the state to comply with the

69. *Soering* was later extradited, convicted, and sentenced to life in prison. The United States Court of Appeals for the Fourth Circuit denied his petition for habeas corpus, *Soering v. Deeds*, No. 99-6498, 2000 U.S. App. LEXIS 15443, at *18 (June 8, 2000), *cert. denied*, 531 U.S. 1074 (2001).

70. LAMBERT-ABDELGAWAD, *supra* note 16, at 6 (citing *Belilios v. Switzerland*, 10 Eur. Ct. H.R. 466, 492 (1988)).

71. Committee of Ministers, *supra* note 17, at Rule 3b.

72. *Id.*

73. *Id.* at Rule 4.

74. *Id.* at Rule 4a.

75. OVEY & WHITE, *supra* note 16, at 422.

principle of *restitutio in integrum*. The ECHR will not order a state to take any particular steps, nor will the Committee, but only when the Committee is satisfied that the measures taken are adequate will the Committee enter the final resolution in the case.⁷⁶

A comprehensive survey of the individual measures taken in cases decided by the ECHR provides an instructive list of the types of relief that may be adopted by a state to bring about execution of a judgment:

The resumption of the domestic judicial proceedings is undoubtedly the most spectacular effect which an international judgment can have. The importance of that measure, and the fact that it is the only effective remedy in certain cases, [led] the Committee of Ministers to adopt a Recommendation to the States on that point. . . .

Now the majority of European states allow for the re-opening of domestic judicial proceedings In practice, this measure has remained the exception: by December 2000 the domestic proceedings had been re-opened in fewer than 15 cases following a judgment of the European Court, half of these being criminal matters

[The] greater supervision by the Committee of Ministers is evidence of what for a number of years has been a growing consideration for the future of the individual. The re-opening of the proceedings has been regarded by the European Court as a measure as close to *restitutio in integrum* as was possible.

Other individual measures may be equally varied. First of all, the State concerned may decide not to enforce the national measure at issue, including where it is a judgment, or the measure may be annulled In criminal matters, a decision to reduce the penalty may be taken at domestic level. Removal of the conviction from the individual police record is also quite frequently recognised.⁷⁷

As to the taking of individual measures, then, the range of possibilities is quite broad, and at least in some instances, the Committee of Ministers has made aggressive use of its power not to close out a case until it

76. See, e.g., Committee of Ministers, *supra* note 17, at Rule 8.

77. LAMBERT-ABDELGAWAD, *supra* note 16, at 15-19.

considers the provisions made by the state for the applicant to have truly placed him or her in the same position as if no violation had occurred. The author of the summary quoted above has concluded that "the European system sometimes proves to be rather ineffective in terms of the adoption of individual non-pecuniary measures, so that the individual is in a sense the poor relation of the system."⁷⁸ That "Wpears to be a fair assessment, although less true today than in the past, and it certainly is the case that the provision of individual relief is handled relatively informally, and is not -an area that receives particularly focused attention by the Committee of Ministers. It is not that states stubbornly refuse to take individual measures considered necessary by the Committee, but rather that the entire question of individual measures receives much less attention than just satisfaction (where the definite order to pay is easily monitored for compliance) and general measures (where the future impact on the state and its citizens is much more likely to be significant)."⁸⁰

The court may be edging toward taking a more assertive posture towards the form of individual measures taken by a respondent state. For example, in *Brumarescu v. Romania*,⁸¹ the court's judgment of January 23, 2001, recognized that parties are "in principle free to choose the means whereby they will comply with a judgment," but went on to declare that under the particular circumstances "return of the property in issue . . . would put the applicant as far as possible in the situation equivalent to the one in which he would have been if there had not been a breach"⁸² The court directed that "the State should therefore restore [the applicant's] title to the rest of the house,"⁸³ though it softened this injunction by specifying the amount of pecuniary damage to be paid if the property was not returned.⁸⁴

GENERAL MEASURES

The Committee of Ministers does not consider the judgment of the ECHR to have been executed, even if the award of just satisfaction has been paid and necessary individual measures taken with regard to the applicant,

78. *Id.* at 20.

