Considering the complementary nature of the work of the European Court of Human Rights and the non-judicial institutions of the Council of Europe

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The author report there are no competing interests to declare

This article is the english translation of the article “Penser la complémentarité de l’action de la Cour européenne des droits de l’homme et des institutions non juridictionnelles du Conseil de l’Europe”, published in the online journal RDLF (https://revuedlf.com/cedh/penser-la-complementarite-de-laction-de-la-cour-europeenne-des-droits-de-lhomme-et-des-institutions-non-juridictionnelles-du-conseil-de-leurope/)

Abstract : *The crisis of the of law that can be observed in many European States underline the need to rethink how the situation should be handled in the Council of Europe. Indeed, the European Court of Human Rights seems to not be able to manage this situation alone anymore, the resistances shown by these States toward the Court rendering the debate in a stalemate. In order to solve this crisis concerning one of the core principle of the Council of Europe, this article offer to look for new outcomes by integrating the work of other organs of the organisation as a way to strengthened the position and the argumentation of the European Court of Human Rights.*

In the altercations between populist governments and European organisations over respect for the rule of law, some actors attract more attention than others. Within the framework of the European Union, several institutions simultaneously play a key role, including the Court of Justice of the European Union, the European Commission and the European Parliament. And yet, within the Council of Europe, the European Court of Human Rights (hereinafter referred to as the ECHR) is the organ that generally attracts all the attention, seemingly disregarding the fact that the conventional system is far from relying exclusively on the EctHR. In this regard, the phenomenon of the crisis of the rule of law has allowed to highlight the non exclusivity of the Court by mobilizing other actors within the Council of Europe.

It is the relationship between their actions that leads us to look at the complementarity between the action of the European Court of Rights and the non-judicial institutions of the Council of Europe within the context of the crisis of the rule of law.

As it stands, this phenomenon affects European states where governments' actions and reforms are part of *"a process of dismantling the rule of law by attacking constitutional justice, the independence of the judiciary, the freedom of the press, refugees, minorities, etc."*[1]. As such, while the term 'crisis of the rule of law' may have been used more broadly to refer to the attacks this concept has faced since 2000 - as a result of counter-terrorism policies or the proliferation of states of emergency[2] - our discussion here will focus on the crisis of the rule of law, understood as the national reforms introduced by populist governments that undermine the concept of the rule of law[3]. These violations, although occurring within individual states, nevertheless largely affect the Council of Europe. The bodies of the Council of Europe are fully affected by this crisis which is undermining the organisation's authority and how it works.

This challenge will affect not only the Court of Human Rights - forcing it to develop the concept of the rule of law in its case law[4] - but also other Council of Europe organs. Thus, while various Council of Europe institutions and bodies are called upon to intervene in the crisis of the rule of law[5], for this contribution we will focus on the complementary nature of the action of the Court of

1 Introduction to the publication " Quel État de droit dans une Europe en crise" edited by Professor Éric Carpano and Professor Marie-Laure Basilien-Gainche, RDLF, available online: http://www.revuedlf.com/dossier/quel- etat-de-droit-dans-une-europe-en-crise/.

2 On this subject, see for example Emmanuel DECAUX, "Crise de l'État de droit, droit de l'état de crise", in "Mélanges en hommage à Louis-Edmond Pettiti, Brussels, Bruylant, pp. 267-288; DELMAS-MARTY Mireille, "Libertés et Sûretés les Mutations de l'État de Droit", Revue de Synthèse, Springer Verlag/Lavoisier, 2009, 130 (3), pp. 465-491.

3 For example, with regard to Poland, *"the election in December 2015 of three judges to seats that had already been filled in October triggered intense legal controversy and marked the beginning of what analysts commonly refer to as 'the crisis of the rule of law in the country"*, ECtHR, Grzçda v. Poland, 15 March 2022, application no. 43572/18, § 15.

4 References to the "rule of law" are found in many judgments of the Court of Human Rights, but these references do not provide an explanation of the content or scope of these concepts. Similarly, the references made to the rule of law in the Statute of the Council of Europe, in Articles 1(d) and 3, and in the Preamble to the EDH Convention do not make it possible to determine the content of the concept.

5 For example, we can mention the work of the Parliamentary Assembly of the Council of Europe and its investigative and whistleblowing role.

Human Rights, the Venice Commission and the Committee of Ministers. First and foremost, the work carried out the Committee of Ministers seems to be an obvious choice given that its work of supervising the execution of judgments complements the work and action of the Court of Human Rights[6]. Alongside the Committee of Ministers, the decision to focus on the Venice Commission is justified in regard to the opinions issued and the definition work carried out by this body, which complements the prior work done by the European Court of Human Rights, especially as far as the rule of law is concerned.

Lastly, this contribution forms part of a more general reflection on "supranational European jurisdictions and the crisis of the rule of law" and more specifically in the third theme of this conference, which seeks to question the opportunity to rethink the role of European supranational courts in the wake of the crisis of the rule of law. In the light of this, our contribution will focus on how the crisis of the rule of law pushes us to rethink the complementarity between the European Court of Human Rights, the Committee of Ministers and the Venice Commission. Indeed, the crisis has highlighted the imperfections of this tripartite system - made up of the Commission, the Court and the Committee - (I), but it has also prompted us to consider the opportunities for how we could possibly change and adapt this system (II).

