



# The Evolving Remedial Practice of the European Court of Human Rights

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8 November 2017, 4.00 – 6.00 pm

Council of Europe, Palais de l'Europe

**Presentation by Mr Robert Spano**, Judge at the European Court of Human Rights elected in respect of Iceland

1. Ladies and gentlemen. The issue of the Court's practice of indicating individual or general non-monetary measures is an important one, both as a technical matter, but also more generally for the sustained efficacy and legitimacy of the Convention system.
2. So, to be useful as the Strasbourg judge on the panel, I will attempt to articulate the challenges facing the Court when confronted with the question whether it should proceed in a particular case by indicating specific remedial measures. In doing so I will of course have to say a few words about the recent landmark judgment of the Grand Chamber in *Burmych and Others v Ukraine*. Having said that, don't get your hopes up; the issue is a difficult one with no clear-cut answers.
3. I think it is useful to begin with the general statement set out at paragraph 141 of *Burmych* where the Court states, and I quote: "The understanding of [the division of responsibility between the Court and the Committee of Ministers] has evolved in the light of the Court's case-law as it has developed with regard to changing circumstances, and notably the proliferation of structural and systemic violations of the Convention."
4. Although the Court is here, in my understanding, alluding first and foremost to the pilot judgment cases, and situations where there has been a persistent failure to execute a pilot judgment, as in the post-*Ivanov* cases dealt with in *Burmych*, it is clear that this statement has broader application; it conveys the evolution of the division of responsibility between the Court and the Committee of Ministers in the light of changing circumstances, in other words an evolution from a posture of passivity by the Court towards the realisation that there is, indeed, a symbiotic relationship between the Court's observance of the engagements under the Convention undertaken by the High Contracting Parties, to use the language of Article 19, and the CM's supervision of the execution of final judgments under Article 46, thus requiring a measure of proactivity by the Court. It is with defining the scope and boundaries of that relationship that the Court has grappled in the last decade or so and, to be frank, I am not sure a linear or coherent approach has, as yet, been adopted at the level of principle by the Court, in particular in non-pilot judgment cases, i.e. in the so-called quasi-pilot cases or, even less, in ordinary cases, either at the level of a Chamber or the Grand Chamber.

5. Now, what is the reason for the Court's trepidation in this area, as identified in the research presented here today by our colleagues at Middlesex? I would, I think, identify four issues that may form an integral part of a possible answer to that question.
6. *Firstly*, the question whether the Court should give indications of individual or general measures in a particular case implicates some difficult questions on the division of powers under Article 46 of the Convention. In other words, the Strasbourg judges are hesitant, rightly so in my view, in traversing the bridge from their core role of objective legal analysis under Article 19 of the Convention to the kind of policy and even political assessment, traditionally performed by the Committee of Ministers, which is often necessary for an informed view on whether and to what extent specific remedial measures under Article 46 should be indicated in judgments for implementation at the execution stage. Having said that, I think it is important to make a clear legal distinction here between remedial measures which the Court indicates in its reasoning in the form of recommendations, on the one hand, and, on the other, remedial measures actually inserted into the operative provisions themselves. There is in my view no plausible legal impediment to the former. Remedial measures in the form of recommendations have in fact only the status of *obiter dicta*, in the form of guidance for the execution process, and courts, whether national or international, have inherent powers to provide such reasoning. Whether it is wise as a matter of judicial policy is another thing entirely. However, the true legal dilemma arises when, as the Court has done in exceptional circumstances, it prescribes individual or general measures in the judgment's operative provisions, like in *Assanidze v Georgia*, *Oleksandr Volkov v Ukraine* and *Grande Stevens v Italy*, as it is the operative provision that is the source of the legal obligation that attaches to the respondent State under Article 46 (2) of the Convention. In this regard I find the language used in the recent Grand Chamber judgment in *Moreira Ferreira v Portugal (No. 2)* of July last noteworthy. At paragraphs 48 and 49 the Court reiterates that it "does not have jurisdiction to order, in particular, the reopening of proceedings", although it may indicate such a measure when there is, in fact, no real choice open to the respondent Government in the light of the nature of the violation.
7. The *second* issue that I would address here is the essence of the judicial function performed by the Court and its effect on the Court's remedial practice. The Court resolves disputes between applicants and the States based on the pleadings as formulated by the parties. The practical problem with the Court proceeding with giving indications of specific remedial measures is that that issue has almost never been pleaded beforehand, at least not in normal Chamber or Grand Chamber cases. The exceptions of course are pilot judgment cases where the whole point is to address a wider systemic or structural problem, the parties thus in such cases invited to submit their observations upon the application of a pilot judgment procedure under Rule 61 (2) of the Rules of Court.
8. The pros and cons of a particular remedial measure, in particular in non-systemic problem cases, taking account of the situation in the Member State in question, are thus often based on speculation on behalf of the judges and we, as judges, don't usually like to be in a position of having to speculate when deciding cases. So, in other words, my sense is that there is an instinctive aversion to providing specific remedial measures in the face of a dossier devoid of actionable information, so to speak, on that particular issue. However, I agree with my colleague and friend Judge Linos-Alexander Sicilianos, Vice-President of the Court, when he stated extrajudicially in a published article in 2014, that if remedial measures are indicated, the nature, seriousness and/or persistence of the violation, the existence of an underlying structural problem, as well as the type and scale of the execution measure to be taken, are the main reasons for the differences in the prescriptiveness of the Court's indicated measures, which range from mildly worded general recommendations to the use of narrowly drawn and even strongly worded quasi injunctive like measures (see, L.-A. Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of Its Judgments: Recent Developments under Article 46 ECHR', *N.Q.H.R.*, Vol. 32/3, 2014, 235-262, at 244-247).

