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(Un)justified Interventionism of the ECtHR in the Execution Process?

From Declaratory Judgments to Indications of Non-Monetary measures

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Inhoudsopgave

List of abbreviations

CDDH - Steering Committee for Human Rights

CoE – Council of Europe

CoM – Committee of Ministers

ECHR - European Convention of Human Rights

ECtHR – European Court of Human Rights

ILC Articles - Articles of Responsibility of States for Internationally Wrongful Acts

MoA – Margin of Appreciation

Chapter 1 - Introduction

Introducing the topic and research question

This thesis will mainly explore the evolving role of the European Court of Human Rights (hereafter 'the Court') towards the indication of non-financial remedial measures in Court judgments in order to provide redress to successful applicants that found a violation of their rights under the European Convention of Human Rights ('the Convention') and/or its Protocols.[1]

The purpose of this study is to clarify the Court's ambiguous standpoint with regard to non-financial remedial measures and to propose solutions to as how the Court can enhance implementation of judgments, without stepping beyond the boundaries of its given powers by the Convention.

Since 2004, the Court has become progressively involved in the implementation of its own judgments, in developing new remedial tools beside damages awards. Partly those tools are established due to the evolving trend to include remedial measures going beyond payment of just satisfaction either in the reasoning[2] or the operative part[3] of the judgment.[4] Before looking into this trend more detailed, it is essential to understand the general purpose of Court judgments.

Foremost, the judgments of the Court contribute to a better understanding of the right embodied in the Convention and its Protocols and concretize those human rights guarantees. It's the interpretation of the Court that shapes the Convention in the first place. But, the concrete effect of the Convention depends on the will of the states to implement a judgment in their domestic legal order. This effectiveness is achieved through a combined and coordinated dialogue and interaction between a plurality of actors, such as the judicial dialogue between the Court and the States, the more political dialogue between the Committee of Ministers (hereafter "CoM") and the States and the distribution of powers between the Court and the CoM.

[1] Inspiration drawn upon the article of A. Mowbray, An Examination of the European Court of Human Rights' Indication of Remedial Measures (2017), Human rights law Review, 17, 451 - 478

[2] The reasoning part is the non-binding part of the judgment

[3] The operative part is the binding part of a judgment which the state concerned should carry into effect

[4] Jahn, Ruling (in)directly through individual measures? Effect and legitimacy of the ECtHR's new remedial power (2014), ZaöRV 74 (1) at 1

Regarding the judicial dialogue, an increased tension has been established between an unambiguous interpretation of Convention guarantees by the Court to preserve a certain legal uniformity and the respect of diversity between the states in the way they protect those Convention rights. The latter, better known as the Margin of Appreciation (hereafter "MoA") doctrine, obliges the Court in principle to refrain from indicating the way a judgment should be implemented. However, over the last two decades, the Court has become more active in guiding the states in the implementation/execution process. Especially with the indication of specific orders, the Court has substantially reduced the MoA normally largely granted to the member state when implementing a Court's judgment.
This increased interventionism of the Court for guiding and assisting the signatory states in the implementation/execution of its own judgments leads to the following research question:

Does the Court have the competence to include in the operative part of its judgments prescriptions/consequential orders as to how a Respondent State has to act in order to stop an ongoing violation of a Convention right and/or indicate the way a state should redress the situation?

The first concern which arises with this question is legal certainty. In the light of the legal instruments, the Court's jurisprudence and the practice of the CoM, I will examine the legal basis for the Courts competences in respect of remedial measures inserted in both the reasoning and operative part of the judgment and whether this role is justified from both a legal and political perspective.
It seems logical that effective protection of human rights is only possible when the Court has the power to make a "consequential order"[5] in order to determine how a respondent state should abide by its judgment finding a violation, because this "may put additional pressure on the state concerned to secure execution"[6]. But could it be that such a power is not included in the competences of the Court? Could it be that consequential orders would therefore not share the binding force of a judgment because they do not belong to "*res judicanda*"[7], which are the matters the Court is called upon the decide?[8]

[5] This means an order inserted in the operative part, having an inherent mandatory effect
[6] H. Keller and C. Marti, Reconceptualizing implementation: the Judicialization of the Execution of the European Court of Human Rights' judgments (2015), The European Journal of International Law Vol. 26 no. 4, at 849
[7] Judgment with binding judicial force
[8] On the subject H.-J. Cremer, Prescriptive Orders in the Operative Provisions of Judgments by the European Court of Human Rights: Beyond Res Judicanda, in A. Seibert-Fohr, M. E. Villiger, Judgments of the European Court of Human Rights – Effects and Implementation (2014), Ashgate, Nomos, at 39

If argued the opposite side, which circumstances and what reasons would justify those consequential orders.

This debate is based on a true legal dilemma, because operative provisions in a judgment are the source of the legal obligation attached to the respondent stated under art 46(2) and their binding force is based on the authoritative interpretation of the text of the Convention.[9]

This legal dilemma comes into sharp focus with the recent case of *Moreira Ferreira,* where the judges are at odds over the Court's authority to order remedies. As stated by A. Donald, the instant judgment addresses the highly disputed question on

> *"how far can - and should - the European Court of Human Rights recommend, or even compel, states to take certain measures after the finding of a violation of the European Convention of Human Rights?*

It was this particular judgment that caught my attention and established the interest for the research topic of my thesis. Due to the absence of an explicit detailed analysis and thorough discussion on remedies and modalities in the case law of the Court, this dissertation may be of relevance, because of its possible contribution to a better understanding of the current practice and evolving role of the Court regarding remedial measures and whether this judicial interventionism is justified.

Methodology & scope of thesis

The methodology used is this thesis is a descriptive and normative legal analysis. The descriptive element will come into play in the analysis of the case law of the Court, Convention provisions, non-binding documents of the CoE and other legal instruments and academic literature. The normative aspect will be applied when interpreting where the Court is and should go in regard of its remedial practice.

The first part will take the logic of the legal system under the loop in order to find a legal basis for non-financial remedial measures, analysing mainly the Convention articles and the Rules of the Court. Further on, I will conduct an analysis of jurisprudence evolved under the Convention in order to obtain a better understanding of the remedial practice of the Court and more specific the indication of non-financial remedial measures. In addition, I will look into

[9] A. Seibert-Fohr, M. E. Villiger, Judgments of the European Court of Human Rights – Effects and Implementation (2014), Ashgate, Nomos, at 28

the practice of the CoM, examining *inter alia* their supervisory reports, recommendations and resolutions to clarify their point of view on remedies. Also, the perspective of the states will be taken into account. Finally, some statistics on remedial measures will be provided.
Relying on the aforementioned sources, I will explain the historical practice, the types of remedial measures indicated by the Court and the reasons and justifications for the Court's evolving practice indicating such measures both in the reasoning and the operative part of the judgment. In addition, I will examine their implications for the division of powers under Art. 46 of the Convention between the Court and the CoM.
Lastly, I will propose several solutions for the Court to enhance implementation, taking into account the standpoint that the Court's judicial interventionism regarding the indication of non-financial measures is justified in exceptional cases.

Chapter 2 – The logic of the system

Introduction

Ubi Jus Ibi Remedium, "where there is the right, there is the remedy"[10]. This traditional civil law principle was turned into a European principle with the establishment of the European Court of Human Rights in 1953, tasked under article 19 of the Convention to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols". The purpose of this article is firstly to empower the Court to deliver a judgment stating whether the member state concerned has breached its obligation to protect human rights under the Convention.
A follow up question on this article is what the Court is supposed to do (or not) after it found a breach of the Convention, since its task is to put both an end to an ongoing Convention violation and prevent future violations.
According to Article 46 (2), the operative part of a judgment is the source of the legal obligation attached to the respondent state, but this article does not clarify what categories of pronouncements the Court can make in those operative provisions.
To obtain some clarity on those ambiguities, I will look into the legal instruments of the Convention system.

[10] Legal definition: https://definitions.uslegal.com/u/ubi-jus-ibi-remedium/

The first part of the legal analysis will take the *traveaux préparatoires* of the Convention as starting point, to understand better the wording of the text and the thoughts of the founding fathers with respect to remedial measures

In addition to the examination of the *traveaux préparatoires*, this chapter will take specific articles of the Convention and its Protocols under the loop to see whether there is an explicit or inherent legal basis for the indication of non-monetary remedial measures in Court's judgments.

Traveaux Préparatoires – The founding fathers thoughts on remedies

The idea of the establishment of a European legal instrument finds its origin in the International Committee of Movements for European Unity (hereafter 'European Movement').

In 1948, the European Movement, who were the Founding fathers of the Convention expressed in the final plenary session of the Congress of Europe in the Hague, that they aspired a Human Rights Charter which would guarantee liberty of thought, assembly and expression, as well as the right to form a political opposition and would furthermore provide adequate sanctions for the implementation of the Charter and redress for any citizens of the Signatory States.[11]

Those aspirations were adopted by the Congress in a resolution which stated that

> "…in the interest of human values and human liberty, the (proposed) Assembly should make proposals for the establishment of a Court of Justice with adequate sanctions for the implementation of this Charter (of Human Rights), and to this end any citizen of the associated countries shall have redress before the Court, at any time and with least possible delay, of any violation of his rights as formulated in the Charter"[12].

The Congress stressed here the importance of 'adequate sanctions' for the implementation of the Charter and 'redress' for successful applicants with the "least possible delay", which clearly shows their support for adequate remedies.

The text of the draft European Convention on Human Rights (hereafter 'Draft Convention') was prepared by the European Movement after the Congress of the Hague took place.

[11] CoE, Report of the Control System of the European Convention of Human Rights, H (92) 14 (Dec. 1992), at 4
[12] CoE, Protocol No. 11 to the Convention on Human Rights and Explanatory Report, H (94) 5, (May 1994), at 17

With regard to the topic of my thesis, there are some interesting articles included in the Draft Convention. For example, Article 13 (b) of the Draft Convention presented by the European Movement to the Committee of Ministers of the Council of Europe in 1949, states that:

> "The Court may either prescribe measures of reparation or it may require that the State concerned shall take penal or administrative action in regard to the persons responsible for the infringement, or it may demand the repeal, cancellation or amendment of the act."[13]

It was made clear in the French text that the Court was the one who could bring the matter before the Council of Europe, as mentioned under Article 14:

> "In the event of failure to comply with a judgment of the Court the matter shall be brought before the Council of Europe, which shall take such action as it may consider appropriate."[14]

The Draft Report on the Convention of the Consultative Assembly's Committee on Legal and Administrative Questions, presented by Rapporteur Mr. Teitgen (French deputy reporter to the Committee) included Article. 24 and Article 27[15], attributing the following competences to the Court:

Article 24:
"The verdict of the Court shall order the State concerned:

1. To annul, suspend or amend the incriminating decision
2. To make reparation for damages caused
3. To require the appropriate penal, administrative or civil sanctions to be applied to the person or persons responsible."

Article 27:
"In case of non-execution of a verdict of the Court, the latter shall appeal to the Council of Europe which shall take appropriate measures".

However, the threefold notion of remedies included in Article 24 of the proposal was omitted by the Commission to the Assembly in its final report, because of its opposing view that the

[13] CoE, Collected Edition of the Traveaux Préparatoires of the European Convention on Human Rights (1975) (hereafter Traveaux Préparatoires) retrieved from https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART50-CDH(70)17-BIL2186383.pdf, at 2
[14] Art. 46 finds its roots in art. 14 of the Traveaux Préparatoires I, at 302
[15] Traveaux Préparatoires retrieved from https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART50-CDH(70)17-BIL2186383.pdf, at 6

Court shall not operate in any way as "a Court of Appeal, having the competence to revise internal orders and verdicts"[16]. Therefore, article 24 of the Draft Report was changed into the next provision:

> "The jurisdiction of the Court shall extend to all violations of the obligations defined by the Convention, whether they result from legislative, executive or judicial acts. Nevertheless, where objection is taken to a judicial decision, that decision cannot be impugned unless it was ('finally' was later added in this provision) given in disregard of the fundamental rights defined in article 2 by reference to article 9, 10 and 11 of the United Nations Declaration."[17]

This provision has changed the original concept of remedies as introduced by the European Movement, claiming that the Court does not in any way "operate as a Supreme Court of Appeal having the jurisdiction to review any errors of laws or of fact which are alleged against a national Court"[18]. It can be concluded from the provision in the report, that remedies such as impugnation of incriminating decisions, reparation for damages and introduction of proceedings against perpetrators were in principle not included. The only exception[19] mentioned, lacks a clear understanding on how to call into question judicial decisions contrary to human rights.

Looking closely at the *Traveaux Preparatoire*, there are no clear reasons mentioned for this change, but according to Martens the explanation for this modification is grounded in the opposing views of the members of the Committee on the establishment of an independent Court vested with the (inherent) power to make orders as to the appropriate form of redress for violations found and the competence to deal with individual complaints.[20] Another reason could be the limited time left for debate between the adoption of the report and its transmission to the Consultative Assembly for further consideration. Its debatable whether the outcome would have been different (in favour of remedial measures) if there would have been more time for a thorough discussion on remedies.

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[16] Traveaux Préparatoires I, at 204

[17] Traveaux Préparatoires retrieved from https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART50-CDH(70)17-BIL2186383.pdf, at 7

[18] Traveaux Préparatoires retrieved from https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART50-CDH(70)17-BIL2186383.pdf, at 8

[19] "…unless it was finally given in disregard of the fundamental rights defined in art. 2 by reference to article 9, 10 and 11 of the United Nations Declaration."

[20] S.K. Martens, Individual complaints under article 53 of the European Convention on Human Rights Martens (1994), Essays in honour of Henry G. Schermers. Vol.3: The dynamics of the protection of human rights in Europe. Dordrecht - Boston - London: Nijhoff, at 277

When the new provision was implemented in the Recommendation no. 38 of the Consultative Assembly in 1949 after which it was submitted to the intergovernmental Committee of Experts on Human Rights, the working papers of the Secretariat of the Council of Europe mentioned *inter alia* the concern of the absence of a reparation mechanism in art. 24. Under point 33 it addressed the 'Competence of the Court to award damages, reparation in kind (*restitutio in integrum*) or reparation for non-material damages', drawing its inspiration from art. 39 statute of the International Criminal Court.[21]

Despite the Consultative Assembly's proposal to enlarge the Courts competences to 'appellate jurisdiction' allowing the Court to "declare the impugned judicial laws to be null and void"[22], this proposal was rejected by the Committee of Experts (composed of representatives of the respective Governments) who explicitly denied those competences in its report to the Committee of ministers, stating that the provision was

> "… in accordance with the actual international law relating to the violation of an obligation by a State. In this respect, jurisprudence of a European Court will never, therefore, introduce any new element or one contrary to the existing international law. In particular, the Court will not have the power to declare null and void or amend Acts emanating from the public bodies of the signatory States."[23]

It can be concluded that the initial scope of remedies, as proposed by the European Movement and the Consultative Assembly, was constrained by the Committee of Experts.
The States' reasoning behind the limitation of remedies reflects the weight of sovereignty given to the states and the fear that the Court would be granted too much power (such as power to declare null and void or amend acts of public organs of signatory states) which would impede this sovereignty. Instead the Committee of Experts included a mechanism of reparation as the only remedial aspect of the Convention, which was most interestingly not mentioned in the Consultative Assembly's resolution.[24]
The outcome established by the Committee of Experts was a kind of reversal of the input provided by both the European Movement and the Consultative Assembly, due to the concern

[21] Traveaux préparatoires III, at 36
[22] Traveaux préparatoires IV, at 64
[23] Traveaux préparatoires IV, 44
[24] S.K. Martens, Individual complaints under article 53 of the European Convention on Human Rights Martens (1994), Essays in honour of Henry G. Schermers. Vol. 3: The dynamics of the protection of human rights in Europe. Dordrecht - Boston - London: Nijhoff, at 278

of State Sovereignty, which was still one of the most important aspects of Public International law at that time, especially in the aftermath of the 2nd World War. So, the position of the European Movement and the Consultative Assembly, which held a more victim centred view, was considered too revolutionary at that time because of fear of interference with the domestic affairs of the states.