I) A crisis revealing imperfections

The crisis of the rule of law will not only have repercussions within states themselves, but also within the Council of Europe, in that it will highlight and even accentuate certain imperfections in the conventional system. The crisis not only reveals the asymmetrical nature of the complementarity of action between the Court, the Venice Commission and the Committee of Ministers (A), but also its limited nature (B).

A) An asymmetrical complementarity

The complementarity of the work of the Court of Human Rights, the Venice Commission and the Committee of Ministers may be considered as asymmetrical in that the conventional system relies almost exclusively on the cooperation between the Court of Human Rights and the Committee of Ministers. Under Article 46 of the Convention, the Committee is responsible for making sure that

6 PALMER Simon, "The Committee of Ministers", in SCHMAHL Stefanie (ed) and BREUER Marten (ed), The Council of Europe, its Law and Policies, Oxford University Press, 2017, pp.137-165; BOILLAT Philipe, DE SALVIA Michel, DOLT Frédéric, DRZEMCZEWSKI Andrew, Les mutations de l'activité du Comité des ministres - La surveillance de l'exécution des arrêts de la Cour européenne des droits de l'homme par cet organe du Conseil de l'Europe. Proceedings of the René Cassin International Institute of Human Rights seminar, Anthemis, 2012, 196 p.

the Court's judgments are executed properly[7], and its role was strengthened when Protocol 14 came into force on the 1st of June 2010[8]. Furthermore, the Committee of Ministers' role also increased after the high-level conferences on the future of the European Court of Human Rights in 2010, 2011 and 2012, which resulted in the Interlaken Declaration[9], the Izmir Declaration[10] and the Brighton Declaration[11] respectively, highlighting the need for the supervision of judgments by the Committee of Ministers to improve[12]. Consequently, and despite criticism or doubts about this body's political composition[13], the Committee of Ministers is systematically and effectively involved in the Court's interpretative work[14].

In contrast, the work of the Venice Commission is much wordier and more fragmented. When the Commission was set up in 1990, promoting the rule of law and democracy was not one of its goals until its statute was revised in 2004. References to the work of the Venice Commission have appeared in roughly 600 judgments and decisions of the Court since 2001[15]. Of these, around 160 refer to the Venice Commission's work on the rule of law which comes to a little over a quarter of all references. Finally, we note that 80 of these (about half) concern violations of the rule of law through breaches of Article 6 of the Convention. These references have become increasingly frequent over the years[16].

Looking at these figures, we can first see that a significant proportion of references to the work of the Venice Commission are about proceedings that directly or indirectly relate to issues

7 On this subject, see LAMBERT-ABDELGAWAD Elisabeth, Les effets des arrêts de la Cour européenne des droits de l'Homme: contribution à une approche pluraliste du droit européen des droits de l'Homme, Bruylant, 1999, 626 p.; LAMBERT-ABDELGAWAD Elisabeth, L'exécution des arrêts de la Cour européenne des Droits de l'Homme, Council of Europe Publishing, 2nd Ed., 2008, 100p.

8 This Protocol amends Article 46 of the Convention by adding two new procedures available to the Committee of Ministers. The first procedure, contained in paragraph 3 of Article 46, enables the Committee to refer to the Court a difficulty in interpreting a judgment to be executed. The second procedure, contained in Article 46(4), enables the Committee to refer a matter to the Court about a State refusing to comply with one of the Court's judgments. On this subject, see BLAY-GRABARCZYK Katarzyna, AFROUKH Mustapha, SCHAHMANECHE Aurélia, "Le contrôle de l'exécution des arrêts de la Cour européenne des droits de l'homme", RFDA, 2014, No. 5, pp. 935-944.

9 Council of Europe, Conference on the future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010.

10 Council of Europe, Conference on the future of the European Court of Human Rights, Izmir Declaration, 26 and 27 April 2011.

11 Council of Europe, Conference on the future of the European Court of Human Rights, Brighton Declaration, 19 and 20 April 2012.

12 Point F of the Interlaken Declaration, point H of the Izmir Declaration and point F of the Brighton Declaration respectively.

13 On the subject, see for example SALINAS ALCEGA Sergio, "Le contrôle de l'exécution des arrêts de la Cour européenne des droits de l'homme suite au processus d'Interlaken: l'évolution technique d'un mécanisme politique", in Revue Québécoise de droit international, vol. 27-2, 2014. pp. 99-117.

14 The work of the Committee of Ministers can be accessed from the website of the Department for the Execution of Judgments of the European Court of Human Rights: https://www.coe.int/fr/web/execution.

15 A search of the HUDOC database for English-language judgments and decisions mentioning the Venice Commission actually brings up 627 results. However, several of these results are merely official translations of the same judgment into several languages. The figure of 600 judgments and decisions of the Court since 2001 therefore excludes multiple results referring to the same judgment or decision.

16 The work of the Venice Commission is available online on the Council of Europe's website dedicated to the Venice Commission: https://www.venice.coe.int/webforms/events/.

about respect for the rule of law. In addition, a large number of references are made in particular in cases involving attacks on the judicial systems of state parties. Examples include landmark judgments such as Baka v Hungary[17], Ramos Nunes de Carvalho e Sa v Portugal[18] and Guômundur Andri Âstrâôsson v Iceland[19]. More specifically, the Commission's reports have supported the reasoning of the European Court of Human Rights in a number of judgments relating to its battle with Poland over the various legislative reforms introduced by the government in power since 2015. The Commission's work has received a great deal of support, particularly in the first cases about changes to the Polish judicial system [20]. The work of the Venice Commission is thus regularly referred to by the Court in its reasoning relating to the protection of the rule of law.

