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THE COUNCIL OF EUROPE'S HUMAN RIGHTS SYSTEM AFTER SIXTY YEARS – POLITICAL EVOLUTION AND CONTINUANCE

The sixtieth anniversary of the Council of Europe (hereinafter "CoE") provides opportunity for reflection on the political developments in the field of human rights in Europe. The organization, which was established in order to promote such values as rule of law, human rights and democracy, created the most efficient mechanism of human rights protection worldwide. This regional system of human rights, being associated with the "West" during the Cold War era, today gathers forty seven member states. All of them, at least theoretically, comply with the highest standards of individual protection and recognize the authority of the European Court of Human Rights (hereinafter "ECtHR" or "the Court").

This paper aims to emphasize on the role that the Council of Europe played in the development of the world's most unique regional system of human rights protection, to underline the CoE attractiveness for the newly established democracies and to emphasize the internal and external impact of this interaction. Thus, the successes and flaws of this system will become more apparent and the recent political dilemmas concerning the Council of Europe and the European Court of Human Rights in particular, will be addressed.

The original reasons for the Court's establishment

The modern shape of the European system of human rights protection existing in the frames of the CoE differs significantly from what the "founding fathers" had in mind. Although, this fact is understandable bearing in mind the reality in Europe and the world today, it is important to remind the basic reasons for the establishment of this system. Winston Churchill's famous speech at the first session of the Council of Europe Consultative Assembly on August 17, 1949 delivers a good picture of the main concerns at that time.

> […] we hope that an European Court might be set up, before which cases of violation of these rights in our own body of twelve nations might be brought to the judgment of the civilized world. Such a court, of course, would have no sanctions and would depend for the enforcement of its judgments on the individual decisions of the States now banded together in this Council of Europe. But these States would have subscribed beforehand to the process, and I have no doubt that the great body of public opinion in all these countries would press for action in accordance with the freely given decision[1].

What needs to be underlined here is the importance of the public opinion's role of the member states in shaping the system's authority/legitimacy. No international pressure tools or threats were proposed. Instead the system was supposed to be a conscious and intentional choice of the European citizens. It was never proposed that the system will replace the national mechanisms of human rights protection. The Convention was designed to occupy „a subsidiary role in relation to national legal orders: it does not supplant norms, but merely tries to complete and, if need be, correct them, without creating a true legal order on its own.[2] Subsidiarity plays the active role of "fine-tune" of the domestic law of the CoE member states[3]. The principle of subsidiarity has served as a cornerstone of the European Convention since its founding.[4] This principle was supposed to be complementary and in that sense respected the states and their understanding of sovereignty. This respect will be visible in the implementation mechanism of the ECtHR judgments on national level.

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[1] http://www.winstonchurchill.org/learn/speeches/speeches-of-winston-churchill/111-the-council-of-europe (20.12.2009), see also: A. Bisztyga, *Europejski Trybunał Praw Człowieka*, Katowice 1997, p. 38–39.

[2] M. Delmas-Marty, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism*, Cambridge–New York 2002, p. 63; quoted in J. L. Jackson, *Broniowski v. Poland, A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court*, "Connecticut Law Review" 2006, Vol. 39, No. 2, p. 768. On the subsidiarity of the European system of human rights protection, see also: L. Wildhaber, L. Garlicki, *Torując drogę dalekosiężnej wizji europejskiej ochrony praw człowieka w XXI wieku*, III Szczyt Rady Europy i Europejska Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności [in:] ed. H. Machińska, *Polska i Rada Europy 1990–2005*, Warszawa 2005, p. 121–122.

[3] J. L. Jackson, *Broniowski v. Poland*…, p. 772.

[4] L. R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, "The European Journal of International Law" 2008, Vol. 19, No. 1, p. 128.

Additionally, the need for the new system stemmed from the disastrous consequences of the Second World War and the emergence of the new political rivalry in Europe. Therefore, the system was supposed to set up minimal standards of human rights protection already existing in the CoE member states.

Secondly, the Cold War called for much more coherent approach towards external threats and the Western European states were aware that internal quarrels can be used by the "East". As Steven Greer promptly observed

> […] the Council of Europe emerged out of the unique circumstances of post-war Western Europe in response to burgeoning Soviet power and the horrors exerted by authoritarianism. Thus, as its inception the European Convention on human rights and the court it created were much more about protecting the democratic identity of member states through the medium of human rights, and about promoting international cooperation between them, than … about providing individuals with redress for human rights violations by national public authorities[5].

Hence, the existence of the Council of Europe and the subsequent regional system of human rights protection aimed primarily not in redressing the individual, but tightening the commonwealth of values that the Western European states shared. As it was the case with NATO during the Cold War, in the face of the common threat, there was little reason to search for arguments why such form of international cooperation is needed. Instead, the demand for firm and stable system in Western Europe, whose success will deter any external threat, became the driving mechanism which allowed the Council of Europe to succeed. However, independently from Steven Greer's argumentation, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR or the Convention) and the European Court on Human Rights in the eyes of many, provide the last resort in appealing every imaginable complaint.[6] However, that was not founding fathers' primary intention.

Thirdly, there is one more important aspect, which later will cause popular attraction of the Eastern European countries to the Council of Europe after the Cold War. This is the fact that the organization will not deal with issues of military nature. Therefore, the Council will be perceived as organization based on good will and noncompulsory decision making process, thus attracting all these who cherished the sovereignty after the collapse of the Eastern Bloc. Although, the overall success of the Council of Europe is primarily based on the effective human rights mechanisms established in the frames of the organization, it provides far reaching benefits. The famous comparison of the Council of Europe to "the gentleman's club" stems from the fact that the membership in this organization grants to the states parties the highest credibility in international relations. It proves the fact that the country has reached a certain level of political stability, that reasonable amount

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[5] S. Greer, *What's Wrong with the European Court on Human Rights?*, "Human Rights Quarterly" 2008, Vol. 30, p. 681.