79. *Id.*

80. OVEY & WHITE, *supra* note 16, at 423, 427.

81. 33 Eur. Ct. H.R. 36 (2001), available at <http://hudoc.echr.coe.int/hudocNiewRoot.asp?Item=1&Action=Html&X=326200216&Notice=O&Noticemode=&RelatedMode=O> (last visited March 22, 2004).

82. *Id.*, 20, 22.

83. *Id.* 122.

84. *Id.* 1120-24.

until "general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations."⁸⁵

A case like *McCann*⁸⁶ (the case involving the killings on Gibraltar) might not call for any general measures, since there was no reason to anticipate a repetition of the incident. However, the more typical case coming before the court involves a statute, rule, or other governmental policy that, if left unaltered, would inevitably lead to similar violations in the future. Some examples of general measures have been provided above, and many more are available for examination. As with individual measures, the ultimate outcome reached involves the interplay of the state's opportunity and responsibility to take the initiative (with the court and the Committee without power to prescribe any particular approach) with the state's obligation to satisfy the Committee as to the adequacy of the steps it has taken in order to obtain the closing of the matter. The procedure used to resolve these sometimes sticky matters is specified in Rule 4 of the Committee of Ministers:

If the state concerned informs the Committee of Ministers that it is not yet in a position to inform the Committee that the general measures necessary to ensure compliance with the judgment have been taken, the case shall be placed again on the agenda of a meeting of the Committee of Ministers taking place no more than six months later, unless the Committee decides otherwise; the same rule shall apply when this period expires and for each subsequent period.⁸⁷

As the case of *Lustig-Prean*⁸⁸ (described above, in which the ECHR found a violation in the United Kingdom's exclusion of homosexuals from its armed forces) demonstrates, the general measures taken following the court's finding of a violation have sometimes been quite dramatic and far-reaching in their impact (in that case, prompt revocation of the exclusionary policy): Sometimes a step as formal as the amendment of a constitution or statute is called for; while at other times, it has been sufficient to alter a government's policy, rely upon the national courts to apply the law newly announced by the ECHR, or publicize the court's ruling to relevant officials

85. Committee of Ministers, *supra* note 17, at Rule 3b.

86. 21 Eur. Ct. H.R. 97 (1996), *available* at <http://hudoc.echr.coe.int/hudocNiewRoot.asp?Item=O&Action=Html&X=326192922&Notice=O&Noticemode=&RelatedMode=O> (last visited March 22, 2004).

87. Committee of Ministers, *supra* note 17, at Rule 4b.

88. 29 Eur. Ct. H.R. 548 (2000), *available* at <http://hudoc.echr.coe.int/hudocNiewRoot.asp?Item=1&Action=Html&X=326193203&Notice=O&Noticemode=&RelatedMode=O> (last visited March 22, 2004).

of the state's agencies so that they may be aware of the holding and comply with it.

Perhaps the most remarkable result of the enforcement system for ECHR judgments is the affected states have almost universally taken the necessary steps to satisfy the Committee that future violations are not likely to occur. It should be noted that an important but somewhat hazy jurisdictional line exists. The Committee of Ministers oversees the enforcement of the judgments of the court and will not close the matter by adopting its final resolution until it is satisfied that the state has taken adequate steps to prevent repetitions of the violation that occurred.⁸⁹ However, once the state adopts general measures and the Committee concludes that it has carried out its functions under Article 46, any allegations that the new provision or statute or policy of the state is itself violative of the Convention or is being applied so as to violate the Convention must be brought back before the court in a new case.⁹⁰ Thus, the question of general measures inevitably invites a certain degree of prejudgment by the Committee of possible future cases, but the adjudication of any such cases lies fully with the court, not the Committee.

