



The Evolving Remedial Practice of the European Court of Human Rights

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- Seminar report -

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Introduction

This Seminar was organised in the framework of the [Human Rights Law Implementation Project](#) ('HRLIP'), a collaborative project between four leading academic human rights centres (Bristol, Essex, Middlesex and Pretoria) and the Open Society Justice Initiative. The aim of the HRLIP is to examine the factors which impact on human rights law implementation across Europe, Africa and the Americas, looking at (i) selected judgments and decisions of the bodies in the three regional human rights systems; and (ii) selected decisions on individual complaints to UN treaty bodies.

How far can – and should – the European Court of Human Rights (ECtHR) recommend, or even require, states to take certain measures after the finding of a violation of the European Convention on Human Rights (ECHR)? This question is increasingly debated as the Court, driven by states' failure to implement judgments, has moved away from its formerly strictly limited, declaratory approach to remedial measures by sometimes indicating specific non-monetary individual measures or general measures. This debate has come into sharp focus with the judgment in *Moreira Ferreira (No. 2) v. Portugal* (Application No. 19867/12) issued by the Grand Chamber on 11 July 2017, the case having been relinquished by the Chamber. The broader issue of the Court's role in the implementation of its judgments has also been highlighted by *Burmych and Others v. Ukraine* (Application No. 46852/13), which the Grand Chamber issued on 12 October 2017.

This Seminar presented new findings of research carried out at Middlesex University, London (UK) within the Human Rights Law Implementation Project, including through interviews conducted with Judges and staff of the Court's Registry, the Department for the Execution of Judgments of the European Court of Human Rights and the Secretariat of the Committee of Ministers, as well as national authorities and civil society actors.

Informed by this research, the event discussed the Court's developing remedial practice from the perspective of different Council of Europe and domestic stakeholders.

- What is the Court's current approach to remedies, and is the perception that the Court's judgments are becoming increasingly specific or prescriptive borne out by empirical evidence?
- What are the implications of the Court's remedial practice on the respective roles of the different Council of Europe institutions, in particular the Court and the Committee of Ministers?
- How do different actors, both at the Council of Europe and national level, perceive the opportunities and risks of the Court being more specific or prescriptive on the prospects for success of implementation?
- How is the Court's remedial practice likely to develop, and how should it?

Participants included Judges and Registry staff of the ECtHR, representatives of the Directorate General Human Rights and Rule of Law of the Council of Europe, as well as representatives of member states and civil society.

Presentations

1. Robert Spano, Judge at the European Court of Human Rights elected in respect of Iceland

Judge Spano ventured that the Court's remedial practice was important for the sustained efficacy and legitimacy of the Convention system. He argued that the division of labour between the Court and the Committee of Ministers has evolved – particularly in the context of pilot judgment cases and other cases involving structural and systemic violations of the Convention – from a posture of passivity by the Court to one in which it is more proactive in its indication of non-monetary individual or general measures. However, it was not clear that the Court had as yet adopted a coherent approach to this matter, especially in 'quasi-pilot' (Article 46) cases or, even less, in ordinary cases, either at the level of a Chamber or the Grand Chamber.

Judge Spano suggested four possible explanations for the Court's trepidation in this area.

Firstly, the question whether of the Court should indicate individual or general measures in a particular case raises difficult questions about the division of powers under Article 46 of the Convention. Strasbourg judges have rightly been hesitant in crossing the bridge from their core role of objective legal analysis 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 specific remedial measures under Article 46 should be indicated. At the same time, it is important to distinguish between, on the one hand, remedial measures which the Court indicates in its reasoning in the form of recommendations, and, on the other hand, remedial measures inserted into the operative provisions. Judge Spano argued that there was no plausible legal impediment to the former. However, the true legal dilemma arises when, exceptionally, the Court prescribes individual or general measures in a judgment's operative provisions (as it did in *Assanidze v. Georgia* (Application No. 71503/01, judgment of 8 April 2004), *Oleksandr Volkov v. Ukraine* (Application No. 21722/11, judgment of 9 January 2013) and *Grande Stevens and Others v. Italy* (Application Nos. 18640/10 et al., judgment of 4 March 2014)) as these provisions are the source of the legal obligation that attaches to the respondent State under Article 46 (2) of the Convention.