[6] L. Wildhaber, L. Garlicki, *op. cit.,* supra note 2.

of predictability can be expected when it comes to the development of the political process, that the laws are obeyed and "Hugo Chavez" kind of surprises to private property can hardly be expected. The private property is protected by the law, thus improving the investment climate. Furthermore, the activities of the Council of Europe in the field of social cooperation lessen tensions on national level as well as among the member states[7].

Concluding, the Council of Europe created a forum where the particular interests of the member states were strengthened by the nurturing of the values that became pillars of the Western Europe's development after the Second World War. In that sense, the European Convention on Human Rights became the outstanding example of international mechanism of human rights protection and the "jewel in the Crown" of the Council's activities.[8]

The European System of Human Rights Protection in the frames of the Council of Europe[9]

The Convention for the Protection of Human Rights and Fundamental Freedoms was opened for signature on November 4, 1950 and after the ratification process entered into force in 1953. The Convention established a catalog of human rights and a mechanism of their protection in the frames of the European Court of Human Rights seated in Strasbourg. Importantly, the Convention was opened for signature only slightly over a year after the establishment of the Council of Europe. This banal fact actually became the source of strength for the Convention since the member states did not argue too much on the meaning of the particular provisions establishing the human rights catalog included in Convention's Chapter I. As Andrzej Bisztyga underlines most of the preparatory work on the Convention's final version focused primarily on the role and place of the Convention and the Court in Europe[10]. The main emphasis was on the dependence of the Court's actions and member states sovereignty.

Initially, the introduced mechanism of individual petition was optional for member states, the Court was part-time and few would pay attention to it. However, from the first case in 1960 the European Convention on Human Rights and the European Court on Human Rights went through a remarkable metamorphosis to end where they are today. "What was once an agreement among a small group of

[7] This does not mean that the organization is always effective and that there are no tensions among its members. To give only the most recent examples, between Georgia and Russia led to arm conflict, or Slovakia and Hungary over the language.

[8] J. Smyth, *Council to battle Russia on Protocol 14*, "Irish Times", 12.05.2009.

[9] In this paper I will also use the notion of „Strasbourg system" as synonym to the European System of Human Rights Protection in the frames of the Council of Europe.

[10] A. Bisztyga, *op. cit.*; see also: B. Bednarczyk, *Granice władzy, wybrane problemy praw i wolności człowieka*, Kraków 2001, p. 170.

Western European states to guarantee core civil and political liberties by means of an optional judicial review mechanism has now been supplemented by 14 protocols, one of which – Protocol No. 11 – recast the ECtHR as a permanent, full-time court with compulsory jurisdiction over all member states to which aggrieved individuals enjoy direct access"[11]. The non-binding character of the initial individual complaint mechanism appeared to be satisfactory until the "big enlargement bang" of the nineties.

Based on the consent of all member states the individual complaint procedure became a successful tool for human rights protection. Simultaneously, the inter-state complaint was seldom used and it quickly appeared that the member states were mostly reluctant to transmit their bilateral quarrels on human rights issues to the ECtHR[12]. Furthermore, for the first thirty years the regional system of human rights protection was not only strengthened but also the minimal standards of human rights protection has been developed. Probably the most explicit example is the evolution of the meaning of Article 2 of the European Convention on Human Rights, which was reinforced by additional Protocol No. 6 and recently by additional Protocol No. 13, which still waits to be ratified by all member states. The human rights catalog was expanded also in quantity by the introduction of new provisions based on Protocols No. 1, 4 and 7. Thus, the European Convention on Human Rights became not only a stiff document from the early fifties, but adjusting framework for human rights protection. The Convention and its mechanism was able to encompass both the changing reality in Western Europe and the need for clear division between the state's competences and individual's rights and freedoms. On the other hand, this qualitative and quantitative expansion led recently to strong criticism of the ECtHR and the role it is supposed to play in the human rights protection.

The Council of Europe after the end of the Cold War

The collapse of the Eastern bloc and the end of the Cold War posed new challenges to Europe. The highest demand was to preserve the peace and security at the continent in the changing reality. Furthermore, the first signals of mutual claims and quarrels among states, nations and ethnic groups in the former Soviet Union and Yugoslavia requested prompt action. The CSCE Charter of Paris for a New Europe

[11] L. R. Helfer, *op. cit.*, p. 125–159.

[12] Recently, the most apparent clash on human rights violations among Council of Europe member states had place in the case of the second war in Chechnya. In 2000 the Council of Europe Parliamentary Assembly called for council member governments to file a state case against Russia before the European Court of Human Rights. The same resolution, however, noted, "[…] Lamentably, no member state or group of member states has yet found the courage to lodge an interstate complaint with the Court." Parliamentary Assembly Resolution 1323 (2003) in: W. D. Jackson, *Russia and the Council of Europe, The Perils of Premature Admission*, "Problems of Post-Communism" 2004, September–October, p. 30.

emphasized the role of human rights, democracy and the rule of law as the new shared principles of the European continent.[13] This political declaration requested also practical actions that would allow the new democracies to strengthen these principles on national level. The Council of Europe appeared to be the most accessible and open form of Western European integration that provided far reaching benefits for the countries willing to incorporate the western values. In exchange for accepting the principles of democracy and predictability the new members of the Council of Europe obtained certificate for good intentions without the need of immediate proof.

By focusing on social, cultural and political issues the Council of Europe provided patterns to follow by the new democracies and means of redress for acute structural problems. The membership in the Council of Europe would satisfy several dilemmas together. Firstly, how to stabilize the new political system in the new member state? Secondly, how to introduce the values of democracy, human rights and rule of law and not to frustrate the dismantling Soviet Union? Thirdly, how to obtain practical solutions to new challenges stemming from the economic, cultural and political transformation? Although, not all new members passed the CoE membership exam, most of them were able to make a good use of the created opportunities. The political systems in the particular countries were reinforced and the level of their predictability was raised. Legal reforms were conducted that envisaged the Council's main principles.