These references are justified insofar as the Venice Commission has done a great deal of work in defining and clarifying the concept of the rule of law - and before that of the pre-eminence of law. From a formal point of view, in The European Convention on Human Rights, the concept of "rule of law" only appears in the preamble of the text[21]. Beside this occurrence in the Convention, the concept can be found in the Statute of the Council of Europe, both in the Preamble[22] and in Article 3, which states that every member state *"recognises the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms"*. In addition to these scattered references, the concept of the rule of law has also been used and explained laconically by the Court[23], making the definition work of the Venice Commission all the more necessary[24].

17 European Court of Human Rights, Baka v. Hungary, 23 June 2016, application no. 20261/12.

18 European Court of Human Rights, Ramos Nunes de Carvalho e Sa v. Portugal, 6 November 2018, application nos. 55391/13, 57728/13 and 74041/13.

19 ECtHR, Guômundur Andri Âstrâôsson v. Iceland, 1st of December 2020, application no. 26374/18.

20 ECtHR, Xero Flor w Polsce sp. z o.o. v. Poland, 7 May 2021, req. no. 4907/18 (irregularities in the election of a judge to the Polish Constitutional Court); ECtHR, Broda and Bojara v. Poland, 29 June 2021, reqs. nos. 26691/18 and 27367/18 (Act of 12 July 2017 allowing the Minister of Justice to dismiss the presidents of courts before the end of their mandates, with no need to state reasons and with no possibility of appeal); Court of Human Rights, Reczkowicz v. Poland, July 2021, complaint no. 43447/19 (irregularities in the appointment of judges to the new disciplinary chamber of the Supreme Court); ECtHR, Dolinska-Ficek and Ozimek v. Poland, 8 November 2021, complaints nos. 49868/19 and 57511/19 (procedure for appointing judges to the new Extraordinary Supervision and Public Affairs Chamber of the Supreme Court); ECtHR, Advance Pharma sp. z o.o v. Poland, 3 February 2022, application no. 1469/20 (irregularities in the appointment of judges to the civil division of the Supreme Court) and finally, ECtHR, Grzçda v. Poland, 15 March 2022, application no. 43572/18 (failure to lodge an appeal following the premature termination of the mandate of the National Council of a sitting judge following a legislative reform).

21 The English version of the text states that governments *"have a common heritage of political traditions, ideals, freedom and the rule of law"*. The French version refers to governments *"possédant un patrimoine commun d'idéal et de traditions politiques, de respect de la liberté et de prééminence du droit"*.

22 *"Governments (...) unshakeably committed to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy"* Statute of the Council of Europe, reference ETS no. 001, London, 3 August 1949.

23 On this subject, see HUSSON-ROCHCONGAR Céline, *"La redéfinition permanente de l'État de droit par la Cour européenne des droits de l'homme"*, Civitas Europa, vol. 37, no. 2, 2016, pp. 183-220.

24 On this subject, see P. WACHSMANN, "La prééminence du droit dans la jurisprudence de la Cour européenne des droits de l'homme", in *Le droit des organisations internationales. Recueil d'études à la mémoire de Jacques Schwob*, Bruylant, 1997, pp. 241-286; SOUVIGNET Xavier *"La prééminence du droit dans le droit de la convention européenne des droits de l'homme";* Y. MORIN, *"La prééminence du droit dans le droit de la convention européenne des droits de l'homme".* MORIN, "La "prééminence du droit" dans l'ordre juridique européen", in Theory of international law at the threshold of

We owe it to the Venice Commission, through its 2011 “Report on the Rule of Law” and its 2016 “List of Rule of Law Criteria”, to provide a clearer interpretation and delimitation of the concept of the rule of law[25]. This would seem to counterbalance the asymmetry raised earlier - the asymmetry between the systematic action of the Committee and the occasional action of the Commission. Indeed, if the Committee of Ministers were to intervene systematically, as a systematic organ to complement the Court's action, the Commission would intervene as an exceptional actor[26] contributing its expertise on specific subjects, such as the rule of law.

As such, and if it weren’t for a second asymmetry, we could envisage complementarity between these different stakeholders. Indeed, the documents adopted by the Venice Commission are not binding on the Member states of the Council of Europe, and cannot be used to sanction a State that does not comply with the Commission's recommendations. In this respect, we note that the various opinions issued by the Commission on the subject of Polish reforms - be they reforms about the Constitutional Court[27] or those relating to the compulsory retirement of judges[28] - are largely ignored by Poland. While the Commission can propose a definition and a list of criteria for the concept, it is not in a position to impose it. The European Court of Human Rights could potentially adopt the criteria developed by the Commission, making them mandatory by virtue of the binding force of its judgments. Appropriating the Commission's work would enable the Court to use this definition and these criteria against states whose actions end up undermining the rule of law. Nevertheless, whether it is a question of a desire to keep the dialogue open or a fear of the criticism that such action would generate, the Court has not yet taken the step of incorporating the definitions put forward by the Commission into its arguments.

Hence, in the context of the crisis of the rule of law, the asymmetrical complementarity between the Venice Commission and the European Court of Human Rights seems to be an initial limitation. Indeed, the Commission's efforts to define and provide expertise are tools that the Court must use sparingly as they cannot be legitimately imposed on states that are party to the Convention.

