The Developing Remedial Practice of the European Court of Human Rights

8 November 2017, 4.00 – 6.00 pm

Council of Europe, Palais de l'Europe

Presentation by Ms Isabelle Niedlispacher, Government Agent in respect of Belgium and Chair of the Committee of Experts on the System of the European Convention on European Rights (DH-SYSC)

Good afternoon,

I have the pleasure to address you on the theme of this seminar from my perspective of **Government Agent**. If you agree, I'll present my own direct experience in Belgium – this includes the role of national actors involved in the execution process – as well as the perspective of other Governments Agents.

When executing a judgment the Members States can face a wide spectrum of prescriptiveness. It can range from **purely declaratory judgments** merely finding a violation to **recommendatory judgments** providing for remedial indications in the non-operative part and to **prescriptive judgments** containing mandatory orders in the operative part.

There are not so many judgments giving an indication of specific non-monetary **individual measures**.

An example of a recommendatory judgment can be found in the 2010 Grand Chamber judgment *Taxquet v. Belgium*. This case related to a lack of adequate procedural safeguards preventing the accused from understanding the reasons for the jury's guilty verdict in the assize court. The Court stated *that the internal law allows applicants to seek the reopening of their trial where it has found a violation*.

Subsequent judgments relating to the same assize court's proceedings have been more specific without being prescriptive. In those cases, the Court has considered that "*a new process or a reopening of the proceedings represents 'in principle' an appropriate means to redress the violation if the interested person asks so".* This formulation underlines the measure *a priori* expected by the Court, but it authorizes the State to take any other measure that is sufficient to redress the violation. In the case of an unfair trial, it seems to me difficult to imagine another remedy than a new trial. However, reopening the case is not always necessary. For example, if the violation did not have a significant impact on the issue of the case, the result of the new trial would be the same. The evaluation whether there is a concrete impact is to be determined by the national judge.

In the case *Winterstein v. France* concerning the eviction of French travellers from private land where they had been living for many years, the Court went even further and described precisely the measures to be taken by the French Government to execute the judgment. In a first judgment in 2013, the Court concluded there had been a

violation of article 8 and reserved the question of just satisfaction for a later stage. In a second judgment last year, the Court assessed the question of just satisfaction and, exceptionally and for the first time, gave precise indications on individual execution measures it believed France should take, referring to the case-law authorising it to do so (§§16-19 of the judgment of 28 April 2016):

- The authorities should undertake not to take any measure with a view to enforcing the decision authorising the applicants' expulsion.

- Considering the vulnerability and special needs of all applicants who were not relocated, should receive support to access proper housing, either on a family land or in social housing according to their wishes. In the meantime, they should be able to enjoy sustainable accommodation without any risk of eviction.

In the case of *Dubská and Krejzová v. the Czech Republic*, the Court did not find any violation, but added that it *found it appropriate to invite the Czech authorities to make further progress by keeping the relevant legal provisions under constant review, so as to ensure that they reflect medical and scientific developments whilst fully respecting women's rights in the field of reproductive health, notably by ensuring adequate conditions for both patients and medical staff in maternity hospitals across the country*.

The case *B. v. Belgium* is an example of a **prescriptive judgement**. It concerned the forced return to an allegedly abusive father of a child well-integrated in the host country. Here, the Court gave mandatory orders in the operative part of the judgment as it stated that there would be a violation of article 8 if the judgment of the Ghents Court of Appeal ordering the child's return to her father were to be executed. The Court believed that the child's forced return to the United States could not be considered necessary as the child had arrived in Belgium when she was five and had lived there since without interruption, being fully integrated in her surroundings and school environment.

The Court's indication of **general measures** to be adopted to avoid similar violations is more frequent than the indication of individual measures in both article 46 and pilot judgments.

In its pilot judgment *W.D. v. Belgium*, the Court is prescriptive because it deals with the structural problem of the relatively high number of detainees held in prison psychiatric wings without access to suitable therapeutic treatment. It is thus not surprising for the Court to be stricter and more specific. In this case, Belgium has been given a period of two years to remedy the general situation, in particular by taking steps to implement the legislative reform. It must also remedy the situation of any applicants having lodged similar applications with the Court before the delivery of the present judgment and any applicants applying to the Court subsequently. Accordingly, proceedings in all similar cases were adjourned for two years pending the adoption of remedial measures. However, even if the Court is more specific in the measures it indicates to the State, we can underline that the Court is also always pointing out the positive developments within the State. This is very clear in this pilot judgment. The Court welcomes the positive reforms introduced in the legal order by the 2014 law concerning psychiatric detention. This is to me the better strategy to stimulate collaboration with the State.

The judgment *Vasilescu v. Belgium* is also an example of a prescriptive judgment. [N.B. This judgment, while containing specifying general measures in an Article 46 chapter, would not qualify as a 'prescriptive' judgment in accordance with the typology proposed by the HRLIP. The latter uses the notion 'prescriptive' for judgments containing a remedial indication in the operative provisions, whereas *Vasilescu* did not contain any such order.] The Court found that the problems arising from prison overcrowding in Belgium and the problems of unhygienic and very old prison institutions were structural in nature. The conditions of detention about which the applicant had complained had been criticised by national and international observers (including the CPT) for many years without any improvement apparently having been made in the prisons in which Mr Vasilescu had been detained. Consequently, the Court recommended that Belgium envisage adopting general measures in order to guarantee prisoners' conditions of detention compatible with Article 3 of the Convention and also to provide them with a

remedy capable of putting a stop to an alleged violation or permitting them to obtain an improvement in their conditions of detention.

In conclusion, I would say that while the Court's current remedial practice is sometimes perceived by States as undermining the principle of subsidiarity and often leads, in the first place, to demands of referral to the Grand Chamber, this practice is nevertheless accepted and even disputed judgments may be completely executed. I can, for example, count a great number of criminal proceedings reopened following a Court's judgment concluding to a violation of the right to a fair trial. I can also think of important reforms that have been taking place for years in the field of detention.

However, most other Agents and national actors believe it is often useful to have specific indications on how to correctly interpret a judgment and execute it. On the one hand, it can help the Court to think about the feasibility of its decision. On the other hand, it can help the Government Agent to push for the execution and the relevant authority to ask for more means to properly execute the judgement.

We can also observe that in practice, pointing out the defects of a national regulation when finding a violation ends up indicating the measures to be taken by the State and as such, already restricts its liberty to choose the adequate means of execution.

Nevertheless, most other Government Agents and most national actors would in general not welcome a more specific and prescriptive approach by the Court when it indicates non-monetary individual measures or general measures.

The reason for that is the risk of confusion between the role of the Court and the role of the Committee of Ministers. Indeed, if the Court is going beyond its role to interpret the Convention and gets involved in the field of execution, it might overlap with the Committee of Ministers, which ultimately controls the execution of the judgments. There is also a risk of inefficiency of the identified measures. Changes in the facts or in the law can happen between the issuing of the judgment and its execution and the Committee of Ministers is best placed to take into account these changes.

During the negotiations of the Brussels Declaration, there were talks about the possibility that the Court could indicate execution measures at the stage of the adversarial proceedings before it, during which the State could identify eventual execution difficulties. However, this possibility has not been retained. States feared that the Court would act beyond its role as an adjudicator of individual complaints.

As far as I know, the majority of governments instead considers that the Court should limit its practice of indicating adequate execution measures to particular cases and justify - even briefly - its choice to indicate the measures leading to complete execution. While doing so, the Court should remain very attentive to giving clear, precise and adequate guidance.

* * *