The membership also increased the investment climate, thus allowing foreign capital to support the growing transformation expenses and to strengthen the public finances. In the field of human rights protection, the new members were obliged to introduce the CoE standards and to implement them without delay. Hence, the individual obtained effective instrument for protection. Additionally, the membership appeared to play also extremely important role in the process of internal political and economic transformation by providing stability to the newly established institutions and mechanisms[14].

Through the judgments of the European Court of Human Rights the Council of Europe played also corrective role in that process by delivering guidelines to how the democratic rules should be implemented[15]. Thus the CoE became not only "the gentlemen's club" but also provider of good practices to its particular members. This "tutor" role led to strong internal criticism in many cases. Still though, no country decided to leave the organization being aware of the simple gain and loss calculation. I would argue that the regional system of human rights protection

[13] The full text of the Charter of Paris for a new Europe is available at: http://www.osce.org/documents/mcs/1990/11/4045_en.pdf [28.12.2009].

[14] During the nineties the amount of Council of Europe member states almost doubled from twenty two to forty in 1999.

[15] Good example in that matter is the case of Lukanov v. Bulgaria, http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=LUKANOV&sessionid=41763960&skin=hudoc-en [29.12.2009].

established in the frames of that organization played crucial role in the process of emancipation of the particular Eastern European states.

On the other hand, not all new members were persistent in their declarations to follow the Council of Europe values. The process of political transformation created suitable environment not only for positive but also negative and extremely dangerous precedents. The complexity of economic, social and most of all political reforms created the popular feeling of chaos and corruption. Each of the former Soviet Union satellites went through its own way with different obstacles and means of redress. Furthermore, the newly established political elites needed to learn how to behave in accordance with the CoE standards[16]. The legacy of the former political system in Eastern Europe appeared to be stronger than it was expected and the communism's impact on the citizen's mentality in the new democracies much deeper than anticipated. Thus, the role that the Council of Europe was to play strongly differed from what the Council was doing for the first thirty years of its existence. The Strasbourg system became not only provider of good practices, but also observer, tutor and coordinator in the same time. And if the Council itself was not eager to play this role, the reluctance to do so, would have led to destructive consequences not only for the countries in transformation, but also to the Council of Europe itself. Therefore, the highly demanding reality in the international relations required adjustment of the Council of Europe and in particular of the Convention and its human rights mechanisms.

Another development from the last decade of the XX century, influenced the evolution of the Court and it can be said that it was both a cause and a result of the Council of Europe's activities. The nineties of the XX century appeared to be known as the "human rights decade". This idealist concept was embedded in the belief that the end of the confrontation between the East and the West provided the most desired conditions and during the early nineties evidences were not lacking. The first war in the Persian Gulf, despite the dire consequences, the humanitarian intervention in Somalia, the popular support for the establishment of the International Criminal Court and last but not least, the already mentioned willingness of the former communist countries to behave in accordance with the western values, just to mention a few. Therefore, the created spirit of the time demanded much more active role by the international mechanisms for human rights protection, if they were to meet the popular expectations. Furthermore, the challenges of the European security required prompt and effective actions and the Council of Europe dared to act. In this way the needed foundation and reasons for the human rights expansion were achieved and the CoE became the most competent and capable promoter on regional level.

Last but not least, the Strasbourg system quickly became popular and demanded tool in the hands of the individuals from the new democracies in their

[16] The milestone case Lukanov v. Bulgaria providing example of abuse of power by the new democratic authorities in the early nineties.

confrontation with the new authorities. The national judiciary systems were often indulgent towards the transformation governments' stumbles and mistakes. Therefore, the individual quickly exploited the new mechanism in search for redress. This constant stream of complaints forced the Council of Europe to acknowledge the reality and to adjust the ECtHR to the individual's expectations.

The role of the Convention in the domestic legal order, Protocols No. 11 and 14, and their political consequences

The ideological and moral unification of Europe and the constant flow of new complaints required improvement of the existing mechanism. The Council of Europe's observations from the early nineties led to prompt action which aimed at two directions: to improve the non permanent system in the frames of the Commission of Human Rights and the European Court of Human Rights, to facilitate the access of individuals to the mechanism, by establishing unified and permanent European Court of Human Rights and secondly, to enhance the constantly growing flow of applications. The Protocol No. 11, introducing these changes, entered into force in 1998. At the time of its introduction it was already known that new protocol will be needed and new reforms necessary in order to take a position on the same constant flow, which appeared to be the biggest challenge.

Recently, Europe is in the midst of a heated discussion concerning the role and the place of the Strasbourg system. This dispute is directly intertwined with the evolution of the integration process that seizes new forms of cooperation. The dispute has far reaching consequences and will eventually shape the future, not only of the European System of Human Rights protection but also of Europe as a whole. Without pretending to provide any unique or innovative solution to the dispute, it is necessary to underline the core of the Strasbourg mechanism and to emphasize the legal provisions as well as the practice in the relations between the Court's judgments and the particular member states.

It was already emphasized that the Strasbourg system is subsidiary to the national systems of human rights protection. However, the Court's judgments are binding for the defendant state. The sentenced government should introduce individual and general measures that will both satisfy and prevent future violations. According to article 46 of the ECHR the "[…] The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties". Besides the voluntarily commitment paragraph 2 of the same article recognize that the final judgments will be transferred to the CoE Committee of Ministers in order to supervise the judgments execution.[17] The judgments binding force seems intrusive to the classical concept of state's sovereignty. However, one

[17] Art. 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11.

needs not to forget that the state was provided with wide range of actions allowing both to keep the state's authority and to respect the individual. Laurence R. Helfer promptly emphasized that this system

> […] proceeds from the premise that the Strasbourg institutions are supplementary and subsidiary to the protection of rights and freedoms under national legal systems, whose political, administrative, and judicial authorities retain the 'primary responsibility' for guaranteeing the rights of individuals. Although not expressly mentioned in the Convention, subsidiarity finds its animating spirit in textual provisions such as the exhaustion of domestic remedies rule and the obligation to provide an effective national remedy. It also informs ECtHR jurisprudence, including the margin of appreciation doctrine and the tribunal's refusal to act as a fourth-instance appeal of national court rulings[18].