The *second* issue relates to 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 problem with the Court indicating 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 are pilot judgment cases in which parties are invited to submit their observations upon the application of the pilot judgment procedure under Rule 61 (2) of the Rules of Court.) The pros and cons of a specific remedial measure in a particular national context, especially in cases revealing non-systemic problems, are thus often based on speculation, to which judges have an "instinctive aversion".

Judge Linos-Alexander Sicilianos, Vice-President of the Court, has stated extra-judicially that if remedial measures are indicated, the nature, seriousness and/or persistence of the violation; the existence of an underlying structural problem; and 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 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, pp. 235-262, at 244-247).

Thirdly, the Member States have not used the opportunity during the four intergovernmental conferences since 2010 – Interlaken, Izmir, Brighton, and in particular Brussels in 2015 – explicitly to invite the Court to be more proactive in the field of specific non-monetary remedial measures. By contrast, the States *have* urged the Court to apply a more robust principle of subsidiarity and the margin of appreciation in its work. 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; in other words, it has been 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 adopted in 2006.

The *fourth* issue identified as helping to explain the Court's reticence to indicate specific remedial measures is the fact that, even when the Court does indicate such measures, there has been a sustained campaign of non-implementation by some member States. This experience culminated in the Court's landmark *Burmych* judgment where a new approach was adopted, making it clear that there are limits to how far the Court 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, it may feel disinclined to jeopardise its authority and legitimacy by resorting more frequently to using that approach.

Judge Spano concluded by exploring whether solutions to these dilemmas faced by the Court could include:

- whether it is possible to bring more clarity to the scope and substance of the legal basis for the Court's indication of remedial measures, in particular in operative provisions of judgments;
- whether it is possible to institutionalise a process by which a more informed basis in the pleadings is elaborated for the Court to address possible remedial issues;
- whether, more broadly, it is in fact the wish of the member States that the Court take a more proactive part in identifying individual and/or general measures for the execution phase; and
- whether member States are receptive to the Court's indications when fulfilling their role in executing in good faith the judgments of the Court.

Member States themselves 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. Hence, 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.

For the full text of Judge Spano's presentation, please [click here](#).

2. Pavlo Pushkar, Council of Europe, Head of Division in the Department for the Execution of Judgments of the European Court of Human Rights

Pavlo Pushkar discussed how the Court's use of specific indications of individual and general measures impacts upon the process of supervision of the execution of the Court's judgments. He ventured that there is no single overarching model of remedial practices that would fit each individual case examined by the Court and transferred for supervision over execution to the Committee of Ministers. In some instances, more prescriptiveness in the Court's judgment provides useful assistance in the execution process. However, in numerous other cases, it would not provide such assistance, and in some cases, specific indications might be counterproductive.

The explanation lies in the foundation of the Convention and the supervision system, as this system is based on subsidiarity. It is thus for the states to choose the means by which to reach the results required by the Court's judgments – albeit always under the CM's supervision. The normal procedure is that the relevant execution measures are identified in the process before the CM, on the basis of action plans and action reports. However, there are two specific situations in which it might be particularly interesting to see the Court's assistance.

- First, the *Broniowski*-type situation, where the Court is capable of identifying immediately the scope, nature, cost and routes of a major, structural problem creating a potential to bring a big number of repetitive cases to the Court. In such exceptional situations, the pilot judgment procedure provides immediate assistance both to the state and the CM in order to rapidly come to grips with the problem identified; and
- secondly, an ongoing execution process which encounters problems of one kind or another, where the Court finds that it may support the ongoing execution process by giving remedial indications either in pilot or –more frequently – in so-called ‘quasi-pilot’ or ‘Article 46’ judgments.

The support given by the Court is valuable notably when, for example, the government considers that the issue is of an isolated nature, notwithstanding indications that the issue could be of a more systemic nature.

Another situation is where the execution process drags out over time. For different reasons, the CM is usually reluctant to set definitive deadlines for particular execution processes. However, if the Court supports particular timeframes in the judgment itself, this may facilitate the execution process both for the government and the CM.