Having read the *traveaux préparatoires*, it is my assumption that, despite the additional Protocols which reformed several articles (such as Protocol 11 allowing individual complaints[25]), the current Convention does not provide any explicit foundation for the indication of remedial measures, apart from the mechanism of reparation which would therefore be the only explicit remedial aspect of the Convention.

The legal basis of remedies in the Convention

Res judicata effect of Article 46

The legal analysis will take Article 46 as starting point, which concerns (1) the binding force and (2) the execution of the judgment. This article reflect 2 phases of a judgment: the phase where the Court drafts the judgment and the execution phase supervised by the Committee of Ministers.

Article 46 (1) states that:

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

Paragraph 1 leaves no doubt about the binding force of ECtHR judgments and clarifies that a final judgment has formal legal force upon the state involved in the case.

It is worth noting that the wording "undertake to abide by" is less strong then the expression "shall abide by". A connection in this regard can be made with Article 1, where it was decided to use an imperative expression:

> "The Hight Contracting Parties *shall secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention".

[25] It must be noted that the early Convention established a European Commission of Human rights which was a body of first instance. The Court was only perceived as a 2nd instance organ and it was not until the entry into force of Protocol 11, that a 'new Court' was established which allowed the Court to have direct jurisdiction (recognition of the right of individual petition).

It could be argued that Article 46 grants more discretion to the state than Article 1, which is a logic reasoning because Article 1 represents the obligation resting upon a state to bring its legislation in conformity with the Convention. Only when there is a violation of a Convention right, Article 46 comes into play. This phase is more delicate because it allows the Court to get involved in the internal affairs of a state and is therefore formulated in a less mandatory way. But Article 46 remains very vague as it doesn't clarify what "abide to" means. It also doesn't provide indications as to the way the Court should draft its judgments when finding a violation.

Furthermore, it is unclear whether this article sets forth a right, or only an obligation. According to Martens, it can be assumed that the "correlative of the State's obligation to abide by that judgment, is a *right* of the individual concerned to have the judgment complied with"[26].

On the other hand, it can be argued that Art. 46 contains the general rule of international law that the states have a duty to redress an injury caused by an internationally wrongful act.[27] When seen in line with the International Law Commission's Articles of Responsibility of States for Internationally Wrongful Acts (ILC Articles) it is rather an obligation than a right. I personally would advocate that Art. 46 sets forth a right, because effective protection of human rights of an individual should prevail above state sovereignty.

This statement is further strengthened when Art. 46 (1) is seen in connection with Art. 19, which states that the task of the Court is "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". The latter provides guidelines for the Court to interpret its already existing powers.[28] Following this reasoning, the "observance of the undertakings" may also include the competence of the Court to ensure that the state concerned fully complies with a Court's judgment as stated under Art. 46(1).

Another important article concerning the competences of the Court is article 32, which points out under paragraph 1 that "the jurisdiction of the Court shall extend to all matters concerning

[26] S.K. Martens, Individual complaints under article 53 of the European Convention on Human Rights Martens (1994), Essays in honour of Henry G. Schermers. Vol.3: The dynamics of the protection of human rights in Europe. Dordrecht - Boston - London: Nijhoff, at 258

[27] M. de Salvia, Execution of the judgments of the European Court of Human rights: Legal nature of the obligations of states and European supervision of national legislative choices in 'the status of international treaties on human rights, Venice Commission 2006, at 92

[28] L.-A. Sicilianos, the involvement of the European Court of Human Rights in the implementation of its judgments: recent developments under article 46 ECHR (2014), Netherlands Quarterly of Human Rights, Vol. 32/3, at 256

the interpretation and application of the Convention and its Protocols thereto which are referred to it as provided in Art. 33, 34, 46 and 47." The second paragraph states that "in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide".
In other words, it becomes clear from this article that the Court has the power to decide it's jurisdiction in rulings upon issues relating to the binding force of its judgments and execution matters.[29] So it's up to the Court to decide whether it wants to get involved in the execution of its own judgment, within the limits of not encroaching upon the powers of the CoM.

The way a respondent state "abides by" a judgment, or in other words "executes" the judgment, is supervised by the Committee of Ministers under art. 46(2).[30] Paragraph 2 of Art. 46 addresses the CoM's power of supervision:

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

A strict reading of the second paragraph suggests that the Court doesn't have any role to play in deciding the way of execution by a Member State and seems to indicate that there is a traditional separation of power between the Court being the judiciary and the Committee of ministers fulfilling the role of the executive branch (among its other powers).

With the entry into force of the Protocol no. 14[31], this clear division of power between the Court and the CoM with respect to the execution of the judgment seemed to have changed, because it granted the Court a role in the execution process under Art. 46 paragraphs 3 to 5. The infringement procedure under paragraph 4 for example allows for direct judicial review of compliance by the Court, after referral by the CoM. The CoM can refer to the Court if a State refuses to abide by a final judgment, which happens only in exceptional cases as stated in the explanatory report to Protocol 14.[32] This report clarifies that the infringement procedure shouldn't be used to reopen a case, already decided by the Court, nor to provide for material

[29] L.-A. Sicilianos, the involvement of the European Court of Human Rights in the implementation of its judgments: recent developments under article 46 ECHR (2014), Netherlands Quarterly of Human Rights, Vol. 32/3, at 257
[30] Assanidze v. Georgia, ECtHR Application No. 71503/01, Judgment of 8 April 2004, para. 198
[31] This protocol amended art. 46
[32] Explanatory Report to Protocol No. 14 to the Convention available at www.echr.coe.int

compensation of a financial penalty by a state party found under art. 46(1).[33] The aim is to put "political pressure" on the state party in order abide to the initial judgment of the Court.[34]

Regarding this evolution, there is a so called 'jurisdictionalization' of the execution process[35], expanding the Court's jurisdiction to the execution phase. It can be said that the control mechanism of Court's judgments has become two-fold: The Court having judicial control and the Committee of Minister providing political control.

Art. 41 - just satisfaction and beyond?

Art. 41 states that:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford *just satisfaction* to the injured party."

The source of the final text of Art. 41 can be traced back to Art. 32 General Act on Arbitration 1928[36], which provides that

> "if, in a judicial sentence or arbitral award it is declared that a judgment, or a measure enjoined by a court of law or another authority of one of the parties to the dispute, is wholly or in part contrary to international law, and if the constitutional law of that party does not permit or only partially permits the consequences of the judgment or measures in question to be annuls, the parties agree that the judicial sentence or arbitral award shall grant the injured party *equitable satisfaction*."[37]

This source is not surprising because, as we have seen earlier, adjudication before the Court concerned primarily inter-state complaints (guided according to dispute settlement treaty provisions) and not individual complaints. Individual communications were thought to be too evolutionary at that time, because of the dominating weight given to state sovereignty in Public International Law. As states under Art. 37 ILC "the state responsible for an

[33] Explanatory Report to Protocol No. 14 to the Convention, para 99
[34] Idem
[35] L.-A. Sicilianos, the involvement of the European Court of Human Rights in the implementation of its judgments: recent developments under article 46 ECHR (2014), Netherlands Quarterly of Human Rights, Vol. 32/3, at 236
[36] D. Shelton, Remedies in International Human Rights Law (2015), Oxford University Press, at 208
[37] General Act of Arbitration (Pacific settlement of International Disputes) (1928), Geneva, UNTS No. 2123

internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be good by restitution or compensation". The ILC articles mainly existed to redress violations in inter-state cases.

Under current Art. 41, the Court is competent to award just satisfaction to the injured party under the condition that a causal link is established between the violation and the damage claimed by the applicant. Another criteria under this article is that the internal law of the state concerned does not provide full reparation (*restitutio in integrum*) of the violation. The provision is also applicable when *restitutio in integrum* is not possible because of the nature of the breach found.

From the narration of the text of art. 41, it can be concluded that the Court included the following remedies in art. 41:(a) pecuniary damages, (b) non-pecuniary damages and (c) legal costs and expenses.[38]

Still today, the only explicit remedy in the convention is found in this instant article, despite the initial aspirations of having a Court with the competence to annul, void or amend judicial, administrative or legislative acts, to grant reparation to victims and to initiate proceedings against perpetrators, as we have seen in the *traveaux préparatoires*.

Some scholars argue that Art. 41 demonstrates that the Court lacks the competence to "annul or nullify acts of member states which are in conflict with the Convention"[39] and that in strict sense, this article suggests that the only thing a state should do, if a violation occurred and the Court awards 'just satisfaction', is to pay off.

This was heavily criticized by one of the founding fathers of the Convention, Rapporteur Teitgen, who said in his speech at the 2nd session of the Consultative Assembly's 2nd, that Art. 50 (now Art. 41) contains a defect because it seems to suggest that "the only form of reparation will be compensation" and that this "seems to suggest that the European Court will be able to grant compensation to victims, damages and interest, or reparation of this kind"[40]. But then he questions whether a grave violation, such as the removal of a fundamental law which guarantees a specific right, could be redressed by awarding symbolic monetary damages to the applicant. His conclusion is that the only way to successfully guaranteeing the

[38] Based on 'type' of awarded remedies between 1972 and 1998, D. Shelton, Remedies in International Human Rights Law (2015), Oxford University Press, at 209

[39] S. Thomsen, Restitution, in R. Bernhardt (ed.), 10 Encyclopaedia of Public International Law (Amsterdam, 1987), at 378

[40] Traveaux préparatoires V, at 298, 300, 302

rights of the Convention, is to "grant jurisdiction to declare void, if need be, the laws and decrees which violate the Convention".[41]

Practice Direction on just satisfaction connected to Art. 19

Under Art. 75 of the Rules of the Court, the Court addresses its ruling on just satisfaction. The Practice Direction[42] on Just Satisfaction Claims, further clarifies that:

> "The Court's award, if any, will normally be in the *form of a sum of money* to be paid by the respondent Contracting Party to the victim or victims of the violation found. Only in *extreme rare cases* can the Court consider a *consequential order* aimed at putting an end or remedying the violation in question. The court may, however, decide at its discretion to offer guidance for the execution of its judgment."[43]

It becomes clear that just satisfaction in the form of a sum of money is considered to be prevalent. Similar wording is found in Rule 60(1):

> "An applicant who wishes to obtain an *award* of just satisfaction under art. 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect."

The Court affirms in the Rule of Court that its primary competence in principle is to decide on just satisfaction, but why is the Court justified to do this in the first place?
A reasonable answer to this question is that art. 41 was modelled on several arbitration treaty clauses. The aim of these clauses was "to deal with the situation that a State, although willing enough to fulfil its international obligation, is unable to do so without changing its Constitution". In those situations, the clauses "confer on the arbitral tribunal the power to transform this obligation into an obligation to pay to the injured party an equitable satisfaction of another kind".[44]

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[41] Traveaux Préparatoires V, at 298, 300, 302
[42] Clarification on aspects of the Courts procedure through a practice direction issued by the President of the Court
[43] President of the ECtHR, Practice Direction: Just Satisfaction Claims, IV, 19 September 2016, para. 23, retrieved from https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf
[44] Vilde, Ooms and Versyp ("Vagrancy") v. Belgium, ECtHR Application Nos.2832/66, 2835/66, 2899/66 Judgment of 10 March 1972, para 20

An interesting aspect in the practice direction is the mentioning of "guidance", which may refer to art. 19 of the Convention: The Court is established "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto".[45] In other words, art. 19 provides guidelines for the Court to interpret its already existing powers. The Practice direction reveals in this regard that the indication of a consequential orders may be inherent in art. 41, which the Court may find necessary to use in some extreme exceptional cases for the purpose of stopping and/or remedying a violation.

Conclusion

As we have seen throughout the analysis, there doesn't exist any provision in the Convention which provides an explicit foundation for the power to indicate non-monetary remedial measures and more specific, to issue consequential orders in a judgment.

Art. 24 of the original Draft Convention, which would provide an explicit base for the Court's power to issue orders, was eventually omitted, due to the fact that in the aftermath of the 2nd World War state sovereignty remained one of the most important principles of Public International Law.

So, the restrictive interpretation of remedies as provided nowadays by Art. 41, can be seen as a consequence of the lifeline of the *traveaux préparatoires*. Also, the arbitration and settlement approach rather than an adjudicative approach at the origin of Art. 41, explains the chosen path to refrain from detailed remedial measures and leave this choice to the state concerned.

I wonder however whether this approach is still up to date. First, seen the fact that the Court is now primary focused on the individual and not anymore on inter-state disputes only. In inter-state disputes, just satisfaction in terms of money was perceived as the appropriate remedy. In case of individual redress, I would argue that award of money is not always an appropriate measure to redress human rights violations, especially regarding the fact that applicants not always ask for awards but request specific directions that a state should take. If Public International law wouldn't have been predominant at time the Convention was drafted, it's my assumption that the framework of remedies would have been extended beyond the limited scope of just satisfaction.

[45] ECHR, art. 19

Secondly, from a legal perspective, there are no provisions which explicitly forbid consequential orders, leading to the conclusion that there is nothing in the Convention that goes against the assumption that the Court lacks such an inherent power.[46]
Moreover Art. 19 grants the Court guidelines to interpret its already existing powers, which can be connected to Art. 46(1) and Art. 41.
Under Art. 46(1), the competence of the Court to observe the undertakings may also include the power of the Court to ensure that the state concerned fully complies with a Court's judgment. To achieve the latter, the Court might issue a consequential order.
This point of view is supported by the Practice Direction on Just Satisfaction Claims, which points out that consequential orders are allowed in extreme rare cases, which reveals that the indication of a consequential orders may be inherent in art. 41 in connection with Art. 46.
The Practice Direction is a good indication that the Court is slowly moving away from its restrictive view of its own powers and that it opens the door for non-monetary remedial measures, such as consequential orders.
It can be concluded that the Court may be destined to pave its own way because of a lack of clear formulations as how the Court can provide guidance with regard to specific performance or injunctions.
Dynamic interpretation of the Court could however be problematic when it steps beyond what is agreed upon in principal by the States. Specific problems in this regard occur when the Court takes the path of evaluative interpretation, which "appears as essentially 'new' and cannot – even reconstructively – be thought as derived from the Convention with the instruments of traditional methodology".[47] However, as seen in the previous analysis, a consequential order does not appear as essentially 'new' and can be seen as deriving implicitly from the Convention under the condition that this power remains an area of exceptionalism.