All of the proposed solutions balanced between the need to protect the individual and to make the Convention useful document on the one hand, and respect for the democratic state on the other. The admissibility criteria were expressing the belief that national system of human rights protection is the most adequate and efficient mechanism where the individual can find justice.[19] Eventually, if the state will fail to provide that justice, the ECtHR based on filed complaint, was allowed to issue its judgment. Even then the margin of appreciation allowed the member states to adjust the Court's rulings to the reality on national level.

Although, extensive legal analysis has been provided concerning the Courts subsidiary role and the practice seems to be coherent recent developments provide new provocative examples of possible scenarios for state action in response to ECtHR judgments[20]. In accordance with the accepted practice states recognize the judgments and in accordance with the margin of appreciation take actions considered proper to complete the case. Here they have several options: to pay just satisfaction, to examine thoroughly the reasons for the judgment and to take all necessary (legislative, administrative, executive or even public relations) steps to prevent further violations. This is, however, the best case scenario. In other words "the judgment is only an expression of an underlying norm of international law that requires the responding states to make good the violation of the human rights, either by *restitutio in integrum* or by just satisfaction, and furthermore require states to bring to an end any continuing or future violation of human rights of this kind"[21].

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[18] L. R. Helfer, *op. cit.*, p. 128.

[19] Exhaustion of domestic remedies and within a period of six months from the date on which the final decision was taken. Art. 35 par.1 of the European Convention of Human Rights.

[20] For legal analysis on the effect of the ECtHR judgments see: G. Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, "Texas International Law Review" 2005, Vol. 40, No. 359, p. 373–378; C. Paraskeva, *Returning the Protection of Human Rights to Where They Belong, At Home*, "The International Journal of Human Rights" 2008, Vol. 12, No. 3, p. 415–448; L. R. Hefler, supra 13, also in Polish: A. Wiśniewski, *Interpretacja autonomiczna w orzecznictwie Europejskiego Trybunału Praw Człowieka*, "Gdańskie Studia Prawnicze" 2005, Vol. 13, p. 127–143; M. Bainczyk, *Standard ochrony praw podstawowych w orzecznictwie sądów europejskich*, [in:] *Społeczne, gospodarcze i polityczne relacje we współczesnych stosunkach międzynarodowych*, eds. B. Bednarczyk, M. Lasoń, Kraków 2007.

[21] G. Ress, *op. cit.*, p. 371.

Since Protocol No. 11 entered into force in 1998 it happens that states limit their activity to the recognition of the judgment and the payment of just satisfaction. The reason for the lack of any attempt to prevent further violations stems from the simple loss and gains calculation. It quickly appears that it is much easier and more effective to recognize that in certain particular aspect the state is simply not able to meet the minimal standards set up by the Strasbourg system. Thus, instead of wasting time and resources for vague attempts to change the reality the state prefers to take the financial burden and cover also future violations financial consequences. By not taking decisive steps to force states to eliminate such structural problems in human rights protection, the Council of Europe and in particular the European Court of Human Rights *de facto* recognizes the existence of structural violations. Excessive length of judicial proceedings in Poland, Italy or Bulgaria is only one of the textbook examples. Poland's poor conditions in detention centers, Bulgarian constant discriminative attitude towards the Roma minority or the Russian lack of appeal procedures or terrifying practices in Chechnya, are issues that require much more political attention at home. In every of these cases the state is able to provide substantial argumentation why there is no significant improvement of the "Strasbourg" minimal standard. It can be the dire financial situation, the chronic overload, the state's priorities or even the lack of political or public interest[22].

The case of Alicja Tysiąc and the dangerous precedent of politicizing the judgment

The case of Alicia Tysiąc v. Poland provided even more interesting example[23]. The Chamber judgment of March 2007 resumed the discussion over the right to abortion on national level. What was interesting was the government response. At that time, the ruling coalition of right wing parties decided to appeal to the Grand Chamber. The then Prime Minister Jarosław Kaczyński was pressured by the conservative and radical right wing politicians (in particular by the vice prime minister and Minister of National Education Roman Giertych and his party League of Polish Families) to appeal. While providing the argumentation for government appeal, the

[22] The lack of public interest is a remarkable case. Although, Poland pays constantly just satisfaction for poor living conditions in the detention centers, there is no public demand for improvement. Although, not representative often comments at the internet prove to underline that instead of paying to criminals, the state should provide even more bitter conditions.

[23] The case of Alicja Tysiąc v. Poland concerned the violation of the right to privacy with relation to the lack of possibility for abortion due to practical inaccessibility of the exclusions to the right to abortion in the Polish law. Although the ECtHR concluded that Polish law "did not contain any effective mechanism capable of determining whether the conditions for obtaining a lawful abortion had been met" ("New York Times", 20.03.2007) the case opened another chapter in the already twenty year old discussion on the right to abortion that takes place in the Polish society. The judgment is available at: Tysiąc v. Poland http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=TYSIAC&sessionid=41763960&skin=hudoc-en [29.12.2009].

much more moderate premier Kaczyński emphasized that the lack of appeal would force the government to change the *Act on family planning, human embryo protection and conditions of permissibility of abortion of 1993* being the result of the achieved social consensus on that matter in the early nineties[24]. However, the then prime minister's argument was inconsistent bearing in mind that according to the good practice in the Council of Europe, after another defeat at the Grand Chamber the government, at least theoretically, would have to change the law anyway. After the expected refusal of the Grand Chamber to consider the case in September 2007, the government was supposed to take one of the possible options: to pay and change the law or only to pay and to keep the status quo. Then however, the right wing conservatives and the church reacted vociferously criticizing that the Court's judgment undermines human dignity and praises liberty. Furthermore, the judgment was accused of confronting the catholic faith and threatening Polish sovereignty[25]. Roman Giertych, lawyer by profession, went even further to say that "Europe demands us to slaughter our own children". In this line of thought he underlined that the state should not pay any just satisfaction and recognized the judgment null and void. Fortunately, for the European Court on Human Rights and the Strasbourg system as a whole, early elections were held in October 2007 and the newly elected government complied with the judgment without further ado.