Another important aspect that deserves to be mentioned is that the Court’s support is limited to its knowledge of the situation as it stood at the time of the deliberations, not to mention the fact that the Court is examining a very specific individual application, faced with the specific arguments of the parties. It is thus not infrequent that the CM might be confronted with situations which were not covered by the initial indications given by the Court.

Notwithstanding this caveat, the Court’s confirmation of the action to be taken is useful, and might assist in achieving tangible results. One example is the case of *Oleksandr Volkov v. Ukraine* (cited above), which concerned re-instatement of a judge of the Supreme Court to his previous position, and the eventual changes introduced to the Constitution of Ukraine and the implementing legislation with regard to the disciplinary liability of judges.

The CDDH (Steering Committee for Human Rights) discussed – and rejected – two proposals for reform in this area. First, it rejected a proposal to formally introduce a practice whereby the Court would indicate, on a regular basis, general measures in its judgments in order to assist the states and the CM in the execution process. Secondly, it rejected a proposal to allow the Court, in appropriate cases and following an appropriate procedure involving the parties concerned, to expressly indicate in the judgment that, apart from the payment of any just satisfaction awarded, no other measures (individual or general) appear to be required. The CDDH considered that – beyond exceptional cases where the nature of the violations found is such as to leave no real choice as to the measures to be taken – in the vast majority of cases, judgments should remain declaratory.

Pavlo Puskar concluded by referring to the need for greater interaction between the Court and the CM. The Execution Department has tried to facilitate such exchanges through the HUDOC-EXEC database; factsheets that highlight the problems related to execution with respect to particular countries; annual reports which highlight problems in the execution process and so-called ‘pockets of resistance’; and a collection of decisions on a case-by-case basis, which is available on the website of the Execution Department.

For the full text of Pavlo Pushkar’s presentation, please [click here](#).

3. 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](#))

Ms Niedlispacher observed that when executing a judgment, member States can face a wide spectrum of prescriptiveness, ranging from purely declaratory judgments finding a violation, to recommendatory judgments providing for remedial indications in the non-operative part, to prescriptive judgments containing mandatory orders in the operative part.

She offered examples of judgments that sit at different points along this spectrum.

An example of a recommendatory judgment is the 2010 Grand Chamber judgment *Taxquet v. Belgium* (Application No. 926/05, judgment of 16 November 2010), which related to a lack of adequate procedural safeguards preventing the accused in a criminal trial from understanding the reasons for the jury's guilty verdict in the Assize Court. The Grand Chamber noted that Belgium had already amended the law to allow applicants to seek the reopening of their trial where the Court has found a violation. Subsequent judgments relating to the Assize Court's proceedings had been more specific without being prescriptive, stating 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".

In *Winterstein v. France* (Application No. 27013/07, judgment of 28 April 2016), concerning the eviction of French travellers from private land where they had lived for many years, the Court went further and described precisely the measures to be taken by the French Government to execute the judgment, including ensuring that applicants who had not been relocated received support to access proper housing and, in the meantime, enjoyed sustainable accommodation without any risk of eviction.

The case *B. v. Belgium* (Application No. 4320/11, judgment of 10 July 2012) provides 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 ECHR if the judgment of the Ghent Court of Appeal ordering the child's return to her father were to be executed.

Ms Niedlispacher observed that the Court more frequently indicates general measures than non-monetary individual measures, in both Article 46 and pilot judgments.

In its pilot judgment *W.D. v. Belgium*, concerning the structural problem of detainees held in prison psychiatric wings without access to suitable therapeutic treatment, the Court gave Belgium two years to remedy the problem, in particular by means of legislative reform. At the same time, the Court welcomed the positive reforms which had been introduced by the 2014 law concerning psychiatric detention, which was a better strategy to stimulate collaboration with the State.

Ms Niedlispacher observed that while the Court's current remedial practice is sometimes perceived by States as undermining the principle of subsidiarity, and may lead to requests for referral of cases to the Grand Chamber, its practice is nevertheless accepted and even disputed judgments may be completely executed. For example, many criminal proceedings have been reopened following a judgment of the Court finding a violation of the right to a fair trial. Important reforms had also taken place in the field of detention.

Most Government 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 execution and the relevant authority to ask for more means to execute the judgment.