B) A Limited complementarity

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the 21st century. Essays in honour of Krzysztof Skubiszewski, Kluwer Law International, 1996, pp. 643-689.

25 On this subject, see BOY Noël, “La notion d'État de droit au sein du Conseil de l'Europe à l'aune des crises hongroise et polonaise”, RDLF, 2020, chron. no. 54.

26 This asymmetry in operation is also accentuated by the fact that the Venice Commission, unlike the Committee of Ministers, is not a permanent body of the Council of Europe.

27 Venice Commission, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, Opinion No. 833/2015, 11 March 2016; Venice Commission, Opinion on the Act on the Constitutional Tribunal, Opinion No. 860/2016, 14 October 2016.

28 Venice Commission, Opinion on the draft Act amending the Act on the National Council of Justice; on the draft Act amending the Act on the Supreme Court, proposed by the President of the Republic of Poland, and on the Act on the Organisation of Ordinary Courts, Opinion No. 904/2017, 11 December 2017.

Beside this asymmetry, the crisis of the rule of law has generally highlighted the limitations inherent in the conventional system, particularly with regard to the work of the Venice Commission and the Committee of Ministers.

The limitations of the Venice Commission's work relate to the definition work previously mentioned. Efforts to define the rule of law are still relatively recent, and the Commission's work remains unfinished. Two illustrations of the limits of the definition proposed by the Commission seem to us to be particularly relevant here.

First of all, the definition work remains essentially focused on the formal aspect of the rule of law, while the implications of its substantive aspect are much less clear[29]. It could be argued that this lack of precision is not a limitation, but rather a strength. Making the rule of law a concept that can become a guiding principle of the Convention, capable of being invoked in support of any violation of the rights guaranteed, could in fact constitute a considerable asset in the Court's interpretation[30].
On the contrary, a clearly delimited definition of the rule of law would be seen as a hinderance to its effectiveness. In the debate about the scope given to the rule of law, we would be more inclined here to defend the thesis of a clearly defined and delimited concept that helps rule out any questioning or doubt as to its application. A definition leading to a diffuse concept with systematic applications would, in our view, weaken the notion and dilute its importance. Too broad an interpretation of the substantive aspect of the rule of law would mean that any violation of a treaty right would constitute a violation of the substantive aspect of the rule of law. Consequently, in a situation of permanent violation of the constituent elements of the rule of law, the notion of a crisis of the rule of law as we understand it to refer to the situation of certain states would lose all meaning since the crisis would then be generalised.

Without debating the Council of Europe's ability to react to a situation where the rule of law is being violated on a global scale, we can already see that there are limits to the Venice Commission's action in the context of the rule of law crisis in Poland and Hungary. Although the Venice Commission considers that it has succeeded in defining a common core of the rule of law, this concept - considered to be part of the common heritage of European states - is still very much influenced by the history of Western Europe. Indeed, the definition adopted by the Venice Commission is based primarily on past experience and the obstacles encountered in the founding states of the Council of Europe[31]. As such, this definition fails to take into account any past or

29 BOY Noël, "La notion d'État de droit au sein du Conseil de l'Europe à l'aune des crises hongroise et polonaise", *op.cit.*

30 The notion of the rule of law could thus join the notion of "democratic society", which was mobilised and developed to become a guiding principle actively used by the Court. On this subject, see JACQUEMOT Florence, Le standard européen de société démocratique, Université de Montpellier, 2006.

31 We are thinking here in particular of the Nazi regime in Germany, which led to an awareness of the essential nature of the substantive component in the concept of the rule of law.

present obstacles that have arisen especially in Central and Eastern European states, such as judicial formalism[32] or resistance of populist governments[33]. These obstacles bear witness to the difficulties that need to be overcome in defining the rule of law - difficulties that the Venice Commission still seems to struggle to consider in its work.

Over and above the problems raised by the behaviour of populist governments for the work of the Venice Commission, we can note that the Committee of Ministers is also affected by these national attitudes, which constitute significant limits to the organ's action. Because of its political nature, this body has been perceived to engage in dialogue or negotiate with state authorities through diplomatic channels more easily. And yet, this diplomatic aspect now seems ineffective when the representatives of states such as Hungary or Poland contest or reject most of the judgments finding a violation of a treaty right related to the rule of law. In this respect, the most recent judgments about Poland have not yet been reviewed by the Committee as to their execution. Nevertheless, if we take into account the judgment of the Polish Constitutional Court of 24 November 2021, finding that Article 6 of the Convention does not apply to the Polish Constitutional Court, it seems unlikely that the judgments will be properly executed[34] [35]. In the same vein, we can cite the resolution taken by the Committee of Ministers on 9 March 2022 about the execution of the Baka v. Hungary judgment handed down on 23 June 2016[36]. In its resolution, the Committee notes *"the persistent lack of progress, almost six years after the present judgment became final"*[37], thus stressing the limitation on the Committee of Ministers' action.