ENFORCEMENT CONTROVERSIES

It would be misleading to conclude this piece, which lauds the generally high level of enforcement of ECHR judgments and describes some of the mechanisms by which that goal is achieved, without acknowledging that there have been controversies—even bitter ones—on occasion. While their occurrence does not, in my view, call for abandoning the views expressed above, they do shed some light on the inherent limitations of the enforcement system under the Convention.

The ECHR announced its judgment in *Loizidou v. Turke*/¹ on July 28, 1998, holding that the applicant, a Greek Cypriot, was entitled to compensation because she had been denied use of her property after the area she lived in was occupied by the Turkish army in 1974.⁹² Turkey refused to pay the award of just satisfaction, leading the Committee of Ministers to adopt an interim resolution on July 24, 2000, stating that Turkey's refusal to satisfy the judgment "demonstrates a manifest disregard for its international

89. OVEY & WHITE, *supra* note 16, at 427; Committee of Ministers, *supra* note 17, at Rule 3b.

90. Committee of Ministers, *supra* note 17, at Rule 8.

91. Available at <http://hudoc.echr.coe.int/hudocNiewRoot.asp?Item=2&Action=Html&X=326202947&Notice=O&Noticemode=&RelatedMode=O> (last visited March 22, 2004).

92. *Jd.*12-14, 26.

obligations."⁹³ On June 26, 2001, the Committee deplored Turkey's continuing failure to comply, and declared its "resolve to ensure, with all the means available to the Organisation, Turkey's compliance with its obligations under this judgment."⁹⁴ Even so, it took another eighteen months of further pressure by the Committee before the award was finally paid.⁹⁵ Turkey has been and remains a major enforcement problem, not only with regard to the many claims similar to Loizidou's that are being presented, but also with regard to numerous judgments arising out of Convention violations found by the court to have been committed by the Turkish security forces. The Committee has been unable to secure enforcement of the court's judgments in these cases.⁹⁶

Another problem area that the Committee has not been able to deal with satisfactorily is the inordinate delay experienced by many litigants in Italy, which has been found again and again to violate the Convention.⁹⁷ "Here it appears that some small progress is being made, although to a certain extent it appears that the problems within the Italian legal system are so deep-rooted and pernicious that there is a limit to what the Government can do to . . . bring about effective reform."⁹⁸ While these continuing violations in Italy are a serious matter, they present quite a different problem than the refusal of a government to pay an award of just satisfaction or to take identifiable steps to deal with a discrete problem. The Committee's difficulties in forcing Italy to improve its court system sufficiently to comply with the Convention resembles in some ways the thorniest of the structural remedy cases in the United States, which have on occasion generated years or even decades of litigation over the desegregation of school systems or the overhaul of prisons or institutions housing the disabled in order to provide a constitutionally adequate level of services.⁹⁹

93. Interim Resolution DH (2000) 105 Concerning the Judgment of the European Court of Human Rights of 28 July 1998 in the Case of Loizidou Against Turkey ¶ 7, available at <http://cm.coe.int/talres/xh/2000/0-299/2000xh105.htm> (last visited March 22, 2004).

94. Interim Resolution ResDH (2001) 80 Concerning the Judgment of the European Court of Human Rights of 28 July 1998 in the Case of Loizidou Against Turkey ¶ 8, available at <http://cm.coe.int/talres/xh/2001/0-299/2001xh80.htm> (last visited March 22, 2004).

95. Interim Resolution ResDH (2003) 174 Concerning the Judgment of the European Court of Human Rights of 28 July 1998 in the Case of Loizidou Against Turkey, available at <https://wcm.coe.int/ViewDoc.jsp?id=85771&Lang=en> (last visited March 22, 2004). See Defense & Foreign Affairs Daily, *Turkey Complies with European Court Ruling on Cyprus, But Ankara Still "On Hold" on Cyprus*, EU, December 5, 2003.

96. OVEY & WIDTE, *supra* note 16, at 429--30.

97. *Id.* at 430.

