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The Convention for the Protection of Human Rights and Fundamental Freedoms as an International Treaty and a Source of Individual Rights

Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950¹ is a particularly important component of the Council of Europe's *acquis*.² The Council's *acquis* comprises more than 220 treaties. The most important elements of this legacy are those regulations which lie at the core of the European legal system for the protection of human rights and fundamental freedoms.³ The Convention for the Protection of Human Rights and Fundamental Freedoms, along with its additional protocols, which was undoubtedly inspired by the provisions of the Universal Declaration of Human Rights, constitutes the most advanced system of regional protection of human rights. The Convention is particularly distinctive not only against the backdrop of the entire global system for the international protection of human rights, but also among other regional systems. What makes the Convention stand out is the fact that it deploys effective international moni-

1 Hereinafter: the Convention.

2 European Treaty Series, no. 005; Polish version: Journal of Laws of 1993, no. 61, item 284.

3 List of the Council of Europe treaties: <<https://www.coe.int/en/web/conventions/full-list>>.

toring mechanisms, including judicial procedures conducted within the European Court of Human Rights.⁴

It can be argued that no other international treaty, be it of a universal or regional nature, is as important as the Convention for providing effective international protection of individuals in their relations with states. In other words, the provisions of the Convention and the way in which its monitoring mechanisms are used in practice demonstrate how the concept of individual rights and freedoms has evolved towards granting individuals the right to draw on the Convention directly and use some of its provisions.⁵

In the context of this article, it should be emphasized that the Convention, like any international agreement, is subject to the law of treaties, as outlined in the Vienna Convention on the Law of Treaties of 23 May 1969.⁶ This applies to its interpretation as well as to the way in which it takes effect and is applied in practice. However, due to the special nature and contents of the Convention, especially those related to individual rights and freedoms, the ECtHR has developed its own interpretation techniques which expand on the Convention provisions in an interesting way. This claim will be discussed hereafter.

For states, the Convention is a direct source of rights and obligations under international law, just like any other international agreement. Therefore, the Convention's provisions should be executed by the states-parties in good faith, in accordance with the *pacta sunt servanda* principle. These obligations are specific to international human rights law treaties, which is a relatively new area of international law. International human rights law, which is an area of law primarily concerned

4 Hereinafter: "the Court" or "the ECtHR". Discussed at length by: M. A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2009; B. Gronowska, *Europejski Trybunał Praw Człowieka. W poszukiwaniu efektywności ochrony jednostki*, Toruń 2011.

5 A. Gądkowski, *Wpływ orzecznictwa Europejskiego Trybunału Praw Człowieka na sytuację prawną jednostki w dziedzinie zabezpieczenia społecznego w Polsce*, Poznań 2020, p. 174 et. seq.

6 UNTS vol. 1155, p. 331; Polish version: *Journal of Laws of 1990*, no. 74, item 439.

with the protection of individuals in their relations with states, epitomises the overall evolution of international law in the past few decades.

Characteristically, some of the provisions of international human rights law address individuals directly, which means that individuals can draw on them when seeking resolution to their issues before international bodies, including judicial bodies. Such international bodies hear claims which individuals make against states that are alleged to have breached their international treaty obligations. This implies that international law clearly interferes in the relations between individuals and states. In these relations individuals are subject to the state jurisdiction, and the state may exercise its regulatory powers.

There is no doubt, however, that the Convention, as an international agreement, is first and foremost a source of international law in relation to the states-parties. After all, international agreements are the major source of state obligations with regard to international protection of human rights. Of course, in this context we should not disregard the importance of international custom and the general principles of law in this area. Likewise, we should not dismiss the importance of so-called international *soft law* regulations. The Universal Declaration of Human Rights, adopted as a UN General Assembly resolution, is a prime example here.⁷

It should be noted here that international agreements, which define states' obligations in respect of human rights, usually set out their obligations related to the protection of individuals as the right holders. At the present stage of international law development, individuals themselves cannot be parties to international treaties. In a wider context, therefore, it can be stipulated that all international human rights treaties are the source of specific obligations for their contracting states-parties. The most fundamentally important obligation in this respect is taking appropriate measures to ensure that individual human rights are respected in accordance with the international standards established in treaties.