What is interesting in this case is the speculation on what would happen if there were no early elections? What will be the case when one of the member states will refuse to pay even just satisfaction, because on national level the judgment will be misinterpreted or even considered harmful? The answer that the state will comply eventually, because the Committee of Ministers will provide political pressure on the government is too simple. In many cases the Council of Europe emphasizes on the minimal option and pressures only as long as the just satisfaction is paid. Refusal to provide changes leads inevitably to the appearance of violations of systematic nature. On the other hand there is just no practical possibility to implement such judgment even by introducing the widest possible margin of appreciation without causing heated public discussion and social divisions. On the other hand the refusal to comply in one particular case can hardly be considered a reason for exclusion from the organization. The fact that until today there was no famous case of refusal doesn't mean that such case is not going to appear. Before the Polish dilemma faded, the Court issued the ruling in the case of *Lautsi v. Italy.* It generated fierce public reaction not only in Italy, but also in Poland and its implementation

[24] For Prime Minister argumentation in Polish see: http://wiadomosci.gazeta.pl/Wiadomosci/10,88722,4236513,Premier__W_sprawie_Tysiac_trzeba_sie_odwolac.html [29.12.2009]. The complete name of the Act in Polish is: Ustawa o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży z 7 stycznia 1993 r. (Dz.U. Nr 17, poz. 78) http://isap.sejm.gov.pl/DetailsServlet?id=WDU19930170078 [29.12.2009].

[25] http://wiadomosci.wp.pl/kat,1342,title,Glemp-sprawa-Alicji-Tysiac-to-ingerencja-obcych-instytucji-w-nasza-ojczyzne,wid,9242734,wiadomosc.html?ticaid=195eb [29.12.2009].

(or the lack of it) will deliver new interesting case to be studied[26]. What is of further importance is that this case provided interesting example of the impact of Court's judgments on countries other than the defendant state.

Thus, it appears that in fact there is a third option, which is simply not to comply with Court's ruling. Of course, there are several conditions that need to be met. The refusal to comply should happen very sparsely. Suitable political configuration in power on national level should exist. The problem should be considered insolvable on national level. The judgment's implementation would threaten the achieved social consensus. The judgment will be considered inapplicable in the society by important part of the society. The lack of compliance with the ruling will not lead to exclusion from the Council of Europe. This is valid even in the case of smaller European states, which could be, at least theoretically, excluded more easily. Thus, the worst case scenario seems remote enough not to be taken into consideration by the state refusing to implement a judgment.

What are then the Council of Europe's options when the state refuses to comply: political pressure, underlining human rights violations, criticism in the CoE bodies, possibility that other member states will raise the issue in their bilateral relations, conditional relations? In itself, the implementation of the ECtHR judgments, together with the Court overload and the question what kind of role the Court should play in the future is one of the key matters of concern for the Council of Europe. The ECtHR 2nd report brings a good picture of the gravity of the problem and the possible measures to be introduced. Strongly believing that there is a chance to oppose the constantly deteriorating statistics[27], the Committee of Ministers proposed additional *soft power* measures. They include more often bilateral meetings between the CoE and the particular member states, providing good practices when needed, high level discussions with competent authorities, expert opinions on legislation and training sessions either in the country concerned or in Strasbourg[28]. This proactive approach with emphasis on execution-related assistance and co-operation activities is hoped that will yield rapid and visible results in particular as far as the reduction in the number of clone or repetitive cases is concerned. Nevertheless, the report does not forget that

[26] Lautsi v. Italy, available in French at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=LAUTSI%20|%2030814/06&sessionid=42082120&skin=hudoc-en [05.01.2010].

[27] According to the 2nd report 7328 cases were still pending before the Committee of Ministers as of December 21, 2008. For more statistical data see: Supervision of the execution of judgments 2008 2nd annual report of the European Court of Human Rights, Appendix 1, p. 31–65 http://www.coe.int/t/dghl/monitoring/execution/Documents/Publications_en.asp [30.12.2009]. These data were provided also in the Parliamentary Assembly Committee on Legal Affairs and Human Rights *Implementation of judgments of the European Court of Human Rights Progress report* of August 31, 2009. Declassified on September 11, 2009 AS/Jur (2009) 36, p. 3, note 8.

[28] *Ibidem*, p. 11–15.

[…] Notwithstanding these efforts in Strasbourg, it must, however, be stressed that it is first of all for the domestic authorities to ensure that the relevant information about the ECHR's requirements is effectively brought to the attention of the relevant decision-makers after a violation has been found.[29]

Often in these cases the CoE has limited arsenal of actions. The political pressure is as successful as the recipient of that pressure is taking care of its own image. Through the political action the remaining members aim to prevent the collapse of the system if such "renegade states" will find followers. Unfortunately, there is a worrying trend that what was recently considered as significantly grave, in respect of the execution of Strasbourg decisions, is now of a relatively frequent occurrence.[30] The political pressure is not independent of other political dilemmas. The case of Russia provides essential example.

Protocol No. 14 and Russia or the limits of patience

The Court's overload is a matter of general concern. There is no paper concerning the Strasbourg system that omits the system's reform based on Protocol No. 11 and the need for new reform stemming from the constant growth of applications[31]. Therefore, Protocol No. 14 was adopted to improve the efficiency and maintain the effectiveness of the Court, as the simplified, full-time Court created by Protocol No.11 still suffered the "risk of … becoming totally asphyxiated".[32] Its purpose is to guarantee the long-term efficiency of the Court by optimising the screening and processing of applications[33].

In this case again significant obstacle of political nature led to unprecedented solution. The Russian State Duma refused to ratify the protocol. The consensus principle, being one of the ultimate sources of CoE legitimacy, has become ball and

[29] *Ibidem*, p. 12.