98. *Id.*

99. See e.g., *United States v. Bd. of Educ.*, 372 F.2d 836, 860 (5th Cir. 1966) (describing difficulties implementing desegregation); *Finney v. Mabry*, 534 F. Supp. 1026 (E.D. Ark. 1982) (rejecting initial effort to reform prison system).

Of course, not even the most ambitious civil rights litigation in the United States has attempted to reform the nation's entire court system.¹⁰⁰

SEPARATION OF POWERS

One additional aspect of the enforcement system under the European Convention should be mentioned briefly. Within the United States, through the use of remands, the immediate responsibility for enforcing the decisions of the courts falls on the courts themselves. The lower courts are charged with interpreting and applying the decisions made by the Supreme Court and other appellate courts. Further review by the appellate courts is always a possibility if questions arise as to whether the implementation of an appellate decision is consistent.

Judgments of the ECHR are final and not appealable to any other court.¹⁰¹ Moreover, there is no judicial role in enforcement of the judgments. The Committee of Ministers, a non-judicial body made up of representatives of the governments of the member states of the Council of Europe,¹⁰² has the authority to determine when a judgment has been fully executed.¹⁰³ While the ECHR's decision and reasoning obviously inform the Committee's deliberations, the process is inevitably more political than it would be if carried out by independent judicial officers.

The enforcement process before the Committee can be very political, especially if the violating state simply refuses to comply. Expulsion from the Council of Europe is possible under such circumstances, but it has been observed that "the harsh nature of that measure has rendered it wholly inappropriate and thus far it has not been put into practice."¹⁰⁴ However, concern about possible expulsion presumably motivated Greece to withdraw from the Council of Europe for four years in the early 1970s, when widespread human rights violations committed by the military government were challenged.¹⁰⁵ Likewise, while Turkey may not fear immediate expulsion from the Council of Europe for its delays in paying

100. *Kalashnikov v. Russia*, 36 Eur. Ct. H.R. 34 (2002), may well mark the beginning of another major crisis over enforcement. The Court found that a criminal defendant's conditions of confinement violated Article 3, *id.* 103, yet there may well be thousands of other Russian prisoners held under similar or even worse conditions.

101. European Convention on Human Rights, *supra* note 2, at article 46, 1.

102. *Id.* at article 38.

103. OVEY & WHITE, *supra* note 16, at 421-23; Committee of Ministers, *supra* note 17, at Rule 8.

104. LAMBERT-ABDELGAWAD, *supra* note 16, at 38.

105. See e.g., Nsongurua J. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM. U. INT'L L. REV. 1177, 1205-06 (2002).

judgments like that in *Loizidou* or even for the abuses being committed by its security forces, it does aspire to membership in the European Union.¹⁰⁶ Turkey has encountered substantial difficulty in pursuing its European Union candidacy,¹⁰⁷ and would no doubt be correct in concluding that a substantially improved human rights record (measured at least in part by enforcement of the ECHR judgments against it) is a necessary if not sufficient condition for admission to the European Union.

CONCLUSION

Judgments of the European Court of Human Rights are enforced by a process that is quite unlike the enforcement processes common in the United States. Most notably, there is no prospect of remand from the European Court, and the court plays no role in enforcing its judgments. The court can award "just satisfaction" to a successful claimant in the form of a monetary payment but is without power to enter any injunction or specify any other action to be taken by the offending state.

Despite these dramatic differences between the European and American processes for assuring compliance, the two systems seem to achieve similar results. Though somewhat indirect from the American point of view, the ECHR/Committee of Ministers process has achieved a high level of compliance by the states. Despite the occasional problems encountered under the Convention, the successful enforcement of ECHR judgments strongly suggests that enforcement of judicial decisions in no way depends on remands.

106. See e.g., Craig S. Smith, *Turks Say to Europe: Can't We Just Come as We Are?*, N.Y. TIMES, Nov. 23, 2002, at A-3.

107. *Id.*