Chapter 3: Individual measures, changing the traditional approach

[46] S.K. Martens, Individual complaints under article 53 of the European Convention on Human Rights Martens (1994), Essays in honour of Henry G. Schermers. Volume3: The dynamics of the protection of human rights in Europe. p. 253-292 Dordrecht - Boston - London: Nijhoff, at 272
[47] On the subject of H.-J. Cremer, Prescriptive Orders in the Operative Provisions of Judgments by the ECtHR, in A. Seibert-Fohr, M. E. Villiger, Judgments of the European Court of Human Rights – Effects and Implementation (2014), Ashgate, Nomos, at 56

Introduction

Abidance with judgment of the European Court of Human Rights is crucial for the effectiveness of the whole system and the legitimacy and authority of the Court.[48]

It is inherent to international law that judgments have to be "translated" into the domestic legal order, because they are in principle not immediately enforceable. This translation, called implementation or execution, is in most cases needed to achieve compliance. There are no clear rules as to the process of implementation as we have seen in the previous chapter, because every state is different and has different ways of implementing a judgment. Much depends on how the Convention is perceived by the Member states and is integrated into the domestic legal context. Furthermore, the implementation process is much subjected to "an inherently political process that plays out on the domestic level" due to the supervision of the CoM.[49]

The following paragraphs will outline the practice that the Court has developed through case law in respect of individual remedial measures. I will start from the traditional declaratory nature of judgments, which evolved into a more directive approach with the establishment of individual and general measures. Later on, I will also take extreme rare cases under the loop in which the Court demonstrates its competence to issue consequential orders.

Traditional approach – The declaratory nature of judgments

This paragraph will explain that the traditional approach of the Court embracing the view that the implementation of judgments is political and domestic in nature. In other words, the role of the court is limited to the drafting of a judgment, without reaching the execution phase.

To understand better the meaning of art. 46, and its 'binding' force, I will look into early jurisprudence in this regard.

The first case, clarifying art. 46, is the *Marckx* case, where the Plenary Court stated that

> "…its judgments are *essentially declaratory* in nature and that, in general, it is primarily for the State concerned to choose, subject to the supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Art. 46

[48] H. Keller and C. Marti, Reconceptualizing implementation: the Judicialization of the Execution of the European Court of Human Rights' judgments (2015), The European Journal of International Law Vol. 26 no. 4, at 80

[49] C. Hillebrecht, Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights (2012), 13 Human Rights Law Review 279, at 280.

> of the Convention, provided that such means are *compatible with the conclusions set out in the Court's judgment*".[50]

This formula reflects the principle of subsidiarity[51], underlining the presumption that the domestic authorities are better placed to decide on the type of measures when implementing a Court's Judgment. Further on, the Court states that "such means are compatible with the conclusions set out in the Court's judgment". This might refer to arguments set out in the reasoning part of the judgment, because the operative part merely determines a violation. The State should therefore choose its means based on the reasoning of the Court.
Subsequently the Court held that a judgment cannot in itself annul or repeal domestic legal provisions or the decision of a domestic court.[52]
Similarly, the Court stated in the *Airey* case that "it is not the Court's function to indicate, let alone dictate, which measures should be taken" in order to give effect to the Convention rights and that "it leaves to the states a free choice of the means to be used towards this end".[53]
Over the years the Court reinstated this approach, stating in the *Dickson* case that

> "…the Court's function is, in principle to rule on the compatibility with the Convection of the existing measures and it does not consider it appropriate in the present case to issue the requested direction."[54]

In the instant case, the Court denied the request of the applicant to spell out measures to be adopted by the government concerned, leaving the state free to choose the means to implement the judgment.
This early jurisprudence shows that the Court is not competent to overrule national court decisions[55] and is not empowered to indicate the measures to remedy a violation[56], amounting only to the determination of a Convention violation. The latter gives existence to a declaratory judgment.

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[50] Marckx v Belgium, ECtHR Application No. 6833/74, Judgment of 13 June 1979, para 58
[51] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, at 3
[52] Marckx v Belgium, ECtHR Application No. 6833/74, Judgment of 13 June 1979, para 58
[53] Airey v. Ireland, ECtHR Application No 6289/73, Judgment of 9 October 1979, para. 26
[54] Dickson v. United Kingdom, ECtHR Application No. 44362/04, Judgment of 4 December 2007, para 58
[55] Pakelli v. Germany, ECtHR Application No. 8398/78, Judgment of 25 April1983, para 45; Belilos v. Switzerland, ECtHR Application No. 10328/83 Judgment of 29 April 1988, para 76
[56] Selmouni v. France, ECtHR Application No. 25803/94, Judgment (GC) of 28 July1999, para 126; Vocaturo v. Italy, ECtHR Application No. 11891/85, Judgment of 24 Mai 1991, para 21

A declaratory judgment is a binding judgment in the way it creates a legal relationship between the respondent state and the applicant and defines their rights in the case before the Court. However, a declaratory judgment does not contain any specific wording, such as "condemn' or 'convict', or words such as 'order' or 'forbid', which would indicate a specific action to be taken as way of enforcement. A declaratory judgment is framed in declaratory terms, in which the operative parts merely 'hold' that a violation occurred. Court's judgments were therefore not directly enforceable in the domestic legal order of the signatory parties to the Convention, because there was no specific action asked for by the Court.
Regarding the declaratory nature of Court judgments, it is well-established under international law that "satisfaction may consist in an acknowledge of the breach."[57]

Evolution of individual measures

As seen in the previous paragraph, the Court refused in the *Marckx* case to include any individual measures in the judgment. For four decades the Court regularly stated that it had no jurisdiction to issue directions in its judgments.[58] In principle, a Court's judgment does not explicitly order the respondent state to take specific measures to redress the situation of the applicant and prevent future violations, leaving the states free to choose the means to implement a judgment, be it by individual or general measures.
But since 1998, certain events have influenced the Court's practice and jurisprudence on remedial practice. For instance, the expansion of the Council of Europe to central and Eastern European countries supplied the system with new judges and new type of cases, which also gave rise to an increasing backlog of cases. [59] This development gave effect to a more intensive role of the Court to fulfil its task to "ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention and the Protocols thereto"[60] and may explain the emergence of new non-monetary remedial measures, as will be demonstrated in the following paragraphs.

[57] ILC Articles, Art. 37
[58] D. Shelton, Remedies in International Human Rights Law (2015), Oxford University Press, at 211
[59] Idem
[60] ECHR, Art. 19

Just satisfaction cases beyond monetary measures

Restitution of property

The Court, as guardian of human rights, could not remain passive and exceptionally 'declaratory' with regard to human rights violations, and therefore progressively changed his traditional approach.

The *Papamichalopoulos* case[61] from 1995 was the first case which deviated from the established practice to merely declare a violation and refrain from specifying what form of restitution the state must provide.

In this case the Court ordered Greece to return the land to the applicants within 6 months, but if Greece would fail returning the land, the Greek authorities should pay compensation of pecuniary damages to the applicants.

The Court included the individual measure to return the land in the operative part of the judgment, combined with the alternative obligation to pay monetary compensation if the state would fail to return the property. It was up to the state to decide between the restitution measure and the alternative obligation to pay just satisfaction.

This case introduced the idea that just satisfaction is not the only obligation that can be derived from a Court's judgment and that a judgment may also require a state to take certain measures, such as restitution of property.

Similarly, the Court stated in the *Brumarescu* case[62] in the operative part that the state had to return the property to the applicant and that failure of such restitution would lead to an obligation to pay compensation.

In the *Gladysheva* case of 2011, the Court held in its reasoning part that "the most appropriate form of redress would be to restore the applicant's title to the flat and to reverse the order for her conviction"[63]. The obligations deriving from the operative part are clear: the respondent state has to annul the domestic eviction order and produce a specific legal effect (which is the most appropriate form of redress) within a deadline of "three months from the date on which the judgment becomes final".[64]

In contrast to *Papamichaloupous* and *Brumarescu*, the Court is clear in the instant case that the restitution of property is the "most appropriate form of redress", without proposing an alternative of payment if the state fails the return the property. In addition, the Court also puts

[61] Papamichalopoulos and Others v. Greece, ECtHR Application No. 14556/89, Judgment of 31 October 1995
[62] Brumarescu v. Romania, ECtHR Application No. 28342/95, Judgment of 23 January 2001
[63] Gladysheva v. Russia, ECtHR, Application No. 7097/10, Judgment of 6 December 2011, para 106
[64] Idem, operative part, para 4(a)

a binding timeframe for restitution. So here we see a genuine measure of restitution of property.

Those cases show that the Court is empowered to indicate specific non-monetary measures, such as restitution of property in order to redress the violation by the respondent state in terms of just satisfaction (Art. 41).

Unfair trials

Apart from property cases, jurisprudence extended to cases concerning unfair criminal proceedings under Art. 6(1). While previously there was no right to reopen domestic proceedings because this was considered to be in conflict with both domestic law and the principle of *res judicata* (if internal legislation would not provide for the reopening), this state of affairs has been changed by the Court in the early 2000s.

This change seems to be politically supported by the CoM's Recommendation 2000(2)[65], where it encourages the States under point II

> "…to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention".

The first case which involved a finding of a violation of art. 6(1), was the *Gencel* case. In this case the Court found that the lack of insufficient independency and impartiality of the Turkish judiciary in the criminal proceedings of the applicant, lead to the conclusion that the most appropriate form of redress would be the reopening of the case.[66] This case establishes the so-called Gencel clause, which was applied later in the *Ocalan* case[67] and in more than 200 other cases. The Ocalan case ruled that when requirements of independence and impartiality are not met, "a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation".[68] This formulation demonstrates that retrial or reopening is not a necessary or exclusive matter but rather an appropriate solution.[69]

[65] CoE, CM/Rec(2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, 19 January 2000
[66] Gencel v. Turkey, ECtHR Application No. 53431/99, Judgment of 23 October 2003, para 27
[67] Öcalan v. turkey, ECtHR Application No. 46221/99, Judgment (GC) of 12 May 2005, para 210
[68] Idem
[69] Moreira Ferreira v. Portugal (No. 2), para 92

So, since 2003 the Court developed a practice encouraging states to reopen criminal proceedings, when a Convention violation was found of Art. 6. Those encouragements where incorporated in recommendations in the judgment, without having a legally binding status. This view started to change with the emerging judicial fault-line in 2008 reflecting the idea that those recommendations should become binding.

This is reflected in the concurring opinion of judges Spielmann and Malinverni in the *Vladimir Romanov* case, where the judges argued that the "best means" to achieve *restitutio in intergrum* is to reopen the proceedings and that this specific direction should be included in the operative provisions making it a binding obligation.[70]

In the *Verein gegen Tiergabrieken* case, the cornerstone of the Grand Chamber's judgment is the idea that a reopening of domestic proceedings is a "key means" (not an end in itself) for the full and proper execution of the Court's judgments and should occur in accordance with "the conclusions and the spirit of the Court judgment being executed".[71] Nevertheless, it becomes clear from the case that "the Court clearly does not have jurisdiction to order such measures"[72]. This in contrast to the 3-year earlier *Lungoci* case[73], where the Court did order a reopening in its operative parts within 6 months from the date to which the judgment became final.

So, after some evolutionary steps, the Court moves back again, leaving the jurisprudence in this regard ambiguous.

But this ambiguous practice towards ordering specific measures in a mandatory way, was again strengthened in the *Maksimov* case the Court held in the operative part, that "the respondent state must take all measures to reopen the cassation appeal proceedings provided by the transitional law".[74]

In the *Laska and Lika* case, the Court took a different path, ruling that the respondent state was under the positive obligation to "remove any obstacles in its domestic legal system that might prevent the applicants' situation from being adequately redressed (…) or introduce a new remedy"[75], which concerns as well the reopening of proceedings. However, this obligation was not repeated in the operative part.

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[70] Vladimir Romanov v. Russia, ECtHR Application No. 41461/02, Judgment of 24 July 2008, concurring opinion judges Spielmann and Malinverni

[71] Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2), ECtHR, Application No. 32772/02, Judgment (GC) of 30 June 2009, para 90

[72] Idem, para 89

[73] Lungoci v. Romania, ECtHR Application No. 62710/00, Judgment of 26 January 2006, operative part, para. 3(a).

[74] Maksimov v. Azerbaijan, ECtHR Application No. 38228/05, 8 October 2009, operative part point 3

[75] Laska and Lika v. Albania, ECtHR Application Nos. 12315/04 and 17605/04, 20 April 2010, para 77

Similar to the previous case, the Court abstained in the *Huseyn* case[76] from giving a consequential order and only stated in the reasoning part that "the most appropriate form of redress would, in principle, be the reopening of the proceedings in order to guarantee the conduct of the trial in accordance with the requirements of Art. 6 of the Convention.[77]

Those cases show that the Court increasingly includes in its practice on non-monetary measures, the specific measure to reopen proceedings to effectuate adequate compliance with Art. 6 of the Convention.

Further clarifying *restitutio in integrum* under Article 41

It's the Court's view that "a judgment in which the Court finds a breach of the Convention imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach"[78]. There is a threefold obligation that can be derived from this statement, namely the obligation to (1) stop the violation; (2) provide reparation and (3) prevent similar violations in the future.[79]
The Court recognized that those obligations

> "reflect the principles of international law whereby a state responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation which existed before the wrongful act was committed, provided that restitution is not 'materially impossible and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation"[80].

This restitution is called *restitutio in integrum* and it follows that "if the nature of the breach allows for *restitutio in integrum*, it is for the respondent State to effect it".[81]

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[76] Huseyn and Others v. Azerbaijan, ECtHR Application No. 35485/05, Judgment of 26 July 2011, para. 262
[77] Idem
[78] Papamichalopoulos and Others v. Greece (art. 50), ECtHR Application No. 14556/89, Judgment of 31 October 1995, para. 34.
[79] H. Keller and C. Marti, Reconceptualizing implementation: the Judicialization of the Execution of the European Court of Human Rights' judgments (2015), The European Journal of International Law Vol. 26 no. 4, at 832
[80] Verein gegen Tiergabriken (VgT) v. Switzerland (No. 2), ECtHR Application No. 32772/02, Judgment of 30 June 2009, at 86
[81] Papamichalopoulos and Others v. Greece, ECtHR Application No. 14556/89, Judgment of 31 October 1995, para 34

Such *restitutio in integrum* might concern measures for reopening and restitution of property as we have seen in the previous case law analysis. Reopening might be an appropriate way (sometimes the most appropriate one) of redress, when requirements of independence and impartiality of Art. 6 are not met. Restitution of property might be considered the most appropriate form of redress, when for example property is unlawfully obtained.
Both measures can either be inserted in the reasoning or operative part, depending on the urgency of the situation, the gravity of the violation and whether restitution is possible.
In this regard it may be important for the state to demonstrate whether *restitutio in integrum* is actually possible, otherwise it would be useless for the Court to indicate those specific measures.

Emerging individual measures in respect of 'article 46 judgments[82]'

The *Scozzari and Giuta* case in 2000, was the first case to refer to Art. 46. This case concerned Italy's interference with family rights; the delay and limited number of organized contact visits between the applicant and her children, when taken into public care and the placement of the children in a community whose managers were convicted of sexual abuse and ill-treatment of disabled people residing in the community.[83] The Court explicitly mentioned the need for general and/or individual measures to put an end to the violation. As stated in the judgment, the respondent State is legally bound "not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, (…), the general and/or, if appropriate, individual measures to be adopted in their domestic legal order".[84] This was the first time the Court indicated 'real'[85] individual measures, with the intention to achieve personal reparation for the applicant.

Unlawful detention

Another practice emerged in respect of unlawful detention cases concerning violations of Art. 5 and 6 where the Court issued states with both non-binding and binding directions to secure the release of detainees.

[82] Art. 46 judgments refer to the legal obligations on the state under Art. 46 either in the reasoning or operative part
[83] Scozzari and Giunta v. Italy, ECtHR Application No. 39221/98 & 41963/98, judgment of 13 July 2000, paras. 183 and 216
[84] Idem, para 249.
[85] The papamichalopoulos case didn't provide a genuine individual measure, because there was a choice for the state to decide between the individual measure and the alternative obligation to pay just satisfaction.