⁷ Text of the Declaration: A/Res. 217 A III.

The Convention is particularly distinctive in this respect, in comparison with other international human rights treaties. It lays out a wide catalogue of individual rights and, moreover, it makes them subjective. Therefore, individuals are the primary rightholders of the rights provided for in the Convention.

The Convention in the Context of the International Legal Obligations of States-parties

Article 1 of the Convention does not only define its jurisdiction *ratione personae*, *ratione materiae* and *ratione loci*. It also formulates a general obligation of states-parties to respect human rights. This article sets forth an obligation for states-parties to ensure that all individuals under their jurisdiction shall enjoy the rights and freedoms listed in section 1 of the Convention, i.e. those defined in articles 2–14, as well as in the relevant additional Protocols. The practice of applying the Convention's provisions, in particular of the abundant and diverse ECtHR case law, demonstrates that the obligations of states-parties are twofold: negative and positive.⁸ The negative obligations constitute the fundamentals of the protection system set out in the Convention. They should be understood as the obligation of states to refrain from human rights breaches, i.e. states-parties shall not interfere in the enjoyment of individual rights and freedoms. In fact, such a prohibition can be categorical only in exceptional circumstances. The Convention's role here is to set out and apply clear rules for establishing any limitations to the enjoyment of individual rights and freedoms. Whenever such a basic prohibition to interfere is not effective in practice for securing individual rights and freedoms, the positive obligations of states-parties need to come into play, e.g. those stipulated in art. 2 and 6 of the Convention, or art. 3 of

⁸ The matter is discussed more broadly by M. Balcerzak, in *Odpowiedzialność państwa – strony Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności. Studium prawnomiędzynarodowe*, Toruń 2013 and E. Morawska, *Zobowiązania pozytywne państw – stron Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności*, Warszawa 2016.

Protocol 1. These obligations of states set out in the above – mentioned articles are aimed at creating both legal and factual conditions enabling individuals to exercise their rights and freedoms. The ECtHR case law indicates that such positive obligations of states, which result from all human rights and freedoms secured in the Convention, are actually the flipside of the negative obligations, i.e. those related to the prohibition of states to interfere in the enjoyment of individual rights and freedoms.⁹ Particularly important here is the obligation of states to secure individual rights and freedoms at least to the degree specified by the universal and regional standards of international human rights protection adopted by the state. In particular, this obligation implies that states need to undertake appropriate measures to ensure genuine and effective protection of individual rights and freedoms at the national level, in line with international standards. Provisions contained in the Convention do not specify, *in abstracto*, what measures should be undertaken by states-parties. The detailed nature of these obligations is specified mainly in the ECtHR case law. It should be noted that these obligations are fulfilled both at the substantive and procedural level. With regard to the substantive aspect, states-parties are obliged to ensure that national law and implementing legislation are compliant with the rights and freedoms provided for in the Convention, in terms of their content, scope and the line of interpretation. As far as the procedural aspect is concerned, multiple provisions of the Convention oblige the states-parties to implement adequate procedures, in line with their internal legal system, which will ensure legal protection against breaches of individual rights and freedoms.¹⁰ Therefore, it is self-evident that national law needs to ensure that the Convention is implemented effectively in practice. This claim is further

9 E.g. *Airey v. Ireland*, judgment of October the 9th 1979, application no. 6289/73, § 32. The Court's case law is fully available at the ECtHR online database at: <<https://hudoc.echr.coe.int>> Hereinafter referred to as HUDOC.

10 Discussed in detail by L. Garlicki, *Komentarz do artykułu 1 Konwencji*, in *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Tom I, Komentarz do artykułów 1–18*, ed. L. Garlicki, Warszawa 2010, p. 33.