The crisis of the rule of law highlights some of the limits of the conventional system. The Council of Europe has already experienced a number of historical crises, be they related to its member states, such as the Greek crisis in 1967 or, more recently, the Russian crisis in 2021, or institutional crises, such as the case of repetitive applications or the issue of the Court's overcrowded courtroom. Faced with these situations, the organisation has systematically managed to adapt and

32 For a presentation of the impact of judicial formalism in the context of Poland's rule of law crisis, see MATCZAK Marcin, *"The Strength of the Attack or the Weakness of the Defence? Poland's Rule of Law Crisis and Legal Formalism",* 10 February 2018, 17 p, available online: https://ssrn.com/abstract=3121611.

33 While populism is by no means a problem exclusive to the states of Central and Eastern Europe, we must nevertheless note that it is in some of these states that populism has caused the most problems to date. On this subject, see DELEERSNIJDER Henry, "La dérive populiste en Europe centrale et orientale", *in* Hermès n° 42, 2005, pp. 181-186; GUEORGUIEVA Petia, "Populismes et populistes en Europe centrale et orientale" *in* Hermès, n° 77, 2017, pp. 117-125.

34 Polish Constitutional Court, ruling K6/21, 24 November 2021.

35 In the same vein, the Polish Constitutional Court once again ruled on the compatibility between the Convention and the Polish Constitution in its judgment K7/21 of 10 March 2022.

36 ECtHR, Baka v. Hungary, *op.cit.*

37 Committee of Ministers, Interim Resolution CM/ResDH (2022) 47, 9 March 2022.

overcome these crises by seeking ways to overcome the various obstacles[38] [39]. In the current crisis about attacks on the constituent elements of the rule of law, the best solution would be for the Council of Europe to strengthen its defences by refining the protection of this concept. As the playwright Aristophanes wrote, *"It is from their enemies, not from their friends, that cities have learned to build high walls"*[40]. This quotation seems appropriate to the current situation in that the crisis of the rule of law provides an opportunity to consider the changes that can be made to improve the conventional system and the protection of the rule of law. This crisis should enable us to rethink the action of the various stakeholders acting within the system and, in particular, to "rethink the Supranational European courts in the wake of the crisis of the rule of law".

II) A crisis providing an opportunity for change

While the crisis that the Council of Europe is experiencing about the concept of the rule of law provides an opportunity to reflect on the changes that need to be made to the conventional system, it is also important to be careful not to seek solutions that deviate too far from the system into which they are supposed to fit (A). These changes, which do not fit in with the system, should then be discarded in favour of proposals providing genuine opportunities for change for the Council of Europe (B).

A) The rejection of unsuitable modifications

Any period of crisis is fertile ground for change, which may be original or, on the contrary, inspired by actions or solutions that can be found elsewhere. We must nevertheless be cautious in this quest for change, in that some proposals inspired by other situations are not necessarily adapted or transposable.

An illustration of an inappropriate proposal would be that one to bring the action of the European Court of Human Rights closer to that of the Court of Justice of the European Union, which

38 For example, in the case of a crisis involving a member state, the Committee of Ministers' resolution of 16 March 2022 on Russia's exclusion from the Council of Europe was followed by a resolution of the European Court of Human Rights of 22 March 2022 - confirmed by the Committee in a resolution of 23 March - stating that the Russian Federation would remain a High Contracting Party until 16 September 2022. On the consequences of this decision, see AFROUKH Mustapha and MARGUENAUD Jean-Pierre, "Les conséquences à double tranchant de l'exclusion de la Russie du Conseil de l'Europe", Dalloz actualité, 30 March 2022.

39 For example, in the case of a crisis affecting the functioning of the Court, the accumulation of repetitive applications before the European Court of Human Rights led the Court, following the invitations made by the Committee of Ministers in a 2004 resolution (Resolution (2004)3), to develop and implement the pilot judgment procedure, a procedure inaugurated with the Broniowski v. Poland judgment, 22 June 2004, req. no. 31443/96. On this subject, see DUCOULOMBIER Peggy, "Arrêts pilotes et efficacité des nouveaux recours internes", *in* DOURNEAU- JOSETTE Pascal (ed.), LAMBERT ABDELGAWAD Elisabeth (ed.), Quel filtrage des requêtes par la Cour européenne des droits de l'homme - Conseil de l'Europe, "Hors collection", 2011, pp. 255-292.

40 Aristophanes, *"Les oiseaux"*, French translation by André Charles Brotier, Garnier, 1889, p.31.

could, in the context of the infringement procedure, order a Member State to pay a lump sum or penalty[41]. We could in fact imagine a change to the Statute of the Court of Human Rights that would allow it to attach a penalty payment or fine to the determination of just satisfaction in respect of the State that has committed an infringement. For example, this would be similar to the CJEU's power to order Poland to pay a €1,000,000 penalty for every day that it does not comply with a judgment[42]. Such sanction would enable the Court to strengthen its rulings on violations by adding a financial penalty aimed at sanctioning a state for the violation it has committed. Nonetheless, this idea of a Court that can impose a penalty or fine raises a large number of difficulties as to its implementation, and even as to its value. First and foremost, this idea of the Court having the power to impose penalties has no basis in the Convention, which only allows just satisfaction to be awarded to the party who is the victim of a violation of a Convention right[43]. Moreover, the Court is under no obligation to award just satisfaction, since it only makes such a decision when an application is made[44] and if the Court finds, in accordance with Article 41, that there has been a violation of the Convention which *"can only be imperfectly remedied by the domestic law of the High Contracting Party"*[45]. Therefore, awarding just satisfaction is not systematic and, above all, is only intended to restore the applicant as closely as possible to what their situation would have been had they not suffered a violation[46]. In this sense, *"the Court compensates for a lost gain or loss but in no case seeks to punish the State"*[47]. The idea that the Court should have jurisdiction to impose sanctions therefore seems inappropriate in regard to the functioning of the Court. Moreover, beyond the possibility of such an amendment to the text of the Convention, observation of the CJEU's practice in this area also raises the question of the relevance of such an amendment. The sanctions imposed by the CJEU on the Polish State remained ineffective for a long time, as the Polish government simply

41 Article 260(2) TFEU*: "If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may refer the matter to the Court, after giving that State the opportunity to submit its observations. It shall indicate the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances"*.