In 2004 the Court delivered 2 significant judgments which were milestones with regard to the evolving practice of indicating precise individual remedial measures that states should take. The first case was *Assanidze* of 2004, which concerned the ongoing detention of the applicant in Georgia, despite the fact that the Georgian Government had given the applicant a pardon and the Supreme Court had ordered his release from detention.[86]

The Court held that Georgian government "must secure the applicant's release at the earliest possible date"[87], because "by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it"[88].

The Court included the final order to release the applicant from detention in order to stop the on-going violation of art. 5(1) and art. 6(1) of the Convention in the operative part of the Convention. This was the first time the Court included an unconditional specific order in the operative part, leaving the state no discretion as to the manner of execution of the judgment. The Court recognized as well that compensation would be an inadequate way of remedying an unlawful detention.

Three months later, the Court came to a similar conclusion in *Ilascu*[89], but extended its competence on consequential orders.

This case concerned the ongoing unlawful detention and ill-treatment which was not prevented by Moldova and Russia. The Court stated that "the Respondent State must take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release".[90]

The reasoning behind this explicit order was that "any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent states' obligation under Article 46(1) of the Convention to abide by the Court's judgment."[91]

The order to secure the immediate release of the applicants was also repeated in the operative part of the judgment.[92] The Court went even further than it did in the *Assanidze* case, by ordering the "immediate release" of the person detained.

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[86] Assanidze v. Georgia, ECtHR Application No. 71503/01, Judgment of 8 April 2004
[87] Idem, operative part, para 14(a)
[88] Idem, Judgment of 8 April 2004, para 202
[89] This case was decided by the Grand Chamber, of which 10 judges also sat in the Assanidze case.
[90] Ilascu and Others v. Moldova and Russia, ECtHR Application No. 48787/99, Judgment (GC) of 8 July 2004, para. 490
[91] Idem
[92] Ilascu and Others v. Moldova and Russia, ECtHR Application No. 48787/99, Judgment (GC) of 8 July 2004, operative part, para 22

In the *Aleksanyan* case, the Court ruled that "the Russian Government must, in order to discharge its legal obligation under Art.46 of the Convention, replace detention on remand with other, reasonable and less stringent, measures(s) of restraint, or with a combination of such measures, provided by Russian law".[93] Continuous detention was inacceptable seen the gravity of the applicant's illness.

In the *Slawomir Musial* case, the Court came to a similar reasoning, although including the measures in the operative part, holding that the respondent state was under the obligation to secure at the earliest possible date, adequate detention conditions in specialized institution able to provide the applicant with the necessary psychiatric treatment and medical supervision.[94] That same year, the Court ordered in the *Scoppola* case that the respondent states was responsible to replace the imposed life imprisonment sentence by a penalty.[95]

In the case *Del Rio Prada*, the Court ordered Spain "to ensure that the applicant is released at the earliest possible date"[96], leaving the respondent state no room of manoeuvre.

Similar mandatory wording is found in the *L.M and Others* case in 2016, where the Court held "that the respondent State had to immediate release the applicants L.M. and M.A.

In those detention cases, there is a shift from recommending measures towards ordering specific measures in a mandatory way and including them in the operative part.

However, this directive approach was again softened with the *Iskandarov* case, where the Court stated, "that the individual measure sought by the applicant would require the respondent Government to interfere with the internal affairs of the sovereign State"[97]. Relying on this reasoning, the Court concluded that a consequential order to ensure the release of the applicant would be excluded in the judgment.

Similarly, in the *Savriddin Dzhurayev* case[98], the Court did not include a specific order, because of the many legal, administrative, practical and security issues involved.[99].

Nevertheless, it provided the Russian authorities with indications to assist the state in

[93] Aleksanyan v. Russia, ECtHR Application No. 46468/06, Judgment of 22 December 2008, at 240
[94] Slawomir Musial v. Poland, ECtHR Application No. 28300/06, Judgement of 20 January 2009, operative part, para 4(a)
[95] Scoppola v. Italy (No. 2), ECtHR Application No. 10249/03, Judgment of 17 September 2009, operative part, para 6(a)
[96] Del Rio Prada v. Spain, ECtHR Application No. 42750/09, Judgment of 21 October 2013, operative part, para 3
[97] Iskandarov v. Russia, ECtHR Application No. 17185/05, Judgment of 23 September 2010, para. 161
[98] Savriddin Dzhurayev v. Russia, ECtHR Application No. 71386/10, Judgment of 25 April 2013
[99] Idem, para. 264

proposing the CoM concrete steps to effectively implement the judgment under the supervision of the CoM who would assess the effectiveness of the measures proposed.[100]

Reopening, still an unresolved discussion

The most recent case regarding reopening is the *Ferreira Moreira (no.2)*[101] case of last year (2017), where the judicial fault-line between the judges comes even stronger to light.
This judgment discusses the highly disputed views on the competence of the Court with respect to the indication of individual and general measures to redress a violation and the legal force of those measures and addresses especially whether reopening falls within the competence of the Court.[102]
The case concerns the refusal of the Portuguese Supreme Court to order a reopening of criminal proceedings, after the Court recommended in its Chamber judgment of 2011 that "a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing of redressing the violation."[103] Also here, the indication of 'most appropriate way' indicates reopening is the most desirable option but not a necessary or exclusive one, leaving the state with a margin of manoeuvre.
The Judgment of 2017 (majority of 9 against 8) reversed the judgment of 2011, because it didn't find a violation of Art. 6(1), stating that the Court doesn't have "jurisdiction to order the reopening of proceedings". This standpoint was highly criticized in the dissenting opinions, and in my eyes justified, because this standpoint doesn't follow case law which established the rule/principle that a retrial clause can be even included in the operative part, as provided by *inter alia* the cases of *Lugoci* and *Maksimov*.
While the Court showed its approval in some past cases on the indication of prescriptive non-monetary remedial measures, the wide divergence of opinions in this recent case leaves a lot of ambiguity with regard to the Court's previous willingness to be more directive in its judgments concerning unfair trials.
The 2 main opposing groups are the Raimondi group and the Pinto de Albuquerque Group. While Raimondi claims that the matter falls outside the scope of the Court's jurisdiction, seen the distribution of the power between the Court and the Committee of Ministers under Article 46 and therefore doesn't grant the Court any powers in respect of the execution of judgments,

[100] Idem
[101] Ferreira Moreira (no.2) v. Portugal, Application No. 19867/12, Judgment of 11 July 2017
[102] Those opposing view became subject of dissenting opinions
[103] Ferreira Moreira v. Portugal, ECtHR Application No. 19808/08, Judgment of 5 July 2011

Judge Pinto de Albuquerque advocates the contrary. The latter argues that "obligations imposed in the operative part and those included in the reasoning part of the judgment have the same legal force, in spite of the different formulation given to them"[104]. The latter criticizes the "self-imposed limitation of the interpretive powers of the Court", as done by the Raimondi Group.

Following the reasoning of the majority, it could be concluded that the Court's interventionism in the execution process is unjustified. But seen the 15 dissents on a scale of 17 judges, it can be said that this case doesn't represent either a strong case in favour of a Court without competences in the field of execution. Furthermore, it is even debatable whether there can be a majority with 15 dissents, but this debate falls outside the scope of this dissertation.

This dissertation shares neither Judge Pinto's standpoint that both the reasoning and the operative part of a judgment are equally binding, nor does it support the restricted view of Raimondo.

I would argue in favour of a Court being competent to impose binding obligations (in the operative part) on states to reopen proceedings, because it seems a logical consequence of a finding of a violation of the right to a fair trial.[105] Moreover, the Court's interventionism may be justified, due to the Courts rich case law on reopening of proceedings.

Expanding consequential orders to other substantive issues?

In 2010, the Court further extended its practice in *Fatullayev*, where it decided that an unjustified prison sentence can also result from violation of other substantive Convention articles (beside invoking Article 5) such as freedom of expression under Article 10.[106] The Court decided that there was no real choice as to the remedial measures, due to the urgent nature of the situation and it ordered the immediate release of the applicant under Article 46.

[104] Ferreira Moreira (no.2) v. Portugal, Application No. 19867/12, Judgment of 11 July 2017, Judge Pinto de Albuquerque, Dissenting Opinion, para 17

[105] P. Leach, No longer offering fine mantras to a parched child? The European Court's developing approach to remedies (2013), In A. Føllesdal, B. Peters, & G. Ulfstein (Eds.), Constituting Europe: The European Court of Human Rights in a National, European and Global Context (Studies on Human Rights Conventions, pp. 142-180). Cambridge: Cambridge University Press, at 155

[106] Fatullayev v. Azerbaijan, ECtHR Application no. 40984/07, Judgment of 22 April 2010, para 175

A milestone case in regard of consequential orders, is the *Volkov* case[107], where the Court expressly required the respondent State under its Art. 46 obligation, to "secure the applicant's reinstatement to the post judge of the Supreme Court at the earliest possible date"[108].
The Court makes clear to the respondent state that the nature of the violation leaves "no real choice as to the measures required to remedy it".[109] So, it becomes clear from the text and the operative part of the judgment that the only way the Ukrainian government could comply with the Court's judgment is the reinstatement of the applicant as a Supreme Court judge. The reason why the Court didn't order reopening of the domestic proceedings, was because of the systematic deficiencies with the independence of the judiciary. Therefore, reopening of the case wouldn't provide appropriate redress.
This case goes beyond the *Assanidze*, because the Court expands its remedial practice to cases of systematic and structural defects. This expansion is likewise confirmed by the fact that 9 years before *Volkov*, the Court merely recommended the reopening of proceedings concerning a case where a judge was dismissed without referring to systematic or structural deficiencies of the disciplinary law of the judiciary.[110]

That same year, the Court decided in the *Youth Initiative for Human Rights* case, that the intelligence agency of Serbia was under the obligation to "ensure within 3 months from the date on which the judgment becomes final"[111] to provide the applicant the information requested for. This case concerned a violation of Art. 10, further expanding individual measures to Art. 10 cases.

Other case law of the Court points out situations where the Court has overstepped its boundaries when making consequential orders.
For example, in the Grand Chamber judgment of the *Markin* case the Court expressed criticism towards the Chamber judgment's "order"[112] and refused to include the Chambers' advice to change the domestic legislation in the Grand Chamber judgment.[113] This case concerned the discrimination of a male Russian soldier who requested parental leave.

[107] Oleksandr Volkov v. Ukraine, ECtHR Application No. 21722/11, Judgment of 9 January 2013
[108] Idem, para 208
[109] Idem, para 195
[110] Maestri v. Italy, ECtHR Application No. 39748/98, Judgment of 17 February 2004, para 47
[111] Youth Initiative for Human Rights v. Serbia, ECtHR Application No. 48135/06, judgment of 25 June 2013, operative part, para 4
[112] Konstantin Markin v. Russia, ECtHR Application No. 30078/06, Judgment of 7 October 2010, para 67: "The Court would recommend"
[113] Konstantin Markin v. Russia, ECtHR Application No. 30078/06, Judgment (GC) of 22 March 2012, para. 118

The *Mammadov* case[114], which is another detention case, stated similarly to the *Volkov* case that the violation found didn't "leave any real choice as to the measures required to remedy it". However, most interestingly, the Court did not specify any measures in this regard. The absence of execution measures led to the following *a contrario* reasoning of the Azerbaijan Government:

> "Having regard to absence of the Court's any ruling to secure the applicant's immediate release and the discretion of the High Contracting Party to choose the means necessary to comply with the Court's judgment, the Government consider that they implement necessary measures to comply with the Court's judgment in the present case."[115]

This reasoning is clearly an excuse for not taking execution measures for implementing the judgment in a correct way. So here we see the downside of leaving the states with too much discretion as to the means to execute a judgment.

The *Mammadov* case is the first case where the Committee of Ministers initiated infringement proceedings under Art. 46 (4).

Further clarifying obligations under Article 46

The previous case law analysis is of great importance as it clarifies further the meaning of Art. 46.

The *Marcx* case established that the judgments of the Court are considered in principle declaratory. The judgment would state the convention Article(s) being violated and sometimes explaining the way it had been violated.

But how can a judgment be merely declaratory when art. 46(1) states that "the High Contracting parties undertake to abide the final judgment of the court in any case to which they are parties"?

The *Assanidze* case may propose an answer to what "abide by" means:

> "In the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal

[114] Mammadov v. Azerbaijan, ECtHR Application No. 15172/13, Judgment of 13 October 2014

[115] L.R. Glas, The Committee of ministers goes nuclear- infringement proceedings against Azerbaijan in the case of Ilgar Mammadov (2017), Strasbourg observers blog, retrieved from https://strasbourgobservers.com/2017/12/20/the-committee-of-ministers-goes-nuclear-infringement-proceedings-against-azerbaijan-in-the-case-of-ilgar-mammadov/

> obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach."

Abidance contains 2 obligations: the first being the obligation to put an end to the breach and secondly to provide *restitutio in integrum*. The question remains what those 2 obligations specifically encompass.

In the *Volkov* case it's noteworthy that the judgment contains a heading on "Application on Articles 41 and 46 of the Convention with a sub heading on "Indication of general and individual measures". This part further clarifies the obligations under Art. 46:

> "*exceptionally*, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to *indicate the type of measure* that might be taken in order to put an end to a violation it has found to exist. In such circumstances, it may *propose various options* and leave the choice of measure and its implementation to the discretion of the State concerned (…). In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to *indicate a specific measure*."[116]

This passage reinstates that the state is granted a margin of appreciation as to the manner of execution of a judgment in order to discharge its legal obligation under art. 46 (1), reflecting the idea that the states are better placed to decide on the way to implement a judgment, because of the different national systems and traditions, and their different way of implementing an international judgment.
However, the formula points out that there are some exceptional cases, where the nature of the violation found might not leave the state a real choice as to the measures required to remedy the violation. In those cases, the Court is empowered to indicate the type of measure, such as individual and general measures, to put an end to the violation. When there is only one form of action possible to repair the violation, consequential orders may be justified is the nature of the violations allows for it. So, this power can be seen as inherent in Art. 46(1) in connection with Art.19.

[116] Oleksandr Volkov v. Ukraine, ECtHR Application No. 21722/11, Judgment of 9 January 2013, para 195

This is furthermore affirmed in the Practice Direction on Just Satisfaction of 19 September 2016:

> "Only in *extremely rare cases* can the Court consider a consequential order aimed at putting an end or remedying the violation in question. The Court may, however, decide at its discretion to offer guidance for the execution of its judgment (Article 46 of the Convention)."

The question remains what the Court understands under "extremely rare cases". It's unclear under which conditions a case becomes 'exceptional' and can be guided in mandatory terms with regard to its implementation.

The *Khodorkovskiy* case of 2011 spells out different categories of exceptional cases[117], where the Court is justified to indicate general and/or individual measures:

The first category of cases concerns cases in which the Court is allowed to indicate the type of measure in order to put an end to a systematic problem[118] or to discontinue an ongoing situation[119].

Other exceptional cases allow the Court to indicate only one measures, because the nature of the violation found is such that is doesn't leave a real choice as to the measures required to remedy it[120].

Finally, the Court mentions a category of exceptional cases, where the Court indicated how to remedy a violation, for example by way of reopening proceedings in a fundamentally unfair trial[121], or by transferring the pension rights of an applicant to a specific pension fund[122].

The Court ruled that Khodorkovskiy didn't fall within one of those exceptional cases, and therefore denied the request of the applicant to indicate specific remedial measures.