substantiated by the fact that art. 52 of the Convention authorises the Secretary General of the Council of Europe to ask for clarification from states-parties regarding the ways in which their national law ensures effective application of the Convention. In practice, this may take the form of legislation that establishes an adequate protection framework in both substantive and procedural law.¹¹ However, it should be noted that should the state fail to fulfil this obligation, or should it fulfil it inadequately, the obligation is transferred onto the international level. In practice, this is where the treaty bodies of the Convention take over, in particular the European Court of Human Rights. This fundamental principle of subsidiarity has been clearly defined in the ECtHR case law. For instance, in *Handyside v. United Kingdom*, the Court pointed out that “the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (...). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines”.¹² At the national level, the principle of subsidiarity implies that states-parties are free to ensure adequate protection of individual rights and freedoms in various ways which they deem fit. However, they cannot fail to provide the minimum level of protection guaranteed in the Convention. From the point of view of the Council of Europe, the principle of subsidiarity implies that the Court respects the superiority of national law in providing adequate protection of individual rights and freedoms. The adequate level of protection, on the other hand, is determined by international standards, in particular those set forth in the Convention. Therefore, the states are independent in this respect to a certain extent, but their actions in the area of human rights protection are subject to international scrutiny, which follows from their treaty obligations.¹³ Needless to say, in line with the principle of subsidiarity, individuals may bring action before the ECtHR only if all avail-

11 Ibidem, p. 27 et seq.

12 ECtHR judgment of December the 7th 1976, application no. 5493/72, § 48.

13 Discussed in more detail by e.g. L. Garlicki, op. cit., p. 29.

able domestic law remedies have been exhausted. Moreover, the ECtHR does not act as an appellate court in such cases. Also, the ECtHR should not act in the national courts' stead in determining the correct interpretation of domestic law. Besides, it should be noted that ECtHR judgments are declaratory, which means that they do not alter the binding force of either national courts' judgments or national legislation. Although the ECtHR judgments are not generally applicable law and they relate to specific cases, they have significant effects in the national legal order, especially from the point of view of the protection of individual rights and freedoms. Such effects are achieved both within the framework of individual and general measures of implementing the Court's judgments by states-parties.¹⁴

The role of the ECtHR is particularly distinctive in that the specific obligations of states-parties result from the Court's interpretation of the Convention. The Convention is an international treaty formulated at a high level of abstraction, i.e. it requires a certain interpretative effort and it does not contain detailed guidelines related to its interpretation. As a result, relevant articles of the Vienna Convention on the Law of Treaties need to be applied to interpret certain provisions of the Convention. As early as in the 1975 judgment in *Golder v. The United Kingdom*, the ECtHR confirmed that the Court's interpretation should be guided by the general principles of interpreting treaties outlined in art. 31–33 of the Vienna Convention.¹⁵ However, the Convention is a special international treaty in this regard, since it exerts direct impact on the relations between states and their citizens, as well as any other individuals under their jurisdiction. These issues are particularly significant when the interests of both states-parties and individuals are taken into account. In addition, some norms enshrined in the Convention are addressed directly to individuals as the right holders. The international legal status of individuals is fundamentally different than that of states-parties in this respect. Individuals here are the right

14 A. Gadkowski, op. cit., p. 208 et seq.

15 ECtHR judgment of February the 2nd 1975, application no. 4451/70, § 29, HUDOC.

holders and states are the obliged entities. Therefore, as the Court stated in the 1968 case *Wemhoff v. Germany*, in the process of interpreting the provisions of the Convention, it is advisable to “seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties”.¹⁶ As a result, in the 1989 case *Soering v. The United Kingdom*, the Court found that “in interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms”.¹⁷

What this means is that through its judgments and decisions the ECtHR has developed its own characteristic interpretation techniques. These techniques are tailored to the special nature of the Convention as an international treaty and to its dynamic application in practice.¹⁸ There are two interpretation methods which are important from this point of view: the *living instrument* doctrine and the doctrine of effectiveness¹⁹. When following the former interpretation method, the ECtHR assumes that the Convention’s provisions need to be interpreted dynamically, as it is a “living organism” created to protect human rights. Protection standards need to be applied in a flexible way, respecting the dynamically changing circumstances in the states that are parties to the Convention. However, states-parties should always strive to increase the level of protection they provide. In practice, this means that it is necessary to depart from the standard way of categorising events as breaches of the Convention, and to start giving consideration to various circumstances accompanying the purported breach, both at the national and international level. For example, in the 2002 case *Stafford v. The United Kingdom* the Court clearly stated that it must take into account “the changing conditions and any