42 CJEU, Order of the Vice-President of the Court of Justice in Case C-204/21R Commission v. Poland (Independence and privacy of judges), 27 October 2021. This case concerns Poland's refusal to suspend the application of a number of laws which, among other things, affect the independence of national courts.

43 Article 41 of the European Convention on Human Rights.

44 With the exception of certain exceptional situations in which the Court may rule on the award of just satisfaction in the absence of a properly made application, see in particular the judgment of the ECtHR, Nagmetov v. Russia, 30 March 2017, application no. 35589/08.

45 Article 41 *op. cit.;* ECtHR, Papamichalopoulos and others v. Greece (Art.50), 31 October 1995, req n° 14556/89, paragraphs 34 et seq.; On the subject, see FLAUSS Jean-Francois and LAMBERT-ABDELGAWAD Elisabeth(dir.), *La pratique de l'indemnisation par la Cour européenne des droits de l'homme*, Bruylant, 2011.

46 In this sense, see MARCHADIER Fabien, "La réparation", *in* SUDRE Frédéric (dir.), ANDRIANTSIMBAZOVINA Joël, GONZALEZ Gérard, GOUTTENOIRE Adeline, MARCHADIER Fabien, MILANO Laure, SCHAHMANECHE Aurélia, SZYMCZAK David, *Les Grands arrêts de la Cour européenne des Droits de l'Homme*, ed. PUF, 9e ed, 2019, pp960-961; conversely, see FLAUSS Jean-François, "Réquisitoire contre la mercantilisation excessive du contentieux de la réparation devant la Cour européenne des droits de l'homme. À propos de l'arrêt Beyeler c. Italie du 28 mai 2002", *in* Receuil Dalloz, 2003, p. 227.

47 MARCHADIER Fabien, "La réparation", *op.cit*.

refused to execute the judgments handed down and to pay the sums requested by the European Court[48]. This observation can be nuanced, as the Polish government recently seems to have reopened up to dialogue with the European Commission - under the pressure of seeing the Structural Funds conditionality mechanism triggered against them. Nevertheless, the European Commission's latest report on the rule of law in Poland stresses, in the very first sentence of its summary, that *"Serious concerns remain regarding the independence of the Polish judiciary"*[49]. Thus, while the power to sanction states that violate the Convention can be seen as a deterrent in most cases, we note that it is not an unfailing solution in the case of a State that persists in its behaviour. Lastly, the Council of Europe does not have the resources of the European Union and cannot use subsidies or structural funds to put pressure on a State or to recover fines that a State refuses to pay.

A second solution would be to apply the pilot-judgment procedure to states whose breaches show systemic and/or structural non-compliance[50]. With this solution the Court could thus, after linking the breach of the rule of law to a systemic problem, indicate general measures to be taken by the State. The Court could then freeze all similar cases and delegate the task of resolving the identified problem to the national authorities. Triggering such a procedure against a State would be a powerful symbol and would enable the Court to give direct indications to the relevant State as to the steps necessary to stop the violation[51]. However, this solution does not appear to be suitable for violations due to non-compliance with the rule of law.

The pilot judgment procedure only makes sense if the State subject to it agrees to participate in the mechanism and to introduce the necessary reforms to its domestic law. In a situation where a State refuses all discussion and is itself the direct cause of the problems identified by the Court, such a procedure would not bring any benefit and would be more akin to a form of abandonment on the part of the Court which, by freezing similar applications, would be giving up the possibility of examining the problem again, for a potentially indefinite period. Indeed, apart from the rare cases in which a particular position has been adopted, the handling of similar cases is normally temporarily adjourned

48 For example, CJEU, Order of the Vice-President of the Court in Case C-204/21 R Commission v. Poland, 27 October 2021, *op.cit.*

49 *"Serious concerns persist related to the independence of the Polish judiciary"*, European Commission, 2022 Rule of Law Report Country Chapter on the rule of law situation in Poland, SWD(2022) 521 final, 13th july 2022, p. 2.

50 On this subject, DUCOULOMBIER Peggy, "arrêts pilotes et efficacité des nouveaux recours internes", *op.cit*; BUYSE Antoire, *"Flying or landing? The pilot judgment procedure in the changing European human rights architecture", in* ARNARDOTTIR Oddnÿ Mjoll (ed.) and BUYSE Antoire, Shifting centres of gravity in human rights protection: rethinking relations between the ECHR, EU and national legal orders, Routledge, 2016, pp. 101115.