In the first category, the discontinuation of an ongoing situation might be achieved through individual measures. Those measures could include consequential orders such as release from detention. Case law demonstrates in this regard that detention cases which concern serious

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[117] Khodorkovskiy v. Russia, ECtHR Application No. 5829/04, Judgment of 28 November 2011, under the heading of "specific individual measures, paras 269-270

[118] Broniowski v. Poland, ECtHR Application No. 31443/96, Judgment (GC) of 2004-V, para 194

[119] Hasan and Eylem Zengin v. Turkey, ECtHR Application No. 1448/04, Judgment of 2007-XI, para 84; see also L. v. Lithuania, ECtHR Application No. 27527/03, Judgment of 2007-X, para 74

[120] Abbasov v. Azerbaijan, Application No. 24271/05, Judgment of 17 January 2008, paras 35 et seq., and Aleksanyan v Russia, ECtHR Application No. 46468/06, Judgment of 22 December 2008, para 240

[121] Maksimov v. Azerbaijan, ECtHR Application No. 38228/05, Judgment of 8 October 2009, para 46

[122] Karanović v. Bosnia and Herzegovina, ECtHR Application No. 39462/03, Judgment of 20 November 2007, paras 28 et seq.

prolongation, violating Article 5, breach the respondent states' obligation under Article 46(1) of the Convention to abide by the Court's judgment.

The obligation of *restitutio in integrum* might encompass especially individual measures which might be necessary to "re-establish the situation which existed before the wrongful act was committed" [123], which is the Convention violation. Those individual measures could vary from return of property to the reopening of proceedings, the reinstatement of a person in his former position and release from detention invoked under Art. 46 (sometimes combined with Art. 41). This leads to the conclusion some of those non-monetary measures which were initially invoked under Art. 41 expanded to Art. 46 with the establishment of the so called 'Art. 46 judgments'.

Conclusion

The early case law of the Court embraces the policy that the Court can only declare whether the respondent state breached a Convention right and cannot require the respondent states to undertake a specific action.

The *Papamichalopoulos* case showed a 'new practice' in this regard because of the new understanding that just satisfaction under art. 41 does not suffice to execute a judgment. Following this case, the Court extended its declaratory judgments to just satisfaction cases going beyond monetary measures, by introducing restitution of property as a binding obligation in the operative parts.

Individual measures find their roots in the early jurisprudence developed under art. 41. This practice further evolved under Art. 46 in the *Assanidze* case, where the Court explained that a respondent State has a legal obligation under Art. 46 to put an end to the breach and to provide *restitutio in integrum*.

Both cases contributed to the evolving practice of the court to indicate individual measures in the operative part of the judgment. However, the nature of the individual measures in both cases differ. While the *Papamichalopoulos* case includes an order to return the property, the *Assanidze* case ordered the immediate release of the applicants from unlawful detention.

A similar practice of leaving no real choice as to the measures required to remedy the violation, emerged in unfair trials. The *Gencel* clause established the formula that the re-opening of criminal proceeding can provide the most adequate form of redress in case those proceedings violate art. 6. This practice evolved from merely identifying and recommending

[123] Art. 35 ILC

the reopening procedure as being the most appropriate form of redress, to ordering those measures in the operative part, as being done in the *Lungoci* case.

Despite the fact that the Court often reinstates the declaratory nature of judgments and the importance of the margin of appreciation of states, it becomes clear that the Court has nevertheless evolved a policy of indications/recommendations and sometimes even orders in three main areas: restitution of property, unlawful detention and unfair trials.
The justifications of the Court indication of individual measures in those type of cases are mainly based on the nature and gravity of the violation and on the assumed effectiveness of the indicated/prescribed remedial measures.
However, the cases explained in this chapter lack clarity and consistency when it comes to remedial measures, especially consequential orders remain ambiguous.
Nevertheless, *Volkov*[124] seems to give the impression that the Court has the inherent power to indicate the type of remedial measures and sometimes is allowed to issue specific consequential orders under Art. 46 when the remedial measures are narrowed down to one measure due to the nature of the violation.
Lastly, it is worth noting that the correlation between Art. 41 and Art. 46 remains ambiguous and inconsistent. Sometimes the Court indicates individual measures under Article 41, sometimes under Article 46 and sometimes under both.

Chapter 5: the evolution of general measures

Introduction

In parallel to the growing practice on individual measures, general measures began also to evolve under Art. 46.
While individual measures are aimed to redress the individual situation, general measures concern mostly legislative reform or change of administrative practice.[125] This means that general measures transcendent the individual situation and focus on the more general scale of people who might end up in a similar situation as the applicant.

[124] Oleksandr Volkov v. Ukraine, ECtHR Application No. 21722/11, Judgment of 9 January 2013
[125] C. Paraskeva, European Court of Human Rights: From Declaratory Judgments to the indication of Specific Measures, European Human Rights law Review (2018), Thomson Reuters and Contributors, at 5

General measures can be divided in 2 groups: Art. 46 judgments and pilot judgments. When general measures are adopted in a pilot judgment, those measures appear always in the operative part. When adopted outside the pilot judgment procedure, general measures are mostly included in the reasoning part of the judgment. Those judgments are called Art. 46 judgments, because the Court makes a reference to the legal obligations of a State under Art. 46 by introducing general and/or individual measures. Sometimes those binding obligations are repeated in the operative part of the judgment.
The next sub chapters will examine the establishment of the pilot judgment procedure and Art. 46 judgments.

The establishment of the pilot judgment procedure

During the 1990s new Eastern European states joined the Council of Europe, which almost doubled the number of potential applicants[126]. Due to this expansion, de Court had to deal with a rising number of cases with an enhanced degree of complexity, involving both structural and systematic problems of human rights protection. These problems arose mainly from the democratization processes in Eastern member state counties. Solutions were looked for in order to deal more efficiently with rising backlog of repetitive cases concerning mainly the problem of excessive length of proceedings under art. 6 (1).[127]
It was the Steering Committee for Human Rights (hereafter "") who was the first to propose a pilot judgment procedure[128]. After the CDDH rejected the Court's proposal to introduce a specific provision in Protocol No. 14 to establish a pilot judgment procedure, it asked the CoM to adopt appropriate recommendations providing a procedure to remedy structural problems.[129]

[126] C. Paraskeva, Human Rights Protection Begins and Ends at Home: The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights (2009), Nomiko Vima (Greek Law Joural), at 3
[127] L.-A. Sicilianos, the involvement of the European Court of Human Rights in the implementation of its judgments: recent developments under article 46 ECHR (2014), Netherlands Quarterly of Human Rights, Vol. 32/3, at 236
[128] C. Paraskeva, Human Rights Protection Begins and Ends at Home: The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights (2009), Nomiko Vima (Greek Law Joural), at 7
[129] C. Paraskeva, The relationship between the Domestic implementation of the European Court of Human rights and the Ongoing Reforms of the European Court of Human Rights (2010), Atnwerp: Intersentia, at 98

The reasoning behind this rejection was the assumed legal difficulty with creating a general legal obligation regarding the pilot judgment procedure and the persuasion that this "procedure could be followed without there being a need to amend the ECHR"[130].

In 2004, the CoM adopted Resolution (2004)3 on 'judgments revealing an underlying systematic problem' in which it invited the Court:

> "…to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments;" [131]

This invitation was based on the growing concern of repetitive cases, revealing an underlying systematic problem[132]. The resolution also shows the willingness of the states to grant the Court more powers in solving systematic problems.
This change of remedial practice through the request of the CoM happened in 2004, but it was not until 2011 that the Court showed explicitly its approval towards the pilot judgment procedure, when it adopted Rule 61 of the Rules of Court. This rule empowered the Court

> "…to identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting State concerned is required to take at the domestic level *by virtue of the operative provisions* of the judgment."

So, there is an overall consensus that the respondent state is obliged in the pilot judgment procedure to abide by the general measures inserted in the operative part of the judgment in order to resolve the systematic issue in the domestic legal order.[133]
Another important feature of Rule 61, is the competence of the Court to impose specified time limits (inserted in the operative part of the judgment) within which the state must comply with the issued remedial measures.[134]

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[130] CDDH (2003)026, Guaranteeing the long-term effectiveness of the ECtHR Implementation of the Declaration adopted by the Committee of Ministers at its 112 Session (14-15 May 2003) Interim Activity Report, Addendum I Final (2003), at para. 21.
[131] Committee of Ministers, Resolution of 12 May 2004, DH Res. (2004) 3, para 1
[132] Idem
[133] P. Leach, No longer offering fine mantras to a parched child? The European Court's developing approach to remedies (2013), In A. Føllesdal, B. Peters, & G. Ulfstein (Eds.), Constituting Europe: The European Court of Human Rights in a National, European and Global Context (Studies on Human Rights Conventions, pp. 142-180). Cambridge: Cambridge University Press, at 162
[134] Idem

As stated under Art. 61(4), those time frames can vary depending "on the nature of the measures required and the speed with which the problem which it has identified can be remedied at the domestic level."

A milestone case in regard of general measures was the *Broniowski* case, where the Court stated that:

> "…Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected. [135]

The Court further clarified that those measures are aimed:

> "…to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause. Such measures should therefore include a scheme which offers to those affected redress for the Convention violation identified in the instant judgment in relation to the present applicant.[136]

The *Broniowski* case was considered to be the first pilot judgment (even though it was not explicitly mentioned in the judgment), because it contains the characteristics of a pilot judgment.
In the instant case, the Court decided that Poland had to "secure the implementation of the property right in question in respect of the remaining Burg River claimants or to provide them with equivalent redress in lieu through appropriate legal measures and administrative practices". [137] The Court first held that Poland had to amend its existing legislation or adopt new laws which would banish the systematic violation of the property rights at stake. Secondly it ordered similar compensation for the affected applicants. More than a year later, the Polish government adopted the "Law on the Realization of the right to compensation for

[135] Broniowski v. Poland ECtHR Application No. 31443/96, Judgment (GC) of 22 June 2004, operative part, para 193
[136] Idem, later codified in Art. 61 Rules of Court
[137] Broniowski v. Poland ECtHR Application No. 31443/96, Judgment (GC) of 22 June 2004, operative part, para. 4

property left beyond the present borders of the Polish State', which provided a remedy to the systematic violation of property rights.
A couple of years later, the Court reinstated in the *Burdov* case that the implementation of a pilot goes hand in hand with "the principle of subsidiarity which underpins the Convention system"[138]. This is interesting seen the fact that general measures are located in the operative part.

The pilot judgments procedure is a well-established procedure accepted by the CoM, the signatory states and the Court, as it has a distinct origin in the CoM Resolution Res (2004)3 and is codified in Rule 61 of the Rules of Court. Therefore, there is no need for a thorough case law analysis.
It can be concluded that the establishment of the pilot judgment procedure to a notable large extend increased the prescriptive content of the operative part of judgments. Furthermore, it empowered the Court to find a solution in one single case which could be applied in similar cases providing equivalent redress for other potential applicants being affected in the context of similar violations.

Emerging general measures in respect of 'article 46 judgments'

In parallel to individual measures in 'Art. 46 judgments', the Court has evolved a practice of general measures in 'Art. 46 judgments', which address systematic and structural problems[139].
As already mentioned above, Art. 46 judgments go often not as far as to issuing binding obligations in the operative parts of the judgments, referring to the legal obligation of the state under Art. 46 in the reasoning part.
As seen in chapter 3, the first time a case referred to Art. 46 in a judgment by the Court, happened in the Sc*ozzari and Giunta* case. In this case, given the fact that the Italian government continuously allowed minors into the care of a questionable community, the Court came to the conclusion that the mere duty of payment didn't suffice. The Court considered that the scope of Art. 46 also included the legal obligation to adopt appropriate individual/and or general measures to put an end to the violation.
However, no specific general measures were ordered or even recommended in the judgment, leaving the choice of means to the respondent state and the Committee of Ministers who

[138] Burdov v. Russia (No.2), ECtHR Application (no. 2), ECtHR Application No. 33509/04, Judgment of 15 January 2009, para. 127
[139] Under chapter 3 we say 'Article 46 judgments' concerning individual measures

could suggest a specific action. In the end the judgment took almost 8 years before it was executed.
Nevertheless, the case became an important point of reference for future judgments indicating general measures.

Another noteworthy case is *Manole and Others* v. Moldova, where the Court considered that

> ".. the respondent State is under a legal obligation under article 46 to take general measures at the earliest opportunity to remedy the situation which gave rise to the violation of Article 10. In the light of the deficiencies found by the Court, these general measures should include legislative reform, to ensure that the legal framework complies with the requirements of Article 10."[140]

Even though the Court seems to be recommendatory with the wording "considers"[141], the Court is more precise later on about what it understands under those general measures as it states that those measures "should" include legislative reform. The judgment also mentions "at the earliest opportunity", which demonstrates some kind of urgency for the adoption of general measures.

In the *Savriddin Dzhurayev* case[142] the Court included in the reasoning part of its judgement a detailed list (under art. 46) of the general measures that were needed to prevent violations of the same kind. The Russian authorities were expected to propose to the Committee of Ministers concrete steps to effectively implement the judgment under the supervision of the CoM who would assess the effectiveness of the measures proposed.[143]
In contrast to the former, the Court included in *Šekerović and Pašalić* the general measures in the operative part, stating that

> "…the respondent State is to secure, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the amendment of the

[140] Manole and Others v. Moldova, ECtHR Application No. 13936/02, Judgment of 17 September 2009, para 117
[141] Other wording used in recommendary general measures are for example: "invite", "suggests", "would encourage" etc.
[142] Savriddin Dzhurayev v. Russia, ECtHR Application No. 71386/10, Judgment of 25 April 2013
[143] Idem, para 264

> relevant legislation in order to render the applicants and others in that situation eligible to apply, if they so wish, for FBH Fund pensions."[144]

The instant case was a follow up on the *Karanovic* case, in which general measures were only included in the reasoning part. In the latter, the respondent state did not adopt any satisfying general measures for an effective execution of the judgment. Therefore, the Court used more precise language in *Šekerović and Pašalić* and ordered explicitly the reform of legislation in order to prevent future violations. In addition, the Court adopted a time limit of six months for the general measures to be adopted.

A similar binding time frame was adopted in *Ananyev and others* where the Court held that

> "…the respondent State must produce, (…), within six months from the date on which this judgment becomes final, a binding time frame in which to make available a combination of effective remedies having preventive and compensatory effects …"[145]

In *Vlad and Others*[146], the Court held in the operative part that

> "… the respondent State must, through appropriate legal measures and administrative practices regarding, in particular, the compensatory remedy, secure the right to a trial within a reasonable time".

As exemplified in the previous overview of case law, the Court sometimes only refers to the nature of general measures in its judgment, leaving the state a wide MoA, while in another set of cases, it provides much more detailed general measures, reducing the MoA of the respondent state.

Further clarifying obligations under Article 46

Pilot judgments confirm that the Court has the power to adopt general measures in the operative part of a judgment. Moreover, the following statement confirms that pilot judgments and 'Article 46 judgments' go hand in hand with the principle of subsidiarity:

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[144] Šekerović and Pašalić v. Bosnia and Herzegovina, ECtHR Application No. 5930/04, Judgment of 8 March 2011, operative part 6

[145] Ananyev and others v Russia, ECtHR Application Nos. 4252/07 and 60800/08, Judgment of 10 January 2012

[146] Vlad and Others v. Romania, ECtHR Application No. 40756/06, 41508/07 and 50806/07, Judgement of 26 November 2013

> "…all these jurisprudential techniques (pilot judgments and article 46 judgments) are actually based on the fundamental principle of subsidiarity. By these methods the Court provides guidance to states to overcome long-standing dysfunctions in their law and practice affecting Convention rights and freedoms."[147]

Jurisprudential techniques such giving guidance to address dysfunctions in a judicial system of a contracting state, is not perceived as being in contravention of the principle of subsidiarity.