Nevertheless, most Government Agents and other national actors would in general *not* welcome a *more* specific and prescriptive approach to be taken by the Court. The reason for that is the risk of confusion between the roles of the Court and the Committee of Ministers. Indeed, if the Court goes beyond its role of interpreting the Convention and gets involved in the field of execution, it might overlap with the Committee of Ministers, which ultimately controls the execution of 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 these changes into account.

In Ms Niedlispacher's view, the majority of national actors instead considers that the Court should limit its practice to indicating adequate execution measures in particular cases and justify its choice. While doing so, the Court should remain very attentive to giving clear, precise and adequate guidance.

For the full text of Ms Niedlispacher's presentation, please [click here](#).

4. Kevin Steeves, Director of the European Implementation Network ([EIN](#))

Mr Steeves ventured that it is important to appreciate and promote the roles of civil society organisations (CSOs) in society – as advocates, experts, watchdogs, enablers, researchers and fact-finders, among others. As one international organisation has noted, “the changes that civil society is undergoing strongly suggest that it should no longer be viewed as a ‘third sector’; rather, civil society should be the glue that binds public and private activity together in such a way as to strengthen the common good.” (*The Future Role of Civil Society*, World Economic Forum, 2013, p.5).

The implementation of the Court's judgments is the responsibility of states, but still it is a task that engages CSOs. As Anagnostou and Mungiu-Pippidi note, civil society actors “provide insiders' information and expertise in the field of their concern, they help check and verify reports, and analyse and critique the performance of parties, exposing persistent offenders and organizing human rights supporters” (Dia Anagnostou and Alina Mungiu-Pippidi. 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', *European Journal of International Law* 25(1), 2014, p. 227).

The European Implementation Network (EIN) was created in line with this thinking about CSOs and their pivotal role in supporting the implementation of ECtHR judgments. The EIN rationale going forward is that CSOs need to be allowed to do *more* (i.e. provide input into the execution process in Strasbourg and domestically) and do *better* (i.e. offer up analysis and proposals to challenge the pockets of resistance adversely affecting implementation).

EIN has three long-term goals, which are relevant to the discussion about the Court's indication of specific remedial measures:

- to *advocate* for effective implementation of judgments through improved structures and processes, enhanced transparency and greater participation of civil society (e.g. quarterly EIN briefings to support Committee of Minister discussions and decisions on cases);
- to *build the capacity* of CSOs to effectively engage in Council of Europe and national implementation processes (e.g. training on Rule 9 submissions); and
- to *facilitate* the mutual exchange of information between EIN's members and partners and CoE decision-makers (e.g. producing tools like a handbook on post-judgment supervision and the CoE system).

With these factors in mind, Mr Steeves identified three areas in which a more specific and/or prescriptive approach by the Court could be beneficial in regard to the role that CSOs can play in promoting effective implementation.

Clarity: The added clarity that comes with specific remedial measures can mitigate the sometimes high levels of ambiguity and uncertainty surrounding many judgments; as a result, there exists a clearer degree of understanding as to what should be done – or, in other words, a type of initial road map is created for implementation..

Leverage: greater clarity in turn permits CSOs to exert more pressure (which is positive) in support of human rights protection and promotion and gives their work more weight and clout.

Efficiency: a related aspect is how CSOs can immediately apply themselves to monitoring, assessing and reporting more closely on the state of implementation. They can also quickly offer up their expertise to support the measures indicated by the Court, such as in the creation of specific mechanisms or procedures.

In summary, the more platforms upon which CSOs can engage, and the more entry points created for CSO activities, the more they will be able to develop and apply their knowledge and expertise and harness the potential of specific and/or prescriptive judgments to help develop better solutions to common problems.

Discussion

The ensuing discussion yielded new insights into the three key areas of the organisers' research.

1. The Court's current approach to remedies

Specificity and prescriptiveness remain the exception

There was broad agreement among participants that the Court, by and large, has to date been fairly cautious in indicating prescriptive measures. A Judge at the ECtHR confirmed that, in the vast majority of cases coming before the Strasbourg Court, the issue of possible individual or general measures did not arise in any shape or form:

The case is an *ex post facto* judicial examination of a dispute that happened many years ago, and we make a judicial determination on whether there has been a violation of the Convention.