51 Judgments handed down by the European Court of Human Rights are *"essentially declaratory"* (European Court of Human Rights, Marckx v. Belgium, 13 June 1979, application no. 6833/74). Although this declaratory character seems to be evolving in the light of certain case law (European Court of Human Rights, Scozzari and Giunta v. Italy, 13 July 2000, judgments nos. 39221/98 and 41963/98; European Court of Human Rights, Maestri v. Italy, 17 February 2004, judgment no. 39748/98), it is still the rule outside of the situation of the pilot-judgments procedures.

during the pilot judgment procedure[52]. The Court normally reserves the right to take up these cases again, particularly when the time limit has expired. However, it was led to modify its position by concluding, in the case of a failure to execute a pilot judgment giving rise to a large number of similar applications, that *"the Court's continued examination of these cases in accordance with the practice adopted hitherto serves no useful purpose from the point of view of the purposes of the Convention"*[53]. The Court's position in this case may be explained by the large number of Ivanov-type applications (over 12,000). Nevertheless, the possibility of a pilot judgment in the context of breaches of the rule of law, a situation giving rise to less litigation, remains an inappropriate approach in our view. Indeed, even if the Court decided to resume hearing the suspended cases, that decision would only be taken after a relatively lengthy period had elapsed during which no solution had been found by the national authorities. It would therefore appear that, regardless of the arrangements adopted by the Court, the pilot judgment procedure proves unsuitable for resolving the problem of violations of the constituent elements of the rule of law in states party to the Convention.

Lastly, we could consider a more appropriate solution, involving action by the Committee of Ministers. Under Article 8 of the London Statute, it would still be possible for the Committee to suspend the right of representation of states which *"seriously infringe the provisions of Article 3"*[54], which states that *"every member of the Council of Europe recognises the principle of the rule of law, etc."*[55]. This sanction does not seem to be an appropriate solution to the crisis of the rule of law. In fact, this procedure has only been used in particularly serious contexts, such as the dictarorship in Greece which led the country to denounce the Convention and leave the Council of Europe in 1969[56], or with the example of Russia in 2022 with first a suspension of rights of representation and then exclusion, linked respectively to the occupation of Crimea and the invasion of Ukraine[57]. Undoubtedly, breaches of the rule of law are constant and devastating, and the suspension of rights - without going as far as exclusion - could constitute a form of punishment for states that violate this principle. Nevertheless, the present situation does not appear to reach the seriousness of those that have previously led to the suspension or exclusion of a State from the Council of Europe, as these

52 The Court has already decided, in the context of a pilot judgment procedure, to suspend processing cases lodged after the date of the pilot judgment while continuing to process cases already lodged at the time of the judgment (see, for example, European Court of Human Rights, Burdov v. Russia (no. 2), 15 January 2009, application no. 33509/04, §144 et seq.) Finally, the Court has also been able to decide, exceptionally, not to suspend processing of pending applications despite the introduction of the pilot-stop procedure (ECtHR, Vassilios Athanasiou and Others v. Greece, 21 December 2010, application no. 50973/08, §58).

53 ECtHR, Burmych v. Ukraine, 12 October 2017, req. no. 46852/13 et al, §199. This judgment followed the pilot judgment against Ukraine 8 years earlier, ECtHR, Yuriy Nikolayevich Ivanov v. Ukraine, 15 October 2009, application no. 40450/04.

54 Council of Europe, Statute of the Council of Europe, London, 5 May 1945.

55 *Ibid.*

56 Committee of Ministers, Resolution (70) 34 on the legal and financial consequences of the withdrawal of Greece from the Council of Europe, 27 November 1970.

57 Committee of Ministers, Resolution CM/Res(2022)2 on the termination of the Russian Federation's membership of the Council of Europe, 16 March 2022.

procedures are clearly reserved for extremely serious circumstances. What's more, although suspension is considered to be *"a temporary and not a final measure, which leaves the channels of communication open"*[58], it has to be said that such a sanction generally runs the risk of having the opposite effect by pushing an already recalcitrant State to entrench into its position.

B) Using the existing arsenal

Compared to the proposals mentioned, which appear to be unsuitable, it is more relevant to focus on the possibilities of adapting pre-existing tools available to the various stakeholders. This crisis does indeed seem to be a major distinction between the action of the Council of Europe and the action of the European Union; between an organisation defending the rule of law and an organisation which uses the obligations of states to respect the rules, as a weapon to punish any breach or violation. Today, while the CJEU confirms the validity of the conditionality of funds[59] and the European Commission intervenes to put this mechanism in place[60], the Strasbourg Court, unlike its Luxembourg counterpart, is pursuing the protection of the principle against possible violations on the part of the State parties, without however seeking to use new tools. This is the direction in which we need to rethink the action of the various stakeholders in the conventional system.

One possibility would be to rely on the work of the Venice Commission. In response to the limitations of the definition of the rule of law, it would seem necessary for the Commission to continue its work and to go into greater depth or clarify the implications of this principle. Without seeking a comprehensive definition, the Venice Commission can still further develop its explanations of how the rule of law should be viewed in the light of the new obstacles created by populism and the actions of certain states[61].

Moreover, the Committee of Ministers could, in supervising the execution of judgments, make more regular use of the option of bringing an action for failure to fulfil obligations, as permitted under Article 46 § 4 of the Convention since the entry into force of Protocol 14. The Committee of Ministers has so far used this procedure only twice, once against Azerbaijan in 2017[62]

58 Council of Europe, Council of Europe suspends Russia's representation rights, Press Room, *25* February 2022, available online: https://www.coe.int/fr/web/portal/-/council-of-europe-suspends-russia-s-_rights-of-representation.