9. The *third* issue I would mention here is that unlike the Member States calling explicitly in the Brighton Declaration on the Court to apply a more robust principle of subsidiarity and the margin of appreciation in its work, as manifested in Protocol 15, which I have argued elsewhere has had a direct impact on the Court's case-law in recent years, *Burmych* being another example of that trend, the States have not used the opportunity during the four intergovernmental conferences since 2010, Interlaken, Izmir, Brighton, and in particular Brussels in 2015, which dealt directly with the issue of implementation of Strasbourg judgments, to explicitly invite the Court to be more proactive in the field of specific non-monetary remedial measures. I am putting here aside the Committee of Ministers' recommendations and resolutions on the pilot judgment proceedings which some have argued constitutes a "subsequent practice" under international law with perhaps broader application to other cases in which the Court resorts to remedial measures. In fact, the issue of which remedial non-monetary measures a Member State can or should take when the Court has found a violation, has in the intergovernmental declarations been conceptually linked to the principle of subsidiarity itself, thus in other words being articulated within the context of the State's margin of discretion during the execution phase, as can be seen from the language of Rule 6 in the Committee of Ministers Rules for the Supervision of the Execution of Judgments and Terms of Friendly Settlements, the so-called CM Rules, adopted in 2006.
10. The *fourth* issue that I would identify, that one may argue has had an impact on the Court's assessment and perhaps reticence to indicate specific remedial measures, is the simple fact that some of the structural and systemic pilot judgment cases demonstrate that even when the Court proceeds with indicating such measures there has often been a sustained campaign of non-implementation by the Member States. This experience has now culminated in the Court's landmark *Burmych* judgment where a new approach has been adopted by the Court making it clear that there are limits to how far it will invest time and resources in proceeding, in effect, as a first instance execution court. If the Court has doubts as to whether specific remedial measures will, in fact, be implemented, as there invariably are no assurances that that will in fact be the case, the Court may feel disinclined to jeopardise its authority and legitimacy by resorting more frequently to using that approach.
11. Ladies and gentlemen. I have now provided an overview of the four main issues that form an integral part of the dilemma that the Court is faced with in this area. Let me conclude by saying that possible answers moving forward can, I think, and in fact will be identified by analysing each of these four components more in depth and articulating possible solutions that seem to address the problems they describe. Potential issues to explore would be the following: Firstly, whether it is possible to bring more clarity to the scope and substance of the legal basis for the Court indicating remedial measures, in particular in operative provisions of judgments. Secondly, whether the Court should institutionalise a process by which a more informed basis in the pleadings is elaborated for the Court to address possible remedial issues. Thirdly, and more generally, whether it is in fact the wish of the Member States that the Court take a more proactive part in identifying both individual and/or general measures for the execution phase, which is of course the more broader political question and which is intimately linked to the fourth and last issue, which is, that even assuming that the Strasbourg Court may possibly in the future develop further its specific remedial practice, it is, at the end of the day, to no avail if the Member States are not receptive to the Court's indications when fulfilling their role in executing in good faith the judgments of the Court. It is after all the Member States themselves that have called for an increased emphasis on the principle of subsidiarity, but that invitation goes both ways as the Grand Chamber emphasised in *Burmych*. The principle of subsidiarity is in fact an institutional mechanism of shared responsibility between the Court and the Member States, the supervision of the execution of judgments being entrusted to the Committee of Ministers. So the flip side of the coin in relation to the States' invitation to the Court to grant more deference when they fulfil their obligations, is that the States in fact implement effectively the Court's judgments at national level.