16 ECtHR judgment of June the 27th 1968, application no. 2122/64, § 8.

17 ECtHR judgment of July the 7th 1989, application no. 14038/88, § 87.

18 M. A. Nowicki, op. cit., p. 556.

19 A. Mowbary, *The Creativity of the European Court of Human Rights*, “Human Rights Review” 1995, vol. 5, p. 57 et seq.

emerging consensus discernible within the domestic legal order of the respondent Contracting State”.²⁰ Similarly, in the 1978 case *Tyrer v. The United Kingdom* the Court concluded that “the Convention is a living instrument which (...) must be interpreted in the light of present – day conditions”.²¹ In this context, it should be emphasized that such a dynamic interpretation of the Convention by the ECtHR translates primarily into the creative nature of its case law. This way of interpreting does not mean, however, that the ECtHR can derive new rights which were not originally formulated in the Convention. On the other hand, with regard to the doctrine of effectiveness, the ECtHR attempts to derive positive obligations of states-parties from the Convention, which further clarify the general obligation of states to respect human rights, as formulated in art. 1 of the Convention. Therefore, the point is that states, in the process of applying the Convention and fulfilling their international obligations, should undertake specific actions (both legislative and institutional) which would bring genuine protection of the rights and freedoms enshrined by the Convention. Thus, in the 1979 case *Airey v. Ireland*, the Court stated that “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.²² The doctrine of effectiveness, defined in this way, is therefore used by the Court to ensure that in the process of fulfilling their international treaty obligations deriving from the Convention, the states-parties shall not just refrain from interfering with the realisation of human rights, but they must provide genuine protection of the rights and freedoms contained therein.

20 ECtHR judgment of May the 28th 2002, application no. 46295/99, § 68.

21 ECtHR judgment of April the 25th 1978, application no. 5856/72, § 31.

22 *Airey v. Ireland*, op. cit., § 24. Commentary: A. Hauser, *Prawo jednostki do sądu europejskiego*, Warszawa 2017, p. 9.

The Convention in the Context of Individual Rights

Undoubtedly, the Convention is an important international treaty in the sense that it is a source of individual rights. However, this statement should be understood and discussed in a wider context. A more general statement could be made, namely that human rights are actually individual rights. First and foremost, this concept entails that individual rights define the legal situation of individuals in the specific norms which are addressed directly to them.²³ After all, individual human rights are grounded in human nature. All humans are endowed with them, regardless of any decisions by state legislature or any other state authorities. In this context, human rights constitute a whole set of individual rights which are derived from the inherent and inalienable dignity all humans are endowed with. The goal of these rights is to provide individuals with the opportunity for self-development. This is how the nature of human rights has been defined not only in the preamble to the Universal Declaration of Human Rights, but also in all the most significant international regulations in this area – universal and regional alike. This makes it possible to evaluate the normative structure of human rights from the point of view of individuals and their individual rights.

According to Sarnecki, subjective rights (in the context of human rights) should be understood as a legal situation created by the law for the benefit of an individual. In this sense, subjective rights shape the legal status of individuals. What this means for individuals is that they may demand certain behaviour from the obliged entity. This can encompass both actions and omissions. The obliged entity in this relationship is required by law to perform the expected behaviour. Most importantly, should the obliged entity fail to fulfil their obligation in this matter, the individual has the legal means to enforce it. This possibility is an indispensable element of subjective rights.²⁴ The discussion above,

²³ The matter is discussed broadly in S. Wronkowska, *Analiza pojęcia prawa podmiotowego*, Poznań 1973, p. 5 et seq.

²⁴ P. Sarnecki, *Prawo konstytucyjne Rzeczypospolitej Polskiej*, Warszawa 2005, p. 88.

particularly of the nature of state obligations under the Convention as well as the role of ECtHR in the monitoring system of the Convention, demonstrates that the Convention is a fundamentally important source of international individual rights. Such a line of reasoning is further substantiated by certain provisions of the Convention which provide the grounds for lodging individual claims. An example of such a provision is art. 13 of the Convention, which explicitly guarantees individuals the right to effective appeal, which can be broadly understood as a means of protecting their rights.