Regarding the roadmap as provided in the *Khodorkovskiy* case, the pilot judgment procedure and general measures fall within the first category of cases[148], because those cases allow the Court to indicate the type of measure in order to put an end to a systematic problem[149] or to discontinue an ongoing situation[150]. The latter can be formulated as the obligation of cessation which could encompass general measures to discontinue a continuous situation. Those measures might concern legislative reform measures. The justification for the indication of general measures such as legislative reform is a follow up on Article 1 of the Convention, which obliges the states to ensure that their domestic legislation is compatible with the Convention.

Conclusion

General measures find their origin in the well-known pilot judgment procedures, which finds its origins in the *Broniowski* case.

It was the CoM, who encouraged the Court to become more involved in resolving systematic problems. The explicit invitation on behalf of the Committee of Ministers also demonstrates the willingness of the Signatory states to grant the Court the competence to include general measures in the operative part of the judgment. In addition, the fact that general measures are sometimes combined with a binding time frame, seems to be an accepted practice as well.

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[147] N. Sitaropoulos, Implementation of the European Court of Human Rights' Judgments concerning National Minorities or Why Declaratory Adjudication Does Not Help, European Society of International Law Conference Paper Series 4 (2011), at 28

[148] Khodorkovskiy v. Russia, ECtHR Application No. 5829/04, Judgment of 28 November 2011, At 270

[149] Broniowski v. Poland [GC], ECtHR Application No. 31443/96, Judgment of 2004-V, para 194,

[150] Hasan and Eylem Zengin v. Turkey, ECtHR Application No. 1448/04, Judgment of 2007-XI, para 84; see also L. v. Lithuania, ECtHR Application No. 27527/03, Judgment of 2007-X, para 74

Despite the fact that this established framework of non-monetary measures has a distinct origin in the Committee of Ministers Resolution combined with the progressive Rules of Court,[151] it can be seen in line with the non-monetary remedial practice of the Court.
The pilot judgment procedure also contributed to the shift from exclusive execution of Court's judgments done by the Member States and the CoM, to a shared responsibility with the Court. This shift provides evidence that the Court fulfils a complementary role in the execution process which enjoys support from both the CoM and the signatory states.

Chapter 6: Political views on and reality of remedial practice of the Court

Practice of the Committee of Ministers

Analysis of the Annual Reports

Under this paragraph the Annual Reports of the CoM will be explored, to understand better the point of view of the CoM regarding the remedial practice of the Court.

The first clear response from the Committee of Ministers toward the remedial practice of the Court is found in its 1st annual Report 2007, where the Committee of Minister recognized the significant importance of the cases *Assanidze* and *Ilascu*. This Report observed that

> "The ECtHR may also *order* the required individual execution measure. The first cases addressing situations of this kind were decided by the ECtHR in 2004, and in both cases the ECtHR ordered the release of applicants who were being arbitrarily detained."[152]

In this very first Annual Report, the CoM already recognizes that consequential orders may be accepted in cases of arbitrary detention. The report also observed that some cases included recommendations in the form of appropriate individual measures.

The 2nd Annual Report of 2008 reveals that Court judgments remain usually silent when it comes to the nature and scope of execution measures, either individual or general, because those measures

[151] A. Mowbray, An Examination of the European Court of Human Rights' Indication of Remedial Measures (2017), Human rights law Review, 17, at 452
[152] Supervision of the Execution of Judgments of the ECtHR, 1st Annual Report 2007, Strasbourg, March 2008, at 17 under point 19

> "… have to be identified by the state itself under the supervision of the CoM. Beside the different considerations enumerated in the preceding paragraph, national authorities may find additional guidance inter alia in the rich practice of other states as developed over the years, and in relevant CM recommendations (…)."[153]

Despite the weight given to the MoA of the states, this Report recognized that sometimes the Court provides "itself guidance as to relevant execution measures" and in this regard "has thus recently provided recommendations as to individual or even general measures it considered as appropriate."[154]

The 3rd Annual Report 2009 states that "the ECtHR today provides such recommendations in respect of individual measures in numerous cases. It may also, in certain circumstances, directly order the taking of the relevant measure."[155] The CoM recognizes that recommending individual measures becomes a common practice of the Court, while consequential orders remain still an exception.

In the 4th Annual Report 2010, the Committee of Ministers adds that

> "… it may also, in certain circumstances, where the State does not have any real choice as to the execution measures required, directly itself order the taking of the relevant measure. For example, in case of arbitrary detention, *restitutio in integrum* will necessarily require, among other things, release from detention and in several cases the Court has also ordered such release". [156]

This report cites beside the *Assanidze* and *Ilascu* case, the *Fatullayev* case[157]. The latter Chamber judgment included in the operative part also an order to secure the applicant's immediate release from prison. The CoM accepts explicitly that sometimes there is no real choice left as to the execution measures required and that *restitutio in integrum* necessarily requires release from detention.

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[153] CoE, Supervision of the Execution of Judgments of the ECtHR, 2nd Annual Report 2008, Strasbourg, April 2009, at 19 under point 18
[154] Idem, under point 20
[155] CoE, Supervision of the Execution of Judgments of the ECtHR, 3rd Annual Report 2009, Strasbourg, April 2010, at 19 under point 20
[156] CoE, Supervision of the Execution of Judgments of the ECtHR, 4th Annual Report 2010, Strasbourg, April 2011, at 17 under point 19
[157] Fatullayev v. Azerbaijan, ECtHR Application no. 40984/07, Judgment of 22 April 2010

In the 5th Annual Report 2011, the CoM recognized the expanding role of the Court with regard to the indication of remedial measures:

> "The Court's interaction with the Committee of Ministers in the application of Article 46 is in constant evolution. Since a number of years, the Court has thus *more and more frequently* has given assistance the execution process in a number of ways, e.g. by providing also itself guidance as to relevant execution measures in its judgments."[158]

The 6th Annual Report 2012 adds that those judgments can be defined as 'quasi-pilot judgment' or 'art 46 judgments'[159], recognizing the evolving jurisprudence under Art. 46.
In addition, the 7th Annual Report 2013 states that "the Court has continued to deploy special efforts to assist execution by including in certain judgments, with reference to Article 46, different indications of relevance for the solution of structural problems."[160] The CoM furthermore recognized the positive impact of this kind of immediate support by the Court given in the judgment, especially regarding measures that address structural problems.
This Report indicated also for the first time a separate statistical appendix on 'Judgments with indications of relevance for execution' including 2 sub chapters: (1) pilot judgments final in 2013 and (2) judgments with indications of relevance for the execution (under Article 46) final in 2013.
In the 7th Annual Report, the CoM confirms that "in recent years, the Court has considerably developed judgments with a special part on Article 46 containing indications and/or recommendations relevant for the execution."[161]
This demonstrates the impact of Art. 46 judgments and their increasing importance with regard to the evolving role of the Court regarding the execution and implementation process.

Both the 8th and the 9th Annual Report mention that recommendations as to the relevant execution measures are common practice of the Court and that in certain circumstances the Court may issue relevant measures within a fix time limit, which refers also to consequential orders:

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[158] Supervision of the Execution of Judgments of the ECtHR, 5th Annual Report 2011, Strasbourg, April 2012, at 21 under point 32
[159] Supervision of the Execution of Judgments of the ECtHR, 6th Annual Report 2011, Strasbourg, April 2013, at 28 under point 37
[160] CoE, Supervision of the execution of judgments and decisions of the European Court of Human Rights, 7th Annual Report 2013, March 2014, at 11
[161] CoE, Supervision of the execution of judgments and decisions of the European Court of Human Rights, 8th Annual Report 2014, March 2015, at 12

> "Pursuant to Article 46, it may in certain circumstances, also decide the effect that should be given to the violation finding, order directly the adoption of relevant measures and fix the time limit within which the action should be undertaken. For example, in case of arbitrary detention, restitutio in integrum will necessarily require, among other things, release from detention. Thus, in several cases, the Court has ordered immediate release of the applicant."[162]

This text is further expanded in the 10th Annual Report of 2016, where is stated that the Court *assists* the execution process by providing recommendations both in respect of individual and general measures. The emphasis on assistance points to a recognized common practice, while earlier this was formulated as "providing recommendations in a growing number of cases" [163].
It is noteworthy that the Court mentions both individual measures and general measures and that those recommending 'interventions' provide support to ongoing execution processes and complement in this regard the role of the CoM.
This recognition of the complementary role of the Court in the execution process is an important observation, which could be an argument in favour of the court's justified interventionism.
Beside recommendations, the CoM recognizes that the Court's interventions may in some cases "also decide the effect that should be given to a violation", The "effect" that should be given to a violation, refers explicitly to measures included in the operative part, taking the form of a binding order.
The Committee of Ministers gives approval to the Court to include certain measures in the operative part, giving the example of the release from detention order.
The CDDH makes clear that it "does not support a regular recourse to this practice on indicating specific measures beyond these exceptional cases, where the nature of the violation found may be such as to leave no real choice as to the measures(s), in particular individual ones, required to remedy it"[164]. The CDDH clearly expresses that those cases should remain exceptional.
The Glossary in this Report furthermore defines a judgment with indications of relevance for the execution "Article 46", as

[162] Idem, at 214 and CoE, Supervision of the execution of judgments and decisions of the European Court of Human Rights, 9th Annual Report 2015, March 2016, at 252
[163] CoE, Supervision of the execution of judgments and decisions of the European Court of Human Rights, 10th Annual Report 2016, March 2017, at 290
[164] CDDH, the Longer-term future of the system of the Convention on Human Rights (2015), Report of the Steering Committee for Human Rights, para 151

> "… a judgment by which the Court seeks to provide assistance to the respondent State in identifying the sources of the violations established and the type of individual and/or general measures that might be adopted in response. Indications related to individual measures can also be given under the section Article 41." [165]

An interesting aspect in this definition the reinstatement that individual measures under Art. 46 judgments, can also be given under Art. 41. As we have seen in the previous chapters, there is still some inconsistency with regard to when/why and how individual measures are indicated under Art. 46 and/or under Art. 41.

The 11th Annual Report of 2017 doesn't add anything noteworthy in the course of affaires evolved through the Annual Reports.

The reality of remedial measures according to the Annual Reports

Following the data provided in the Annual Reports, different charts could be created to map out the course of remedial measures between 2010-2017 and 2013-2017, in order to obtain a more comprehensive overview of the remedial practice.

The first chart will demonstrate all final Article 46 judgments[166] compared to all final pilot judgments between 2010 and 2017. The following charts will provide an overview of the amount of individual and/or general measures indicated in those judgments. Finally, I will place the total amount of judgments indicating remedial measures against the number of remedial measures indicated the operative part.[167]

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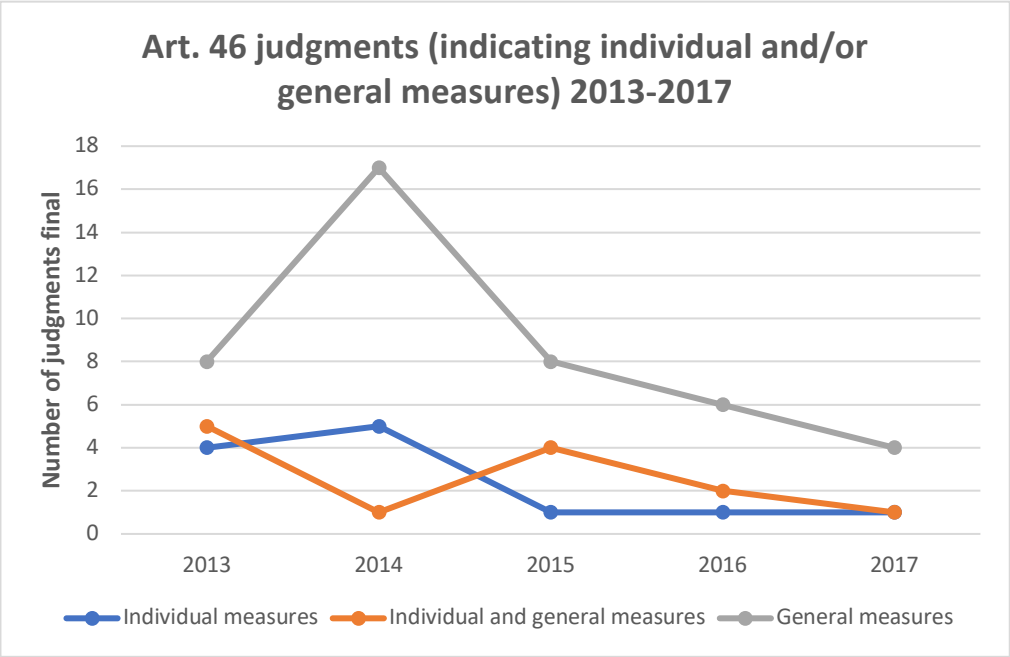
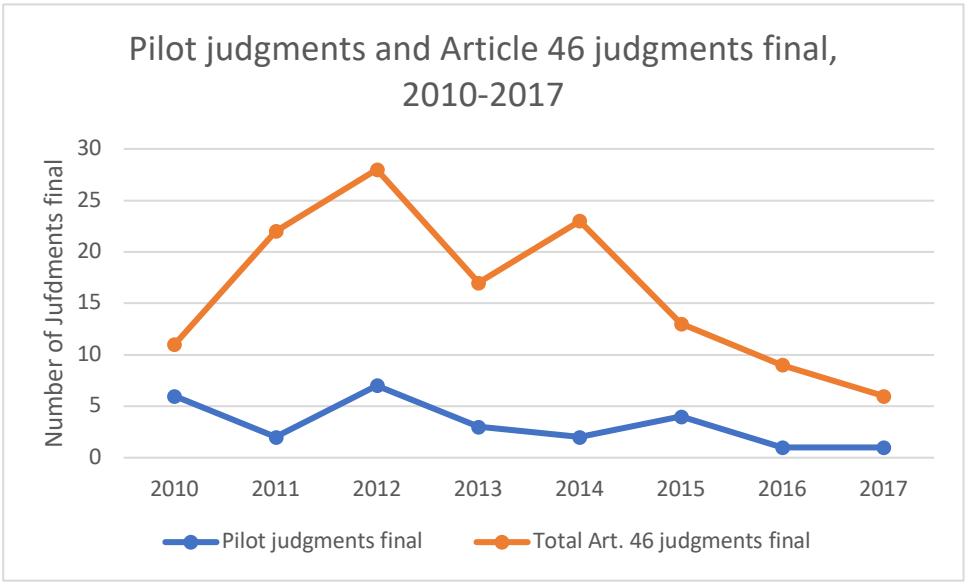
[165] CoE, Supervision of the execution of judgments and decisions of the European Court of Human Rights, 10th Annual Report 2016, March 2017, at 41

[166] Statistics 2010-2013 based on 7th Annual Report 2013 under Note 4, and statistics 2014-2017 based on Annual Reports of those years.