59 CJEU, Hungary v. Parliament and Council, C-156/21, 16 February 2022; CJEU, Case Poland v. Parliament and Council, C-157/21, 16 February 2022.

60 European Commission, Proposal for a Council implementing decision on measures to protect the Union budget against breaches of the rule of law in Hungary, COM(2022) 485 final, 18 September 2022.

61 We are thinking in particular of the examples given above, i.e. the instrumentalisation of judicial formalism, the almost systematic rejection of reports of violations affecting the rule of law, etc.

62 The referral to the ECtHR by the Committee of Ministers on 5 December 2017 will give rise to the Mammadov v Azerbaijan judgment of 29 May 2019, req No 15172/13.

and a second time against Turkey in 2022[63]. The use of this remedy in non-executed judgments finding violations of the rule of law would thus constitute a means of pressure available to the Committee of Ministers. The explanatory report of Protocol 14 states that the introduction of this remedy for failure to fulfil obligations represents a more moderate alternative to the suspension or exclusion of a State under Article 8 of the Statute of the Council of Europe[64]. Such an action would provide greater support for a judgment by giving the Court the opportunity to rule once again on the situation of the State concerned.

Another possibility would be to consider more frequent use of the inter-State remedy available under Article 33 of the Convention. Most of the inter-State cases that have been decided by the Court show a certain misuse of this procedure as it was originally intended. Originally, the treaty system considered that through an inter-State application a State should *"not be regarded as acting to enforce its own rights, but rather as submitting a question affecting European public policy to the Commission"*[65]. However, most of the inter-State appeals lodged showed that states were using this procedure with the political intention of protecting their nationals[66] or as a means of exerting diplomatic pressure[67]. In these situations, the Court finds itself playing more the role of an arbitrator in a conflict between states, following the example of the International Court of Justice. As a political weapon at the disposal of states, this inter-state recourse could now constitute an interesting action for the crisis of the rule of law. An action brought by one or more states against another State for breaches of the rule of law could in fact represent a strong political gesture, enabling the Court to act as arbitrator.

Finally, a more divisive possibility would be to consider a more restricted use of the concept of the rule of law by the European Court of Human Rights. Considering that the crisis of the rule of law mainly concerns breaches of the constituent elements of the concept in its procedural aspect, it would therefore seem more appropriate to concentrate and limit the use of the rule of law in its formal aspect. If *"it was from their enemies, and not from their friends, that cities learned to build high walls"*, we could also add that it was from their enemies that cities also learned to limit the area they could effectively protect. To vast, indefensible territories, one would prefer a smaller territory,

63 The referral to the Court of Human Rights by the Committee of Ministers on 2 February 2022 gave rise to the Kavala v. Türkiye judgment of 11 July 2022, application no. 28749/18.

64 Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13 May 2004, paragraph 100, p. 19.

65 Commission EDH, Austria v. Italy, 11 January 1961, claim no. 788/60.

66 For example, see Commission EDH, Austria v. Italy, *op.cit*; Court of Human Rights, Denmark v. Turkey, 5 April 2000, application no. 34382/97.

67 For example, see Commission EDH, Danemark, Norvège, Suède et Pays-Bas c. Grèce, 24 janvier 1968, req n° 3321/67 à 3323/67 et 3344/67; Commission EDH, Danemark, Norvège, Suède et Pays-Bas c. Grèce, 16 juillet 1970, req n° 4448/70; Commission EDH, France, Norvège, Danemark, Suède et Pays bas c. Turquie, 6 décembre 1983, req n° 9940-9944/82.

but whose defence can be guaranteed. In the same way, should we not prefer a principle that is mobilised in a more concentrated way, in a more precise area, rather tha one extending diffusely over the entire Convention. Since the crisis of the rule of law confronts the principle with new obstacles and infringements in its formal aspect, it would seem safer to strengthen this aspect of the principle further before seeking to mobilise it in a much more evasive substantive aspect. Extending the implications of the rule of law through its substantive component without defining all the implications of the principle in its formal component seems to us to be an extension of the principle that might end up weakening it instead of strengthening it.

Ultimately, when hesitating about what action should be taken in the context of this crisis, there is, in our view, one certainty - one that is clearly shared in view of the title of the final theme of this conference - and it is that action can and must be taken. Just as *"the Convention is a living instrument to be interpreted in the light of current conditions"*[68], we need to rethink the action of the various supranational organs in the face of the rule of law crisis. The conventional system and the Court's action, complementing that of the other Council of Europe stakeholders, must evolve and adapt to cope with the various changes. As outlined above, one of the most desirable developments would be to deepen and clarify the definition of the rule of law, at least formally[69]. In our view, it is indeed impossible to hope to defend effectively against infringements of a principle whose scope and content escape the actors applying it. As Socrates put it, *"Anyone who holds a true opinion without understanding is like a blind man on the right road"*[70]. While there is no doubt that the rule of law is an essential principle, we now need to understand and determine the content of this principle so that we do not end up like blind men on the right path.

68 European Court of Human Rights, Tyrer v. United Kingdom, 25 April 1978, application no. 5856/72.

69 Such a definition would itself have to change and evolve in the future to adapt to new situations.

70 *"those who have any true notion without intelligence are only like blind men who feel their way along the road"*, Plato, The Republic (translated by Benjamin Jowett), Roman Roads Media, 2013, p.233.