In relation to the above discussion, it is worth noting that Z. Kędzia has observed that human rights have a twofold structure. The first layer are subjective rights which individuals are entitled to, and which are guaranteed by the states and other entities. Hence, they are rights which ensure the protection of values which are particularly important not only for individual self-development but also for the functioning of a society. The second layer is the legal norm from which the subjective right is derived. Both of these layers are inherently linked with each other and constitute two aspects of a single legal structure.²⁵ The legal structure discussed by Kędzia refers to both the domestic and international legal order. The thesis that the source of individual rights can be found in international law is, therefore, fully justified.

As stated above, the Convention is a source of international obligations of states-parties, but also at the same time it is a source of individual rights, which makes it so exceptional among other international treaties. It introduces a wide range of individual rights and raises them to the status of subjective rights. It should be emphasised that these characteristics make the Convention stand out in comparison to other classic international treaties. Its special status does not require further justification. On the other hand, the issue of the status of ECtHR case law as

25 Z. Kędzia, *Burżuazyjna koncepcja praw człowieka*, Wrocław 1980, p. 168 et seq. and J. Czapiek, *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka*, Olsztyn 2014, p. 26 et seq.

a possible source of individual rights is more complex. ECtHR judgments where the Court found a breach of state obligations and thus specifying the Strasbourg standards, despite being declaratory in nature, are actually binding for state parties and should be acted upon accordingly by states-parties in good faith. Formally, they do not create obligations *erga omnes* as their legal force is relative. However, besides the fact that ECtHR decides upon a specific case, each judgment also expresses significant opinions and standpoints regarding the compliance of a specific legal regulation or action with the Convention. According to the doctrine of *res judicata* it is possible and permissible for entities other than the complainant to lodge claims before state bodies (including judicial bodies) on the basis of the interpretation of the Convention discussed in ECtHR judgments. Such claims may be lodged not only in the countries to which the given ECtHR judgments pertain, but in other countries too.

Regarding the relationship between ECtHR judgments and subjective individual rights, it may be stated that art. 46 of the Convention does not establish the sources of subjective rights *per se*. As a result, it also does not establish the source of specific positive law-making obligations of states.²⁶ However, there is no doubt that art. 46 does provide the basis for reconstructing an international obligation for states. This general obligation becomes specific in particular cases, i.e. once the Court decides on the legal classification of facts presented by the complainant.²⁷ Introducing any specific legislation specifying those obligations remains within the remit of the state. States enjoy relative legislative freedom in this respect, which may be justified by various reasons, both systemic and functional. Looking at how ECtHR judgments are executed these days, it becomes clear that states no longer have unrestricted freedom

26 For more discussion of this issue, see eg. M. Ziółkowski, *Wyrok ETPCz jako podstawa wznowienia postępowania cywilnego*, „Europejski Przegląd Sądowy” 2011, No. 9, p. 35 et seq.

27 M. Ziółkowski, *Obowiązek przestrzegania wyroków Europejskiego Trybunału Praw Człowieka w świetle art. 46 Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności oraz rezolucji Zgromadzenia Parlamentarnego Rady Europy z 26 stycznia 2011*, in: *Wykonywanie wyroków Europejskiego Trybunału Praw Człowieka przez Sejm*, Biuro Analiz Sejmowych, Warszawa 2012, p. 23 and seq.

in determining the methods of enforcing the Court's judgments. Currently there is a tendency to emphasise the competence of the Court in terms of specifying the implementation obligations of states. In principle, however, states-parties are responsible for the outcome. They are also autonomous when it comes to regulatory (enforcement) aspects and are free to choose appropriate measures intended to execute ECtHR judgments.²⁸ At this point, it is necessary to quote the stance of the Polish Constitutional Court, which still seems relevant: "(...) it is an internal matter of states-parties to draw conclusions from ECtHR judgments; they need to consider the scope, adequacy, necessity and proportionality of the measures they take, in terms of changes in legal regulations, application of law, also including its interpretation".²⁹

It should be noted that the literature on the subject abounds with arguments to support the thesis that art. 46 of the Convention is not a source of individual rights *per se*, and neither is it a source of specific obligations for states related to legislation in this area. It is undoubtedly true that the Convention ensures the protection of individual rights formulated in art. 2–14 therein, as well as in the Additional Protocols. The rights enshrined in the Convention can give rise to individual claims. However, it should be noted that the option to lodge claims for the protection of individual rights is not derived from art. 46 of the Convention. Art. 46 addresses the states-parties as the obliged entities, and not individuals as the protected entities. As has already been underlined, obligations arising from the *pacta sunt servanda* principle are incumbent on states-parties. Final ECtHR judgments formulate obligations for the respondent states-parties which violated the provisions of the Convention. This argument can be further substantiated by the substantive cri-

28 I. C. Kamiński, R. Kownacki, K. Wierczyńska, *Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w polskim systemie prawnym*, in: *Zapewnienie efektywności orzeczeniom sądów międzynarodowych w polskim porządku prawnym*, ed. A. Wróbel, Warszawa 2011, p. 97 et seq.