The Court's cautious approach was largely attributed to its cognisance of the need not to upset the institutional balance between the Court and the Committee of Ministers (see section 2 below) as well as its concern not to overstep the boundaries of its jurisdiction and thus risk jeopardising its legitimacy.

Specificity and prescriptiveness – welcomed by civil society; resented by states?

Contributions to the debate revealed a perception that civil society representatives tended to welcome greater specificity, whereas state actors would generally like to see fewer recommendatory or prescriptive judgments. One speaker ventured that there was “a fundamental disagreement between the NGO community [...] and agents of the government [...] on the system of enforcement”.

Yet, the research team stressed that, according to their findings, the views on both sides were more nuanced: civil society actors were realistic about the dilemmas facing the Court, recognising that it might not be feasible for Strasbourg Judges to resort more frequently to giving remedial indications, since doing so might engender state resistance to a perceived restriction of their discretion in choosing the means by which to implement an adverse ruling. At the same time, it was important to view the state not as a monolithic or unitary actor that forms a single view of judgments of the Court, but as an entity made up of numerous actors with distinct attitudes towards the Court's remedial practice. This made it difficult to generalise about state preferences in terms of specificity and prescriptiveness.

Participants were overall satisfied with the Court's current, prudent approach to indicating remedial measures, notably because such indications were largely restricted to cases in which it was clear that the judgment could only be implemented in one particular way. A government representative acknowledged that states' initial reluctance to accepting the Court being more prescriptive had given way to recognition of the practical utility of specific remedial recommendations or orders. In the same vein, a representative of the Execution Department noted:

We are not too concerned with prescriptive provisions in the operative part of a judgment because they usually just highlight what is evident.

It was also suggested that there were two distinct layers of the current discourse. Several speakers submitted that while they could imagine some states exhibiting *generalised* mistrust of a more proactive stance on remedies by the ECtHR, there was no evidence of any governments having objected to the power of the Court to indicate a specific measure in any *particular* case. With reference to the Grand Chamber judgment in *Assanidze v. Georgia* (cited above), in which the Court held unanimously that Georgia had to “secure the applicant's release at the earliest possible date”, it was suggested that

there is an acceptance of those few judgments where the Court has been prescriptive because there has been an explanation given as to why that was the case. [...] Certainly, in *Assanidze*, there is a

strong statement by the Court that it took the step of requiring Georgia to ensure that Assanidze was released because that was the only possible response to the judgment. [...] There was nothing to discuss in a political forum.

Do states today 'need' greater specificity and prescriptiveness, more than they used to in the past?

One participant observed that the discourse had shifted considerably over recent years. There has been a long-standing recognition – as evidenced by a speech delivered ten years ago by then President of the ECtHR, Jean-Paul Costa – that states parties have a duty to take into account the ECHR as interpreted by the Strasbourg Court, even in judgments against other states, i.e. to respect the interpretative authority (*res interpretata*) of the ECtHR's case law. Against this background, it was striking that the debate today revolved around precise remedial indications given by the Court.

A government representative offered two possible explanations for this development. The first reason why some governments today welcomed more prescriptive judgments – or even 'needed' greater specificity in order to ensure effective implementation of rulings – may be that many states had introduced, in compliance with recommendations by the Committee of Ministers, the possibility of reopening domestic criminal and civil proceedings following adverse judgments of the ECtHR. Clear guidance as to the necessity of a judicial re-examination of a case could facilitate Government Agents' task of explaining, to domestic judges, the necessary implementation steps. The Court should also have regard to the fact that the possibility of having the domestic proceedings re-opened may impact on the award of compensation. Secondly, it was submitted that the need for greater specificity, prescriptiveness and a more coherent approach to indicating general measures was a result of the pilot judgment procedure. In pilot judgments or 'quasi-pilot judgments' (i.e. judgments in which the Court identifies a systemic problem without ordering specific remedies in the operative provisions or adjourning similar applications), where the respondent state is required to introduce an effective compensatory remedy at the domestic level, the Court should explain its own method of calculating the amounts of just satisfaction and pecuniary damage to be awarded to successful applicants. Where the Court fails to do so, it can be difficult for Government Agents to propose, vis-à-vis the Ministry of Finance and other relevant ministries, ways to calculate such payments.