[30] Implementation of judgments of the European Court of Human Rights, Progress report, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Christos Pourgourides, Cyprus, EPP/CD AS/Jur (2009) 36, 31 August 2009, http://www.assembly.coe.int/CommitteeDocs/2009/ejdoc36_2009.pdf.

[31] For example: J. W. Reiss, *Protocol No. 14 ECHR and Russian Non-ratification: The Current State of Affairs*, "Harvard Human Rights Journal", Vol. 22, p. 295–296. G. Ress provides ECtHR backlog data comparison from 5981 complaints in 1998 to 13858 in 2001 which for only that period he estimated as roughly 130% increase. G. Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, "Texas International Law Review" 2005, Vol. 40, No. 359, p. 362–363, whereas Vincenzo Starace provides the number of 38810 individual applications of which 27189 were assigned to a decision-making body. V. Starace, *Modifications provided by protocol No. 14concerning proceedings before the European Court of Human Rights*, "The Law and Practice of International Courts and Tribunals" 2006, Vol. 5, p. 184. The most recent data available on the Council of Europe website provide the number of 97000 cases pending before the European Court of Human Rights. http://www.coe.int/t/dc/files/themes/protocole14bis/default_en.asp [30.12.2009].

[32] J. W. Reiss, *Protocol No. 14 ECHR and Russian Non-ratification*…, p. 294.

[33] For detailed analysis of protocol No.14 provisions see the explanatory report http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm [30.12.2009]. See also: V. Starace, *Modifications provided by protocol No. 14...*, p. 183–192.

chain because one country (no matter how big or strong) refused to adopt a document providing more efficacy to the already existing mechanism. The Russian arguments cover vast spectrum of issues with more or less reasonable argumentation.

Russia's official charges against Protocol No. 14 emphasized the extensively broad margin of judicial discretion of the one judge committee and the fact that according to the new admissibility criteria complaints can be declared inadmissible if "the applicant has not suffered a significant disadvantage"[34]. However, it can hardly remain unnoticed that at the end of 2008 among the around 94000 cases in 27246 the defendant was Russia. This brings the logical question, if the Russia's refusal to sign Protocol No. 14 doesn't stem from other reasons?[35]

Probably, the most famous and shallow political argumentation was proposed by premier Vladimir Putin and then constantly repeated by president Dmitry Medvedev, that the Court is strongly politicized and that the reform will only provide effective tools for harassing Russia. As Jennifer Reiss promptly quotes it from Vedomosti News Service

> [...] Dissatisfaction of Russian authorities with the strong motivation of the European Court of Human Rights to tackle the Russian cases should be replaced by ... gratitude. After all, [the] Strasbourg Court only struggles to win the cases that were dismissed by Russian courts: most of the plaintiffs appealed to the Strasbourg Court with banal complaints, considering that at home they do not receive a fair trial. Their motivation could be explained by the previous success of the claimers before them. Over 10 years after having ratified the European Convention on Human Rights, Russia has reached a solid first place on the number of lawsuits filed in Strasbourg. It far outstripped the previous leaders-Poland, Turkey and Ukraine.[36]

The Russian bitterness is derivative of the harsh bilateral relations between the ECtHR and Moscow. As Court's president Jean Paul Costa stressed it: "My impression is that Russia, when it signed the convention, did not expect that an international court—such as the European Court of Human Rights—could be in a position to condemn a state such as Russia"[37]. Apart from the fact that Russia became the biggest (not only because of its territory) distributer of complaints to the Court, but also its foreign policy is strongly criticized for total lack of respect for human rights[38]. Until recently, the most famous episode of the clash between

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[34] По вопросу о Протоколе № 14 к Европейской конвенции о защите прав человека и основных свобод, Права человека. Практика Европейского суда по правам человека/Concerning Protocol No. 4 of the European Convention of Human Rights and Fundamental Freedoms, Human Rights, European Court of Human Rights Practice, http://www.jpr-pechr.ru/art/postanov3.html [05.01.2010].

[35] M. Kłopocka-Jasińska, W. Jasiński, *Europejski Trybunał Praw Człowieka przed reformą*, „Rzeczpospolita", 03.07.2009, http://www.rp.pl/artykul/63036,328562_Europejski_Trybunal_Praw_Czlowieka_przed_reforma.html [03.01.2010].

[36] J. W. Reiss, *Protocol No. 14 ECHR and Russian Non-ratification*…, p. 308–309, note 108. See also: http://www.ruleoflaw.ru/content/view/865/1/ [31.12.2009].

[37] J. Rozenberg, *Stalemate in Strasbourg, "*The Law Gazette", October 16, 2008, http://www.lawgazette.co.uk/opinion/comment/stalemate-Strasbourg [31.12.2009], quoted in: J. W. Reiss, *Protocol No. 14 ECHR and Russian Non-ratification*…, p. 309, note 114.

[38] Although in percentage per million people Russia with 143.23 cases below the 161.85 per million case average, and well below Slovenia, which tops the list at a count of 1,349 cases per million people. Statistics

the "Russian bear" and the European values took place during the second war in Chechnya[39]. The influx of examples of serious human rights violations led to the suspension of Russia's voting rights in the Council of Europe Parliamentary Assembly (hereinafter PACE)[40]. Although Russia was restored in a less than a year, her human rights file didn't improve. The Georgian – Russian conflict also confirmed the dire situation of human rights protection. But not only Russia's military activities triggered off criticism. The killings of human rights activists or journalists (Anna Politkovskaya and Natalia Estimirova just to name the most recognized), the legally doubtful and politically motivated trials (of the Yukos owners and in particular against Michail Chodorkovsky) or the suppression of free media contrast with the standards promoted by the Council of Europe. The political developments and the change on the president's post and most interestingly the negative attitude towards the Organization for Security and Cooperation in Europe election observation mission delivered additional proofs that Russia interprets the Council of Europe values in a specific "Eurasian" way, as it was once stated in Moscow.