29 Judgment of the Polish Constitutional Court of October the 18th 2004, file ref. no. P 8/04, OTK – A 2004, no. 9, item 92.

teria for an objective assessment of the implementation of international obligations by states-parties. Another argument that can be invoked in support of this thesis refers to the material criteria of an objective assessment of the implementation by a state party of its international obligations. This concerns both the obligation to implement the provisions of the Convention and the obligation to implement the ECtHR judgments. Naturally from the formal point of view both types of obligations should be fulfilled by the states in good faith, according to the *pacta sunt servanda* principle mentioned above. The fulfilment of states-parties' obligations arising from the Convention can be evaluated objectively on the basis of the *pacta sunt servanda* principle formulated in the Vienna Convention of 1969, as well as its rules for interpreting international treaties. However, with ECtHR judgments the matter is more complex.

Apart from a general obligation to fulfil its obligations in good faith, art. 46 par. 1 of the Convention does not formulate any *in abstracto* substantive criteria for evaluating the implementation of specific obligations by respondent states-parties arising from ECtHR judgments; hence there may be multiple forms of implementation. It depends on various factors, such as the nature of the breach, the nature of the rights which are violated, the source of the breach, the nature of the act as the cause of the breach, among others.³⁰ This implies that the state party's obligation to implement the ECtHR judgment in good faith must be assessed in the context and on the basis of a specific case. However, it should always take into account the assessment framework, which results from the judgment itself. Therefore, the respondent state which the Court found to be guilty of a breach is in fact free to choose the measure it deems fit for putting an end to the obligations resulting from art. 46 of the Convention. However, this freedom of choice is only granted if the measures it opts for are consistent with the conclusions drawn from

30 Discussed at length by A. Bodnar, in *Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w Polsce. Wymiar instytucjonalny*, Warszawa 2018.

the judgment.³¹ However, a thesis can be put forward that from art. 46 an obligation for states-parties can be derived; this obligation is not unambiguous, though, and its realisation depends on the level of involvement of the Committee of Ministers of the Council of Europe, i.e. in fact it depends on political decisions.³² In this context, a more general conclusion comes to mind, namely that implementing judgments of international courts is more difficult and complicated than implementing the judgments of domestic courts. Among other reasons behind it, this complexity results mainly from the special position of the state as a sovereign international law entity. In particular, it concerns its status before international courts, in the process of realising their jurisdiction and implementing their decisions.³³

When we evaluate the current content and wording of art. 46 of the Convention, we must remember that they were put forward in the Additional Protocol no. 14 of May 13, 2004, in relation to the introduction of new options to monitor the enforcement of ECtHR judgments.³⁴ This protocol equipped the Court with new competence to decide on cases where states-parties fail to fulfil their obligation (formulated in art. 46 par. 1 of the Convention) to implement the ECtHR judgments in good faith. Such infringement proceedings are exceptional and differ significantly from typical complaint or advisory proceedings. In infringement proceedings, the Grand Chamber of the European Court of Human Rights decides only about a possible infringement of international obligations (those formulated in art. 46 of the Convention) by states-parties. The legal basis for such decisions is provided in art. 31 b) of the Convention in connection with rule 99 of the Rules of Court.

31 See eg. M. Ziółkowski, *Obowiązek przestrzegania wyroków...*, op. cit., p. 27.

32 M.A. Nowicki discusses the procedure before the Committee of Ministers in more detail in: *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2013, p. 267 et seq.

33 A. Gadkowski, *Legal Basis for the Establishment of International Courts*, in: *Judicial Power in a Globalized World: Liber Amicorum Vincent De Gaetano*, eds. de Albuquerque P. P., Wojtyczek K., Cham 2019, p. 197 et seq.