2. The respective roles of the Court and the Committee of Ministers

***Burmych and Others v. Ukraine* – a landmark ruling on the institutional balance between the ECtHR and the Committee of Ministers**

A significant part of the debate revolved around the division of responsibility between the Court and the Committee of Ministers, whose respective roles in instances of a state's prolonged failure to execute a pilot judgment was discussed with reference to the recent Grand Chamber judgment in *Burmych and Others v. Ukraine* (Application Nos. 46852/13 et al., judgment of 12 October 2017) concerning prolonged non-enforcement of domestic court decisions. In that case, the ECtHR – having examined its role under Article 46 ECHR in the execution of its own judgments – decided, by ten votes to seven, to strike out more than 12,100 applications from its list of cases in order for them to be dealt with by the Committee of Ministers, in the framework of its supervision of the general measures required to implement pilot judgment *Yuriy Nikolaevich Ivanov v. Ukraine* (Application No. 40450/04, judgment of 15 October 2009).

The judgment was seen by one participant as strengthening the pilot judgment procedure, since it confirmed the findings previously made in the *Yuriy Nikolaevich Ivanov* pilot judgment. A representative of the Execution Department ventured that the judgment highlighted yet another important issue, namely the sharing of information, by the Committee of Ministers and the Department for the Execution of Judgments, with the Court on the state of execution of cases pending before the Committee of Ministers and pertaining to issues on which the Court had to pronounce itself anew in examining a fresh application.

While the landmark nature of the *Burmych* judgment was recognised, it was also highlighted that there was no clear conceptual link between that case, in which the Court held that it would not continue to issue countless judgments

on the same matter and award just satisfaction to numerous applicants, and the question of remedial indications of a non-monetary nature in ordinary individual cases, which was the focus of the research being carried out by the team at Middlesex University.

Legal authority of the Court to make specific remedial orders

The discussion also unveiled the difference of opinion among Judges as to the legal authority of the Court to take a more proactive stance on remedial measures.

Among the Judges who took the floor were some who argued that the ECtHR, as an international court, should be allowed some margin of manoeuvre within the Convention system for defining its role with respect to remedies. In support of this argument, reference was made to three provisions in the ECHR that could serve as a legal basis for indicating or prescribing remedial measures – Article 46 (binding force and execution of judgments), Article 19 (concerning the role of the Court to ensure respect for the Convention), and Article 32 (pursuant to which the Court is competent to rule upon its own jurisdiction where this question is disputed). These provisions, in conjunction with subsequent state practice which showed that the Committee of Ministers supported the Court's remedial approach, constituted a sufficient legal basis to conclude that the Court was competent to be prescriptive.

Other participants took the view that, since the Convention did not contain a specific provision giving the Court the power to make prescriptive orders, the principle should be for the Court not to enter into the field of implementation, and instead restrict itself to identifying the problem underlying the violation(s) found. Yet, it was not proposed that the Convention be amended to accord the ECtHR a greater role in the execution of its own judgments, with one participant stating that

[that type of discussion] is not going to go anywhere because, I think, the lines are well drawn. The states do not want the Court to be prescriptive in its judgments.

It is worth noting that proponents of both sides recognised that there was not only a legal issue concerning the limitations of the Court's jurisdiction in the sphere of remedies, but that its remedial approach moreover raised a question of the authority and legitimacy of the Court. One participant stated the principle guiding the ECtHR's remedial approach should always be a concern for enhancing the protection of human rights. In this connection, one Judge, suggesting that the Court should restrict itself to giving remedial indications in cases where doing so would assist the state in implementing the judgment, proposed a three-tier typology of applications which were unlikely to prompt backlash from states, and thus lent themselves well to the Court being more specific and/or prescriptive. These categories encompassed:

- cases in which there is evidently only one possible response to the judgment;
- cases concerning issues that the respondent state had already started to tackle – in this scenario, the Court could encourage the state to continue moving forward in that direction; and
- cases in which it transpired from the parties' submissions that an array of implementation measures was being discussed – here, the Court could provide guidance on which measures the state should focus.