When it concerns the Russian cases at the ECtHR, without going into details, it is worth mentioning that they cover wide spectrum of violations and relate to both structural problems and individual cases. Excessive length of pretrial detentions, low quality judicial remedies, and domestic non-enforcement of decisions against the state are accompanied by complaints that often are not covered by the Convention's provisions, but attract the attention of the human rights activists.

Jennifer Reiss points out also objections of more general nature concerning explicitly the Court, stressed by president Putin, who underlined that "the simplified system…[provided by Protocol No. 14 – SD] could result in a deterioration in quality of examination of these matters".[41] As Reiss accurately points out, Putin's words are contradictory to the Russian activities in the process of creation of Protocol No. 14 when no substantial criticism was recorded by the Russian representatives unlike those of Austria, Belgium, Finland, Hungary, Latvia, and Luxembourg.[42] Concluding, it becomes obvious that Protocol No. 14 became part of the puzzling relations between Moscow and Strasbourg. The Russian Duma's negative attitude towards the protocol was in line with Kremlin's rhetoric accusing the Council of Europe of anti-Russian intensions.

The Council of Europe found adequate solution to the stalemate created by Russia. New Protocol No. 14bis was adopted in May 2009 during the session of the Council of Europe's Committee of Ministers in Madrid. The proposal and in-

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from or based on data as of Dec. 31, 2007, obtained from the German Ministry of Justice, Mar. 2008 in: J. Reiss, *op. cit.*, p. 307, note 101.

[39] See supra note 12.

[40] http://www.independent.co.uk/news/world/europe/russia-derides-council-of-europes-cold-war-mentality-over-chechen-campaign-719448.html [31.12.2009].

[41] J. W. Reiss, *Protocol No. 14 ECHR and Russian Non-ratification*…, p. 305.

[42] *Ibidem*, p. 302–305.

troduction of this Protocol No. 14bis[43] created unique precedence in the Council's behaviour. It *de facto* established "two speed" Council of Europe with the second speed reserved for the Russian Federation. This *de facto* approval of Russia's position ultimately omitted Moscow's veto which threatened to paralyze the Court. It is not that the Court will be significantly relieved by Protocol No. 14bis, but at least first steps can be made in the attempt to solve the dire situation.

Indeed, this Council of Europe's political manoeuvre proved effective, since the Court is able to introduce some of the Protocol No. 14 key provisions towards states that have signed Protocol No. 14bis or have recognized the provisional application of the corresponding elements of Protocol No. 14[44]. Secondly, it made the Russian politicians aware, that the selected tactic failed and further opposition will only additionally stretch the country's flimsy human rights record. The last signals from Moscow prove that change in the Russian position is possible[45]. Thirdly, it proved that the CoE member states are determined to protect the system and refuse to bargain the European values for good relations even with the biggest member state.

The uneasy relations between Strasbourg and Moscow explicitly underline the uniqueness of the European System of Human Rights Protection. Although, the human rights decade is long gone the member states are firm in their conviction that the Strasbourg system should continue to exist and its productivity should be expanded, because it is not only essential but needed part of Europe.

The pilot judgment procedure and the future of the Court

In the case of the pilot judgment procedure again the *spiritus movens* will be the constantly growing case workload and this issue needs to be touched at least briefly. Although, seemingly the procedure concerns technical issue, the future role of the Strasbourg system will depend on its future development. The strong stream of repetitive cases led to the conviction that the Court should become some kind of supranational or constitutional court[46], which will focus mainly or even only, on the interpretation of the Convention and will advice the member states how to behave

[43] The protocol contains two procedural measures taken from the earlier Protocol 14 to increase the Court's case-processing capacity. A single judge will be able to reject manifestly inadmissible applications and the powers of the committees of three judges will be extended to allow them to declare applications admissible and deliver judgments on the merits if there is already well-established case-law of the Court. Several States have already pursued one or other of these avenues. Indeed, the Court already began to apply the new procedures as from 1 June 2009, for certain states. For more information see: http://www.coe.int/t/dc/files/themes/protocole14bis/default_en.asp and http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/Protocol+No.+14bis/ [both 03.01.2010].

[44] http://www.coe.int/t/dc/files/themes/protocole14bis/default_en.asp.

[45] Медведев: Европейская конвенция по правам человека может быть принята, December 17, 2009 http://www.rosbalt.ru/2009/12/17/698185.html [03.01.2010].

[46] For detailed description of the differences between the supranational and constitutional perspective for the European Court of Human Rights see: J. L. Jackson, *Broniowski v. Poland...*, p. 776–781.

by the means of the pilot judgment procedure. Still other will claim that, bearing in mind the constant growth of applications (and thus violations), the court should become the full-fledged last instance[47]. Reversely, within the ECtHR there is also "minimalist" option requiring only improvement of the court's effectiveness without enhancing the Strasbourg system. As Laurence Helfer observed

> the debate has focused on whether the Court should provide "individual" or "constitutional" justice" and goes further to explain that "[…] Advocates of the former view argue that the right of individual petition is the centerpiece of the Strasbourg supervisory system and, as a result, that the ECtHR should "hear any case, from anyone who claims to be a victim of the Convention" and provide a remedy to every individual whose human rights have been violated. Proponents of the latter position […] argue that the ECtHR should concentrate on providing "fully reasoned and authoritative [decisions] in cases which raise substantial or new and complex issues of human rights law, are of particular significance for the State concerned or involve allegations of serious human rights violations and which warrant a full process of considered adjudication.[48]

Analysis of the recent Court's and Council of Europe's developments allows concluding, that steps are made in both directions, yet the proponents for constitutional approach prevail at least for the time. The pilot judgment procedure and the new admissibility criteria envisaged in Protocols No. 14 and 14 bis are the most visible footsteps of this development.

The pilot judgment affirms that individual violation of human rights is of systematic character, thus stemming from the binding legal provisions or from the legal practice on national level. It also affirms that the violation concerns or should concern numerous group of people in certain country. It orders the state to take decisive steps, including of systematic character, if needed, aiming elimination of the source of violation.[49] The pilot judgment points out structural hardships in the application of minimal standards of human rights protection and thus through its application the Court can be relieved from significant amount of repetitive cases. Thus, the main burden will be returned to the member state. However, this requires as the case of Broniowski[50] exposed, among others that similar cases will need to wait until the pilot judgment is decided and then the appropriate changes on national level are introduced[51].