34 European Treaty Series no. 194; Polish version: *Journal of Laws* of 2010, no. 90, item 587.

Should the Grand Chamber find an infringement, the case is transferred back to the Committee of Ministers. The Committee is a supervisory body which is tasked with ensuring that states-parties fulfil their obligations in this respect, hence it issues a final decision about the measures to be implemented in such cases.³⁵ Therefore, it cannot be considered as new proceeding against the state party, unlike a typical complaint proceeding. It should be considered as infringement proceeding regarding a breach, i.e. failure of a state party to comply with a significant international obligation arising from the Convention. Hence, a decision in such a case does not constitute a declaration of breach of the Convention in the sense of a violation of a specific subjective right formulated therein. An individual whose application initiated the proceedings which ended with an ECtHR judgment cannot point out to either the Court or the Committee of Ministers that a state party failed to fulfil its international obligation. Furthermore, individuals do not have the right to file complaints in such cases. If we assume that art. 46 par. 1 of the Convention pertains to subjective rights, it would mean that the Court would be entitled to decide in cases filed by individuals regarding the violation of states-parties' obligation to enforce ECtHR judgments in good faith³⁶. However, this is not the case, and the Court's decision initiates a control mechanism which is much more political in nature, namely the Committee of Ministers supervises the execution of final judgments of the ECtHR.

On the other hand, such a thesis does not predetermine that e.g. there are certain legislative actions which the state party must necessarily undertake to remedy the violation, which in turn would mean that the Court's judgment could be considered as executed. On the flipside, it would also be risky to venture a statement that failure on the part of the state party to undertake specific legislative actions would imply that an individual should be entitled to claims related to non-fulfilment of positive obligations by the state party, as defined in art. 46 par. 1 of the

³⁵ It is undoubtedly true that should the state party fail to execute an ECtHR judgment, this could in practice constitute a violation of individual subjective rights.

³⁶ L. Garlicki, *op. cit.*, p. 353.

Convention. Nevertheless, failure to undertake such legislative actions by the state would of course mean that the above-mentioned *infringement proceedings* may be initiated, as per Additional Protocol no. 14.

Concluding Remarks

The most important role of the normative system of the Convention is to protect individual rights in an effective way. The effectiveness of this system of protection should, in turn, be assessed from the point of view of the actual individual rights derived from ECtHR judgments, as well as the possibility of executing these judgments in practice. The Court decides whether the facts of the case as presented by the individual complainant point to the possibility of violating individual rights. Such a violation would in turn mean a breach of an international legal obligation by the state party. The Court does not have the authority to specify the exact nature of the international legal obligations of states-parties. It is also not empowered to enforce the implementation of its judgments effectively. Therefore, the states-parties' legislatures have relative freedom to undertake such legislative and normative actions which would enable the proper implementation of ECtHR judgments. Under no circumstances, however, should this freedom be unrestricted. In each case the scope of this freedom should be determined by the need to provide effective mechanisms and institutions for the international protection of human rights. Of course, it is not impossible to imagine a particular situation where a state would not operate any such mechanisms for the implementation of ECtHR judgments whatsoever. Similarly, a state could fail to undertake any actions at all to remedy the breach of the Convention. In such cases, it would be fully justified to claim that such a state fails to fulfil its obligations formulated in art. 46 par. 1 of the Convention. In specific cases this could lead to the Court finding a violation of individual human rights by a state party.³⁷

³⁷ M. Ziółkowski, *Obowiązek przestrzegania wyroków...*, op. cit., p. 36.

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SUMMARY

The Convention for the Protection of Human Rights and Fundamental Freedoms as an international treaty and a source of individual rights

The aim of this paper is to present the legal nature of the Convention for the Protection of Human Rights and Fundamental Freedoms as a special treaty under international human rights law. The article focuses on the twofold nature of the Convention. First, it presents the Convention as an international treaty, and thus as a source of specific obligations of states-parties. Second, it presents the Convention as the source of fundamental individual human rights. The article also discusses the role of ECtHR case law in the context of fundamental individual human rights.

Keywords: human rights law, international protection of human rights, fundamental rights, Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights.

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