Practical considerations: the problem of the lapse of time between violation and judgment

All stakeholders were conscious of the practical limitations imposed on the Court's ability to make remedial indications or orders by the lapse of time between the facts of a case and the ECtHR handing down its judgment. For example, where a procedural violation of Articles 2 (right to life) or 3 of the Convention (prohibition of torture, inhuman or degrading treatment or punishment) had stemmed from the loss of evidence during the initial investigation, the question arose whether a fresh investigation was possible many years after the incident. Similar considerations came into play as regards the re-opening of criminal procedures which had been concluded years before the judgment of the Strasbourg Court was handed down.

How far does the binding force of judgments go?

Picking up on the issue raised by Judge Spano about the binding force of the Court's judgments, one participant considered that even if remedies were not pleaded by either party or prescribed in the operative provisions of a judgment, remedial action remained an obligation resulting directly even from a purely declaratory judgment: it was a general principle of international law, as confirmed by the International Court of Justice, that the binding force of a judgment did not only cover the operative part, but also the reasoning – at least as far as remedial action was expressly or by necessary implication determined in the reasoning. This was most relevant in cases where the Court directly addressed the compatibility not of an individual act or omission, but of general legislation or regulations, with the Convention. There, even if the Court said nothing about remedial action, it was clear by necessary implication that the relevant law could no longer be applied.

The Committee of Ministers' competence to prescribe general measures

One participant suggested that, in cases where the Court remained silent on Article 46 ECHR, the Committee of Ministers should not require the respondent state to take general measures to avoid repetition of the violation(s) found. This proposition was viewed as a misconception of the well-established role of the Committee of Ministers in the execution of judgments (the principles of which had been summarised by the Court itself in *Scozzari and Giunta v. Italy* [GC] (Application Nos. 39221/98 and 41963/98, judgment of 13 July 2007) and was strongly rejected by other speakers.

3. Future development of the Court's approach to remedies

How is the Court's remedial practice likely to develop?

The discussion saw participants draw certain parallels between the evolution of the Court's pilot judgment procedure and its cautious move to sometimes being more specific or prescriptive in ordinary judgments. It was recalled that the pilot judgment procedure had initially been resisted by governments, but had over time become politically acceptable. Perceptions varied as to the likelihood of prescriptive judgments finding a similar acceptance by the states in the future.

One participant raised the question as to whether greater prescriptiveness might limit the interpretative authority (*res interpretata*, see section 1 above) of ECtHR judgments, by prompting states to argue that a judgment against another state which might be seen as having repercussions for the legal orders of other countries was framed with regard to the very specific legal situation in the respondent state, and was hence not applicable to similar situations elsewhere in Europe.

Future areas of research

Lastly, discussants identified two possible areas for future research. These were (i) the systematisation of implementation steps undertaken by states in common problem areas with a view to identifying good practices, and (ii) a micro-level analysis of the individual measures that the Committee of Ministers required states to take in the implementation of judgments not containing remedial indications. Specifically,

- one of the Judges present recalled that the pilot judgment procedure had 'flourished' because its application had been focused on areas of common concern to most, if not all, states parties to the ECHR, with almost all pilot judgments concerning either (i) prison overcrowding or poor conditions of detention; or (ii) lengthy judicial proceedings and non-execution of domestic courts' decisions. He suggested that future research should identify other problems that have arisen in several countries, and investigate how these have been resolved.
- A senior official from the Department for the Execution of Judgments of the European Court of Human Rights ventured that matters of individual redress constituted another area warranting closer analysis. The Committee of Ministers had considerable experience in supervising the adoption of individual measures

following a violation judgment of the ECtHR. Future research should seek to elucidate to what extent requests for specific individual measures made by applicants, but not accepted by the Court, had subsequently been taken up by the Committee of Ministers in the process of supervision of the execution of judgments.

Overall, participants expressed appreciation for the research being carried out at Middlesex University in the framework of the [Human Rights Law Implementation Project](#). The event provided an opportunity for a discussion on a topical issue among academics, Judges and lawyers from the Court, government representatives and staff of the Committee of Ministers, which should be seen as a way to find synergies to enhance the Convention system and to promote and accelerate the implementation of judgments.