Furthermore, such solution requires political will on national level (which was evident in this case) to accept open exposure of state's weakness[52]. It is difficult to predict what will be the state's behaviour in other cases. In her thorough analysis

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[47] Which it is not, as was emphasized next to note 6.

[48] L. R. Helfer, *Redesigning the European Court of Human Rights*..., p. 130.

[49] M. Krzyżanowska-Mierzewska, *Sprawy mienia zabużańskiego przed ETPCz*, „Europejski Przegląd Sądowy" 2008, grudzień, p. 22.

[50] Broniowski v. Poland is available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=BRONIOWSKI&sessionid=42020788&skin=hudoc-en.

[51] M. Krzyżanowska-Mierzewska, *op. cit*., p. 21.

[52] The Constitutional Court has undertaken action simultaneously to the Court in Strasbourg, thus simplifying the whole proceeding. See Broniowski v. Poland supra note 50.

of the case *Broniowski v. Poland* Magda Krzyżanowska-Mierzewska proved that the application of the pilot judgments can establish a dangerous precedent. By solving the Court's structural problems through the opportunity to suspend the consideration of repetitive cases and to send them back on national level at the expense of individual's satisfaction, the Court itself violated the right to a due process. Additionally, the Court simply omitted the material part of the particular complaints by focusing on the generality of the systemic problem[53]. Thus, the first official pilot judgment procedure solved one systematic problem that the ECtHR recognized, but in the same time neglected the main purpose the Court was called for – to provide redress for individual violations of the Convention provisions.

Apart from the legal dilemmas, the decision to introduce the pilot judgment not through appropriate provisions in Protocol No. 14, but through the "back door" recommendation of the Committee of Ministers[54] undermined the legitimacy of this mechanism.[55] Future critics of the procedure will always be able to address it if all other arguments will be defeated by the practice.

Conclusion

After sixty years of existence the Council of Europe went through remarkable evolution. What was once a tiny club of Western European states gathered by shared values and common threat today is the most remarkable regional system of human rights protection. Despite the structural problems, it provides the most efficient tool of international human right protection to approximately 800 000 000 people in 47 member states. After the end of the Cold War the Strasbourg system promptly adjusted to the new challenges and enlarged its competences. It was both necessity and expectation. Necessity, because reluctance to do so would have simply led to disastrous consequences and expectation because for millions of people the Council of Europe became the first visible symbol of the changing reality.

Today United Europe is torn by disputes about the future of the integration process, its shapes and limits. In the same time the Council of Europe is able to find *modus vivendi* for countries with different religious, ethnic and political background by providing them with three basic values that appeared to be the right recipe for peace and prosperity.

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[53] The interesting hypothesis raised by M. Krzyżanowska is that the EctHR could have solved the cases faster, if it had considered them on the regular case by case basis. M. Krzyżanowska-Mierzewska, *op. cit*., p. 23.

[54] Recommendation Rec (2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies *(adopted by the Committee of Ministers on 12 May 2004* https://wcd.coe.int/ViewDoc.jsp?Ref=Rec%282004%296&Language=lanEnglish&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

[55] For brief description of the political aspects around the introduction of the pilot judgment procedure see: C. Paraskeva, *op. cit*., p. 433–434.

Selectively, the paper attempted to touch on some of the most recent political challenges faced by the Council of Europe. Some of them were only of speculative nature (the Polish case), some of more apparent (like the Russian case) and some still remain to be analyzed (like the case of *Lautsi v Italy*). Undoubtedly, the Council of Europe is on a crossroad. The internal dilemmas concerning the shape and the role of the ECtHR are additionally heightened by the European Union's attempt to play more visible role in the field of human rights protection.

Furthermore, the appearance of significant discrepancies in the understanding and implementation (or their lack) of the minimal human rights standards among the member states amplifies the voices for more decisive role of the Court. Furthermore, the Council of Europe's enlargement for the last twenty years brought new challenges for the court.

On the other hand tribute should be paid to the Council's good will and efforts to expand the geographical and institutional limits of the European Convention of Human Rights and the Court. That made the Council the pioneer of European unification. Reversely, since the early nineties there is still ongoing search for the shape and role of the Strasbourg system. The educational or "tutor" role is new for the system. Today the prevailing trend in Strasbourg seems to aim at enhancing this "tutor" role.

However, it is important to remember that such development, willing or not, will eventually diminish the Court's role of being efficient tool of individual's protection. The common values, respect for sovereignty and development of soft power mechanisms when it comes to the implementation of the Court's rulings are the actions the system knows best from the down of its existence. The strength of the Strasbourg system comes from the good it makes. The European Court of Human Rights protects the individual and provides arguments for the necessity of constant nurturing of the Council's values: democracy, human rights and the rule of law. The strongest and only guarantee for its existence is the common faith that the system is indispensable part of these values. Countries that cannot find themselves in compliance with these values weaken the system and its fundaments. In the Winston Churchill's speech quoted already above, the former premier reminded that

> We should certainly make some provision for association with representatives of these countries, who are deprived of ordinary democratic freedom but who will surely regain it in the long march of time. […] I agree with all those, and there are many, who have spoken in favour of setting aside some seats in the Assembly as a symbol of proof of our intention that the Assembly shall some day represent all Europe, or all Europe west of the Curzon Line[56].

His dream not only became true, but exceeded even Churchill's bravest expectations. The question is why he envisaged the Curzon line as the ultimate limit for the European system to be established?

[56] Winston Churchill speech of August, 17, 1949 supra note 1.

Was it because he hardly believed that the Soviet Union will ever collapse, or because he was aware that East of the Curzon line the values are different from what the Council of Europe will stand for? If the latter answer is correct, that should mean that the surplus to his dreams might lead to the collapse of his work.