[167] Those statistics are based on the Annual Reports of the Committee of Ministers and the Human Right Law Implementation Project (collaborative research project between the universities of Bristol, Essex, Middlesex and Pretoria) and 'the Open Society Justice Initiative', retrieved from https://www.bristol.ac.uk/media-library/sites/law/hric/2018-documents-/2017%2011%2008%20Handout%20for%20Strasbourg%20seminar%20(MDX)%20(1).pdf



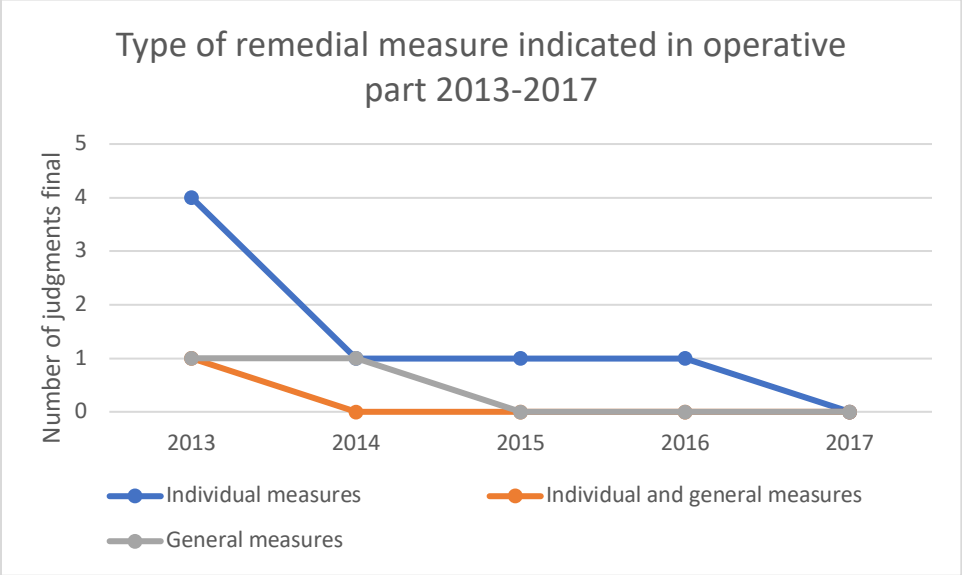
The first Chart shows that there were more Art. 46 than Pilot judgments between 2010 and 2017. A notable peak of Art. 46 judgments and pilot judgments occurred both in 2012 and 2014. It is noteworthy that the amount of Art. 46 judgments decreased drastically since 2014.



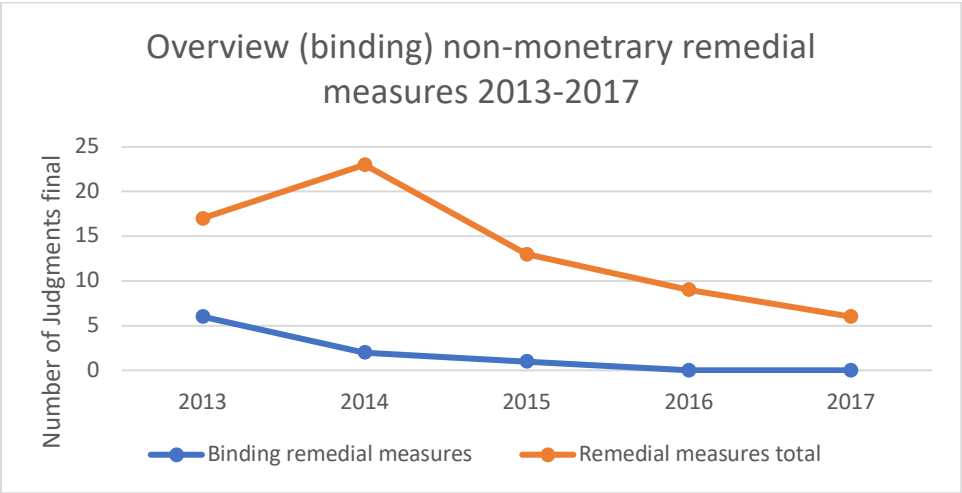
From the second chart can be concluded that the Court's remedial practice of indicating individual and/or general measures has reduced over the years.

Overall, the most common form of remedial measures has been that of general measures. The peak of Art. 46 judgments in 2014 in the first chart explains the peak of general measures and individual measures indicated in the judgment in the second chart. It is interesting to note that during this year, the indication of both individual and general measures was at its lowest point.

Another aspect worth examining is whether those individual and/or general measures were indicated in the operative part of the respective Art. 46 judgments.



Consequential orders had their peak in 2013, from where they reduced to zero in 2017. It's not surprising that individual measures are more often formulated in binding terms than general measures (while overall the Court indicated much more general measures), as for the latter general measures are mostly inserted in the operative part of the judgment in the pilot judgment procedure.



The last chart shows that the Court's directive approach regarding binding remedial measures has decreased since 2013, almost in parallel with the total of non-monetary remedial measures (including also non-binding measures varying from orders to recommendations).
It can be concluded that the overall non-monetary remedial practice of the Court had its peak in 2014, from where it slowly decreased.

Another important final observation regarding judgments specifying remedial measures is that those judgments are only a small fraction of the Court's case law. According to the study of the Human Rights Law Implementation Project, the peak of 2014 (both pilot and Article 46 represents) represents "only six per cent of the overall number of Chamber and Grand Chamber judgments finding at least one violation (34 out of 548)" [168] and that "the average percentage from 2004 to 2016 was just two per cent"[169].

Recommendations and Resolutions adopted by the Committee of Ministers

Through the guidelines of Recommendation (2000) 2[170], the CoM encourages the contracting parties to the Convention to implement re-examination and reopening mechanisms in their domestic legislation, which in exceptional circumstances proves to be "the most efficient, if not the only, means of achieving *restitutio in integrum"*.[171]
The CoM points out 2 exceptional circumstances: (1) The continuing suffering of very serious negative consequences, which are the effect of the domestic decision; and (2) the impossibility of remedying those outcomes by way of just satisfaction.

The CoM adds that Contracting States should provide for reopening of domestic proceedings in the matter of a substantive or a procedural violation of the Convention.[172]
The Explanatory Memorandum clarifies the type of violations which are mentioned under sub paragraph (ii)[173]. It points out that situations of substantial violations concern mostly "criminal convictions violating Article 10 because the statements characterized as criminal by the national authorities constitute legitimate exercise of the injured party's freedom of

[168] A. Donald, P. Leach, A.-K. Speck, Studies on the Developing Remedial Practice of the European Court of Human Rights, Human Rights Law Implementation Project, at 2
[169] Idem
[170] CoM, Rec. (2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, 19 January 2000
[171] Idem, under II (i)
[172] Idem, under II (ii) (a) & (b)
[173] Idem, Explanatory Memorandum under 12

expression" [174]. Other cases concern violations of art. 9, where the criminal conduct is a legitimate exercise of freedom of religion. Concerning procedural violations, the explanatory memorandum states that those situations occur when the injured party was not able to prepare his/her defence in criminal proceedings, statements are obtained in an unlawful way (through torture for example), or where the principle of equality of arms was not respected in the civil proceedings.

Those shortcomings should be of such gravity that they give rise to serious doubts about the outcome of the domestic proceedings. From the memorandum is becomes clear that re-examination and reopening are of particular importance in the area of criminal law. Infringements in criminal proceedings could for instance have affected the choice of detention, and the reopening of proceedings could allow for a determination whether the applicant is innocent and what penalty should have been applied when there wouldn't have been a Convention violation.

In addition to reopening of proceedings, it's the Committee of Ministers' view that release from detention is "an integral part of the right to reparation in the absence of any compelling reasons justifying their continued detention pending the outcome of the new trial"[175].

Finally, the explanatory memorandum states that "the recommendation does not deal with the problem of who ought to be empowered to ask for reopening or re-examination"[176], leaving this an open-ended discussion as already shown by *Moreira Ferreira*.

The preamble of Resolution 2004(3)[177] expressed the interest in "helping the state concerned to identify the underlying problems and the necessary execution measures". This interest of helping the state could be facilitated "if the existence of a systemic problem is already identified in the judgment of the Court". This Resolution clearly supports the practice of general measures to solve problems related to systematic problems.

This is further confirmed by Recommendation 2010(3)[178], which provides in the preamble that "the case law of the European Court of Human Rights (…), notably its pilot judgments, provides important guidance and instruction to member states in this respect.

[174] Idem
[175] CoE, The execution of judgments of the European Court of Human Rights (Human rights Files No. 19, 2nd edition) (2008), at 23
[176] CoM, Rec. (2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, 19 January 2000, Explanatory Memorandum under 13
[177] CoE, Res. 20014(3) on judgments revealing an underlying systematic problem, 12 May 2004
[178] CoE, Rec. (2010(3)) on effective remedies for excessive length of proceedings, 24 February 2010

It becomes clear from both documents that the CoM accepts the practice of the Court regarding general measures and notably pilot judgments.

Consensus of states

As stated earlier, the Court's case law shapes the interpretation of the Convention provisions. It is relevant in this regard to examine whether the states agree with certain 'interpretations' and 'new practices' of the Court. When looking at the Courts practice on individual and general measures, it is important to view whether the states agree, because consensus is a good indication as to what interpretations of the Convention state parties accept.

In case a state does not agree with a certain practice or interpretation, they can oppose under Art. 36 of the Convention against the new interpretation of the Court.[179] It follows from this that the Court cannot follow any more its evolutive interpretation.

Looking at the practice of prescriptive/consequential orders, the question is whether there exists a clear resistance of one or more state parties.

Villiger points out that this practice is not contested. Similarly, Jahn argues that "respondent states have generally neither made submissions offering a contrary interpretation and application of Art. 46 nor have they openly abstained from compliance or expressly criticized this development."[180]

So, member states up until now, have not critically scrutinized the development of remedial measures under Art. 46 and more specifically, the Courts evolving practice with regard to consequential orders in exceptional cases.

Furthermore, with regard to reopening of domestic proceedings, the majority of European states agreed to introduce reopening clauses in their domestic legislation.

Regarding general measures, states have generally accepted their obligations as spelled out under Art. 46 in order to prevent repetitive cases.[181] In addition, there is a clear consensus among the Member States with regard to the pilot judgment procedure, which is conceived as a major development in the field of the remedial practice of the Court.

[179] On the subject of H.-J. Cremer, Prescriptive Orders in the Operative Provisions of Judgments by the ECtHR, in A. Seibert-Fohr, M. E. Villiger, Judgments of the European Court of Human Rights – Effects and Implementation (2014), Ashgate, Nomos, at 56

[180] Jahn, Ruling (in)directly through individual measures? Effect and legitimacy of the ECtHR's new remedial power (2014), ZaöRV 74 (1), at 22

[181] CoE, The execution of judgments of the European Court of Human Rights (Human rights Files No. 19, 2nd edition) (2008), at 27

Conclusion

The CoM Instruments demonstrate different approvals from the CoM towards different remedial measures. First, as seen in the previous chapter, the encouragement of the CoM to set up the pilot judgment procedure provided a legal basis for the Court to get more involved in the execution process in cases concerning structural deficiencies and systematic problems. There is a clear consensus among the Member States as well towards the establishment of the pilot judgment procedure. This evolutionary step is a strong argument in favour of consequential orders, because the pilot judgment procedure explicitly accepts prescriptive content in the operative provisions of a Court judgment.

Beside this explicit approval, the CoM increasingly accepted the indication of individual and general measures by the Court, as expressed in the Annual Reports.

The Annual Reports embrace the Court's practice on recommendations of individual and general measures which are considered appropriate by the Court. In addition, the CoM accepts that the Court may sometimes directly order the adoption of relevant measures within a fix time limit. In regard to the latter, the CoM mentions explicitly the order of release in arbitrary detention cases.

The acceptance of general measures is mentioned in Resolution Res (2004)3, where the CoM accepts the Court's role of helping the state concerned in identifying the systematic problem already in its judgment and in this regard propose the necessary execution measures. This practice is also generally accepted by the Member States.

Chapter 7: Proposals to enhance implementation

Introduction

For an adjudicatory system, such as the human rights protection system of the Court, judgment compliance is an essential pillar of legality. Abidance with a judgment, as stated by art. 46 (1) of the Convention, is therefore of great importance for effectiveness of the protection system. But compliance is often slow and only partial as confirmed by official statistics[182] and empirical studies[183]. So, compliance with judgments is one of the major

[182] Report on the Steering Committee for Human Rights on Whether More Effectice Measures are Needed in Respect of States That Fail to Implement Court Judgments in a Timely Manner (CDDH Report), Doc. CDDH (2013) R78, 29 November 2013, Addendum I at 1ff

[183] D. Anagnostou and A. Mungui Pippidi, Domestic Implementatino of Human Rights Judgments in Europe: Legal Infrastructure and Government Effecticebess Matter, 25 (1), European Journal of International Law (EJIL)

challenges of the Court and the indication of individual and general measures is, among other things, an attempt to enhance implementation of judgments. In this regard, I will propose some ideas how strengthening the Court's competence to review compliance may benefit better compliance.[184]

Comprehensive framework on the adoption of individual measures

More coherence and clarity in the application of individual measures is needed. While general measures in principle are applied to structural problems, the indication of individual measures happens in a much less consistent and clear manner.

As seen in the *Assanidze* case, the Court held that "by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it".[185] *Khodorkovskiy* and other cases further clarify that "by its nature" mostly concerns violations happening in property cases, unlawful detention cases and unfair legal proceedings.

Its noteworthy that "by its nature" doesn't seem to address grave human rights violations violating the right to life under Article 2 and acts of torture, inhumane and degrading treatment under Article 3. Most likely the Court reluctance in indicating individual measures in those cases is because of the existence of Rule 39, which allows the Court to "indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings"[186]. Those interim measures are only allowed where there is an imminent risk of irreparable harm to body and limbs.

Current case-law of the Court demonstrates that the specific protection of Rule 39 does not apply to cases *inter alia* of "imminent demolition of property" or "to obtain the release of an applicant who is in prison pending the Court's decision as to the fairness of the proceedings".[187] This could explain why individual measures happen to be indicated in those type of cases. But the Court should provide more clarity on this aspect.

(2014) at 205; Hillebrecht, the Power of Human Rights Tribunals: Compliance and Domestic Policy Change, 2 European Journal of International Relations (2014), at 1

[184] Inspiration drawn upon J. Jahn, Ruling (in) directly through individual measures? Effect and legitimacy of the ECtHR's new remedial power (2014), Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 74 (1) and H. Keller and C. Marti, Reconceptualizing implementation: the Judicialization of the Execution of the European Court of Human Rights' judgments (2015), The European Journal of International Law Vol. 26 no. 4, 829-850

[185] Assanidze v. Georgia, ECtHR Application No. 71503/01, Judgment of 8 April 2004, para 202

[186] ECtHR, Rules of Court, Rule 39

[187] ECtHR, Factsheet interim measures (2018), Press release February 2018 retrieved from https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf, at 2

The nature of the violation is one way of deciding whether conduct-specific measures are needed to repair the violation. However, other criteria should also be taken into account; the urgency of redress, the gravity of a breach, the type of right concerned (substantive /procedural), the existence of systematic deficiencies at the domestic level etc.
The court should adopt a comprehensive framework on those different criteria. This framework could help the Court in making a more informed choice on the appropriate general and/or individual measures and whether they should be formulated in a more mandatory or recommending manner. On the other hand, this assessment can also indicate the incapacity of the Court to grasp the implications of a specific case leading to deference to the national authorities. Despite the fact that deference leaves the states more discretion on the way of implementing a specific judgment, the Court may still provide recommendations in the reasoning part.
In response to the Court's reasoning, the state and the applicant should be given the opportunity to submit observations to the indicated remedial measures of the Court. Creating a constructive dialogue will foster understanding, legitimacy and clarity with regard to the Court's judgment and will in the end enhance implementation.
In addition to this proposal it is important to clarify better the remedial categories emerging under Art. 41 and Art. 46 and their correlation. This part is very much neglected in the debate on remedial measures.

Putting a binding time frame

Another solution might lie in the setting of a binding time frame for implementation. A lot of problems occur with the delay of implementation of judgments. Putting a binding time frame could be an extra incentive for the state to implement the judgment concerned. The practice of binding time frames happens already in the following type of cases. Firstly, they can be adopted in general measures within the pilot judgments procedure as stated under Rule 61:

> "The Court may direct in the operative provisions of the pilot judgment that the remedial measures referred to in paragraph 3 above be *adopted within a specified time* …"

And second with regard to just satisfaction under the Practice Direction:

> "The Court will of its own motion *set a time-limit* for any payments that may need to be made, which will normally be three months from the date on which its judgment becomes final and

> binding. The Court will also order default interest to be paid in the event that that time-limit is exceeded, normally at a simple rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points."[188]

The Court could expand this practice to general and individual measures outside the Pilot Judgment procedure and just satisfaction claims. As seen in some cases, the Court uses sometimes a 'time-limit language' such as: "as soon as possible", "immediate", "the earliest possible date", but this practice could be further refined to real time-limits. This approach is supported by the CoM in its Annual Reports, where is stated that pursuant to Article 46 the Court

> "… may in certain circumstances, also decide the effect that should be given to the violation finding, order directly the adoption of relevant measures and *fix the time limit* within which the action should be undertaken".[189]

A proposal could be to amend the Courts Rules to provide the possibility for the Court to indicate a specific binding time frame for different types of remedial measures in different type of cases. The CoM will keep its responsibility to supervise the implementation of the judgment within the time frame provided by the Court. The political supervision of the CoM "has proven useful for facilitating compliance through diplomatic dialogue and peer pressure would be complemented by a scheme of legal accountability, which would step in if the former fails."[190] In other words, after the expiration of the time limit, the Court could review whether the respondent state has successfully complied with the judgments if the applicant asks for this. In addition, the Court may ask the state to pay default interest in the case the time-limit is exceeded, such exists already for just satisfaction claims.

In this way, the task of the Court 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto' is fulfilled, because this task includes the Court's competence to ensure the observance of engagements taken by the contracting parties to fully abide by the judgment of the Court as stated under Art. 46.

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[188] ECtHR, Practice Direction on Just Satisfaction Claims, at 62

[189] CoE, Supervision of the execution of judgments and decisions of the European Court of Human Rights, 8th Annual Report 2014, March 2015, at 214 and CoE, Supervision of the execution of judgments and decisions of the European Court of Human Rights, 9th Annual Report 2015, March 2016, at 252.

[190] H. Keller and C. Marti, Reconceptualizing implementation: the Judicialization of the Execution of the European Court of Human Rights' judgments (2015), The European Journal of International Law Vol. 26 no. 4, at 850

Reinterpretation of Article 41

When reading article 41 in the strict sense, it becomes clear that just satisfaction is only granted when restitution is (partly) impossible and there is no other way to remedy the violation, which seems to suggest that restitution is the primary form of reparation, while practice of the Court shows the contrary, namely that Art. 41 grants the sole competence to decide monetary compensation.
In most article 41 cases, the Court awarded the following types damages in the operative part of the judgment: (a) pecuniary damages; (b) non-pecuniary damages; and (c) costs and expenses.[191] This practice gives rise to the assumption that just damages awards is the primary form of reparation while restitution is perceived as a subsidiary form. But it's debatable whether those "awards" in the end serve the protection of human rights or merely contribute to the economic interest of applicants.

Looking more closely at Art. 41, there are several obligations towards the present, the future and the past. The obligation of the present represents the principle to put an end to the violation. The obligation of future is based on the obligation to ensure the violation will not recur again. According to Martens, this obligation can be defined as an obligation of cessation. The last obligation concerns reparation of the past, being an obligation of *restitutio in integrum*, and if possible, the payment of damages (compensation).
So, beside the acceptance of monetary compensation, the obligation of cessation and *restitutio in integrum* should also become accepted remedies as being provided by art. 41. According to Martens, the Court is in principle competent to "make all necessary orders as to cessation and *restitutio in integrum*"[192]. It must be noted that specific individual and general measures clarify what the implied obligations of cessation and *restitutio in integrum* entail and therefore provide clear parameters as to how a judgment should be implemented.

Reform or reinterpretation of Art. 41 should recognize the different types of measures depending on the nature of the case, without favouring monetary compensation by definition (as is done in current practice of the Court). The prevalence of the latter would designate the

[191] ECtHR, Practice Direction on Just Satisfaction Claims, at 61
[192] S.K. Martens, Individual complaints under article 53 of the European Convention on Human Rights Martens (1994), Essays in honour of Henry G. Schermers. Vol. 3: The dynamics of the protection of human rights in Europe. p. 253-292 Dordrecht - Boston - London: Nijhoff, at 272

Court as a Court of compensation, while the Court should be perceived as a Court protecting effectively human rights and should not be pursued for mere financial interests. The different measures should vary from award of damages/compensation (monetary and non-monetary), declaratory relief to *restitutio in integrum*. The latter is achieved in particular through the reopening of proceedings, but as stressed in Recommendation (2002)2, the reopening of proceedings is only one of the means to secure *restitutio in integrum* to the applicant.
Other ways to secure *restitutio in integrum* may happen for exemple through release in unlawful detention cases and return of unlawfully obtained property.
This can either be victim oriented, indicating individual measures or for the benefit of members of the society, by indicating general measures.

As Recommendation 2000(2) on "re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights" does not deal with the problem with whom the competence lies to ask for reopening or re-examination, the CoM could adopt a new Resolution on reopening and re-examination, clarifying this power.
Case law shows that in some exceptional cases, the Court has held that "the most appropriate form of redress for a breach of the fairness requirements of Article 6 would be for the applicant to be given a retrial."[193]
Most favorably, the CoM should invite the Court as it has done in the Pilot judgment procedure) to identify situations in which the injured party continues to suffer very serious negative consequences, not capable of being remedied by just satisfaction, because of the outcome of domestic proceedings and to assist the state in finding the appropriate measures ranging from administrative re-examination of a case to the full reopening of judicial proceeding.

Quality of reasoning: Simplify formal language in judgments

Another way to enhance implementation is to simplify the formal language in judgments. The Court's language is often formal and incomprehensible, leaving the states with doubts as to how the judgment should be implemented. In this regard the Court should first adopt clear and understandable language in the corpus of the judgment as to how the conduct or omission of the state concerned violated the Convention right(s).
This view is shared in the Brighton Declaration:

[193] Abbasov v. Azerbaijan, ECtHR Application No. 24271/05, Judgment of 17 January 2008, para 38

> "Judgments of the Court need to be clear and consistent. This promotes legal certainty. It helps national courts apply the Convention more precisely, and helps potential applicants assess whether they have a well-founded application."[194]

More precision in the judgments enables the Court to provide greater clarity as to what Convention standards and effective human rights protection require. This is especially useful in the reopening and retrial of cases, because of the importance for the national Courts to understand the Court's reasoning concerning the violation of the Convention right, as the judiciary was responsible for the domestic judgment leading to the Convention violation.
It moreover will confine the States objections based on the argument that the judgment was not clearly formulated and therefore would lack effective implementation.
This issue was addressed in the *Vermeire*, where the Court expressed its concerns with the fact that the Belgium Courts did not enforce the judgment about which "there was nothing imprecise or incomplete".[195] Thus it is necessary that the judgment is precise and formulated in clear and understandable language.
According to the CDDH, the Court could in addition "indicate more clearly in its judgments which elements were actually problematic and constituted the direct source of the finding of the violation"[196], which could facilitate the Court in setting clear parameters if the nature of the breach requires so. In the end, this clarity should enable the State to understand what the respective judgments actually demands.

On the one hand there are some positive effects of concrete and clear remedial measures for compliance. As demonstrated by Helfer, the more precise an obligation is formulated, the higher are the political costs for the state when not abiding by the judgment.[197]
Concrete and clear remedial measures can also function as a point of reference for the supervision process of the Committee of Minsters, which in turn improves accountability. This accountability can also be better exercised by civil society, because they will be better informed about the specific obligations arising from a judgment.

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[194] Brighton declaration, para 23
[195] Vermeire v. Belgium, ECtHR Series A no. 214-C, Judgment of 29 November 1991, para 25,
[196] CDDH, Report of the Steering Committee for Human Rights, the Longer-term future of the system of the Convention on Human Rights (2015), para 169(iv)
[197] L. R. Helfer, Redesigning the European Court of Human Rights: Embeddedness As a Deep Structural Principle of the European Human Rights Regime (2008), 19(1) The European Journal of International Law Vol. 125, at 156

On the other hand, specification of remedial measures can also work against an effective implementation. As seen in the previous chapters, states may find those measures overly intrusive as they infringe their sovereignty and their Margin of Appreciation. There may also be problems regarding the timeframe as set by the Court, or measures indicated by the Court which are simply not feasible in the domestic system due to their reform.[198] Or sometimes circumstances change in the domestic sphere of a state, which could leaves the directed measures inappropriate or inadequate.
However, an overall more comprehensive and precise judgment, should in my opinion still benefit the implementation of a judgment.
Finally, the newly established Protocol No.16 which allows for a constructive dialogue between the national courts and ECtHR, could contribute to more clarity through the creation of a common understanding on the execution requirements and the consequences flowing from those requirements.

Chapter 8: Concluding remarks

In 1949, the Congress of the European Movement presented to the CoM a proposal to "prescribe remedies, or require the state concerned to impose criminal or administrative measures against any person responsible for violating, annulling, suspending or amending the impugned decision"[199], which appeared to be too ambitious at that time, but the Court now seems to be moving slowly in that direction.

Traditionally, the only explicit remedial tool the Court can order a state to take under the terms of the Convention is just satisfaction as provided by Art. 41, beside its traditional practice of declaratory judgments.
The first evolutionary step in remedial measures was taken in the *Papamichalopoulos* case which established the alternative remedy of non-monetary redress, beside monetary compensation. The next milestone case for individual remedies was *Assanidze*, where the Court ordered for the first time an individual measure in the operative part of the judgment. Concerning general measures, *Broniowski* marks the first case where those measures were

[198] H. Keller and C. Marti, Reconceptualizing implementation: the Judicialization of the Execution of the European Court of Human Rights' judgments (2015), The European Journal of International Law Vol. 26 no. 4, at 840
[199] Traveaux préparatoires I, at 42 and 301-303.

adopted in the operative part of the judgment. Furthermore, this case was considered to be the first pilot judgment.
In unfair trials, the Court started since the *Gencel* case a practice of indicating that the reopening of proceedings can provide the most adequate form of redress, which was even ordered in the *Lungoci* case.
Another evolution happened with *Scozzari and Giunta*, when the Court evolved a practice of individual and general measures in 'Article 46 judgments'.
In Art. 46 judgments, the Court provides assistance to the respondent state in identifying the sources of the violations and the type of remedial measures that are needed to effectively execute the judgment invoking Article 46 and/or Article 41. Those measures are indicated by the Court either in the reasoning and/or operative part of the judgment, getting the Court increasingly involved in the execution process. In this regard the obligations of the states to comply with a judgment under Art. 46 has become 2-fold: obligation of result and obligation of means in exceptional cases.
Yet, the increasingly involvement of the Court in the execution phase has led to much debate on whether the indication of non-monetary remedial measures is justified.

As explained in the first chapter, the Court's competence to be more involved in the implementation process when drafting a judgment finds its legal roots in the Convention mainly under Art. 41, Art. 46, Art. 32 and Art. 19.
Next to the legal foundation, the practice of remedial measures enjoys support from both the signatory states and the CoM. This is established by the fact that the states never explicitly objected to the increased interventionism of the Court in indicating non-monetary measures in the reasoning and operative part of certain judgments. Furthermore, the CoM adopted several resolutions and recommendations which enable the Court the get more involved in the execution process. The pilot judgment procedure, rooted in the CoM Recommendation Rec (2004)2 shows the will of the CoM to empower the Court (1) to identify the nature and the structural or systematic problem in a judgment and (2) to provide the type of remedial measure which the state must adopt by virtue of its binding force in the operative part.
Moreover, the assisting role of the Court through the indication of individual and general measures is approved in the Annual Reports of the CoM. In addition, the CoM mentions that the Court may sometimes directly order the adoption of relevant measures within a fix time limit.

Despite those explicit approvals, the CCDH argues in its report of 2015, that the proactive role of the Court in the indication of non-monetary remedial measures should be restricted to those exceptional cases where there is no real choice as to the measure(s) required to remedy the violation.

Those exceptional cases are further clarified in the *Khodorkovskiy* case and provide *inter alia* the following category of non-monetary remedies: restitution of property, release in unlawful detention cases, reopening of unfair trials and general measures (such as reform/amendments of legislation) in and outside the pilot judgment procedure.

In those category of exceptional cases, there is a general consensus that the Court is considered to be the most suitable organ within the CoE to prescribe the appropriate measures to redress the violation. Furthermore, precision of the measures can facilitate supervision by the CoM and implementation of the judgment by the state concerned. In addition, clarity can foster accountability and give an additional legal incentive (when measures are adopted in the operative part) to the state to implement a judgment. Also, civil society will be empowered, as they know what the state is expected to do and can put additional pressure.

This leads us the answer to the research question: The Court does have the competence to include in the operative parts of its judgments prescriptions and consequential orders as to how a Respondent state has to act in order to stop an ongoing violation of a Convention right and to indicate the way a state should redress the situation, when those interventions are limited to the aforementioned exceptional cases. In those exceptional cases, "the nature of the violation found may be such as to leave no real choice as to the measures"[200] (in particular individual ones), it falls within the jurisdiction of the Court to decide seen the circumstances of a specific case to indicate a specific measure.

An important note in this regard is that the Courts interventionism should not be seen as contrary to the principle of subsidiarity as it complements the role of the CoM in supervising the execution of the judgments.

Beside the Court's justified interventionism in exceptional cases, improvements are needed to strengthen the Court's role in the execution process to enhance implementation of judgments. First the Court needs to adopt a comprehensive framework on the adoption of individual measures, to make an informed assessment whether the Court is allowed to indicate specific measures and define better those exceptional cases where individual measures are indicated.

[200] Oleksandr Volkov v. Ukraine, ECtHR Application No. 21722/11, Judgment of 9 January 2013, at 195

Secondly, the use of binding time frames for general and especially individual measures could benefit implementation, because they put extra pressure on the state to implement the remedial measures. A reinterpretation of Art. 41, putting *restitutio in integrum* first, should go beyond awards since the aim of restitution is not monetary compensation but restoring the victim's situation. Measures for *restitutio in integrum* may entail measures varying from return of property, reopening of an unfair trial, release from unlawful detention to the reinstatement in the former job. The indication of individual measures should always go hand in hand with the principle of subsidiarity. Finally, judgments of the Court need to be formulated in a less formal way, identifying in a comprehensive way how the Convention right(s) was/ violated, indicating the source of the violation. Furthermore, if appropriate, the Court can indicate remedial measures in the reasoning and/or operative part, formulating those measures in a comprehensive way.

Despite the Courts overall shift from declaratory judgments towards indications of specific remedial measures, the statistics of the Annual Reports demonstrate that interventions of the Court in Art. 46 judgments and pilot judgments have decreased since 2013 and that the use of the operative part is rare. Beside this declination, it must be born in mind that the indication of non-monetary measures consists of a small part of the total number of cases.

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