EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Seminar

"Binding Force: Institutional Dialogue Between The ECHR and The Committee of Ministers under Article 46 of The European Convention on Human Rights"

An overview of the use of Article 46 of the Convention in the case-law of the European Court: indicating specific individual or general measures to be taken by the respondent States

Speech by Marko Bošnjak

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Dear President of the Court,

Dear speakers and participants,

I am honoured to be speaking during today's institutional dialogue between the European Court of Human Rights and the Committee of Ministers under Article 46 of the European Convention.

I would like to thank the organisers of this important seminar for the opportunity to exchange on the execution of the judgments of the European Court of Human Rights, a topic that is of paramount importance in maintaining and strengthening the protection offered by the Convention.

In my presentation, I will give an overview of the use of Article 46 of the Convention by the Court when indicating specific individual or general measures to be taken by respondent States.

To that end, and after a brief introduction, I will start my intervention by discussing the purpose of specific Article 46 measures in judgments of the Court. I will then address the legal status of such measures within the global framework of the Council of Europe. After that, I will present some cases where the Court has indicated specific measures to be taken by respondent States, which will allow me to analyse the different types of indications used by the Court in its Article 46 case-law.

[**INTRODUCTION**]

Under the traditional interpretation of Article 46 of the Convention, the Court has no role to play in the execution of its own judgments. In this respect, the Court has consistently deferred to the Committee of Ministers as the main responsible organ of the Council of Europe for the supervision of Court judgments. For instance, in *Soering v. United Kingdom* on 7th of July 1989, the applicant invited the Court to provide indications as to the operation of its judgment to the respondent government – to which the Court responded that "by virtue of [Article 46] the responsibility for supervising execution of the ECHR's judgment rests with the Committee of Ministers of the Council of Europe" (para. 25). Over time, the practice of the Committee has substantially grown, and it is indisputable that its

methods of work have expanded beyond the expectations of the drafters of Article 46, to adjust to contemporary realities and optimise the impact of the Convention at the national level.

In the past, successful applicants have asked the Court to enjoin respondent States to implement legislative reforms which would bring domestic law that had been at the source of a violation into conformity with the Convention. To such demands, the Court replied that it had no power to incite respondent States to alter their legislation. In the case of *Airey v. Ireland* of 8th of October 1979, for instance, the Court ruled that "it is not the Court's function to indicate, let alone dictate which measures to take" (para.26). Over time, the Court's lack of power to give direction caused criticism as not being conducive to the prompt execution of judgments. It is clear that the execution of a judicial decision is a fundamental right - one that is an integral and essential part of the right to a fair process, as the Court recalled in its judgment of *Hornsby v. Greece*, on 19th of March 1997, in the context of the implementation of judgments at the domestic level.

Consequently, over the course of the last twenty years the Court has assumed more responsibility in the execution of its judgments, notably by giving indications as to the specific individual and/or general measures to be taken under Article 46 of the Convention in order to put and end to a situation which it has found to violate the Convention.

A closer look at the case-law of the Court reveals that the traditional institutional equilibrium of the Council of Europe provided by the Convention has substantially changed. As of October 2022, more than 300 Court judgments contain indications under Article 46 of the Convention.

Although in the past this practice seemed quite revolutionary, in truth it merely reflects the long-established rules of customary international law regarding the legal consequences of an internationally wrongful act. In fact, most of the measures discussed today are necessary to – and I hereby quote the 2001 Yearbook of the International Law Commission – "re-establish the situation which existed before the wrongful act was committed" (ibid., at 26); i.e., in the context discussed today of a violation of the Convention. It follows that specific individual measures indicated under Article 46 can be considered as a form of restitution stemming from the consequences of a breach. General measures, on the other hand, constitute guarantees of non-repetition of similar breaches in the future.

Before I begin the substantive part of my presentation, let me say a few words about pilot judgments. This procedure was created to enable the Court to identify in a judgment the existence of structural problems underlying breaches of the Convention, and to subsequently indicate measures to be taken by the respondent State to remedy them. Under this procedure, all cases deriving from the same systemic root cause are incorporated into the framework as well as the execution process of the pilot judgment. Pilot judgments are typically adopted in situations affecting a large number of people and in which there is an urgent need to grant them speedy and appropriate redress. This mechanism therefore allows respondent States to resolve large numbers of individual cases stemming from the same structural problem at the national level – and as such, fulfils the principle of subsidiarity enshrined in the Convention. The Court, in applying pilot procedures to cases, acknowledges the fact that the continued existence of structural deficiencies in the domestic system is not only an aggravating factor as regards Contracting Parties' responsibility for past and present violations, but also poses a threat to the effectiveness of the supervisory system established by the Convention.

I will not be discussing pilot procedures for the purpose of my presentation, as this topic exceeds the framework of today's discussion.

[**PURPOSE** OF A.46 MEASURES]

As already mentioned, the Court's main concern when indicating specific measures under Article 46 is to facilitate the swift and effective amendment of a shortcoming in a respondent State's system of

human-rights protection. Upon identification of such a defect, domestic authorities have the responsibility – under the supervision of the Committee of Ministers – of taking the necessary measures of redress, in accordance with the principle of subsidiarity under the Convention. This ensures that the Court does not have to reiterate its findings of a violation in a series of similar cases.

As such, these measures allow the Court to ensure, upon delivery of its judgment, that the protection offered by the Convention is effective, and serves to prevent the continued violation of the rights at stake. This practice also facilitates the Committee of Ministers' role in supervising the execution of Court judgments.

[**STATUS** OF A.46 MEASURES]

It is useful for the purpose of this presentation to recall that, in keeping with the institutional balance between the Court and the Committee of Ministers under the Convention, as well as the States' responsibility in the execution process, the ultimate choice of measures to be taken remains with the State under supervision of the Committee of Ministers. The Court has underlined this principle in its Grand Chamber judgment of *Ilgar Mammadov v. Azerbaijan* in 2019, in the context of infringement proceedings under Article 46.4 of the Convention. This procedure allows the Committee of Ministers, where it takes the view that a State has refused to execute the Court's judgment or to solve the problem that led to a breach, to refer to the Grand Chamber of the Court for a definitive and final ruling on the matter. Such a procedure is designed to be used in the most exceptional circumstances and has only been used twice to this day. In the infringement procedure of *Ilgar Mammadov*, the Grand Chamber held that the detention of the applicant - a political activist - by the authorities was in breach of his Convention rights, and that the domestic authorities had not provided the redress required and had not acted in good faith. The applicant's conviction was quashed, and he received compensation as a result of the proceedings.

The inclusion or absence of a specific statement related to execution is not decisive for the purpose of whether the respondent State has effectively fulfilled its obligations under Article 46. In *Ilgar Mammadov v. Azerbaidjan,* the Grand Chamber reiterated that the decisive factor in this regard is whether the measures subsequently taken by the respondent State are '*compatible with the conclusions and spirit of the Court's judgment*' (ibid., para.186). In the same judgment, the Court has clarified that to confine the supervision process to the explicit indications contained in its judgments would hinder the flexibility and discretion needed by the Committee of Ministers in supervising the adoption of adequate and effective measures, in accordance with both the information provided for by the respondent State and the evolving personal situation of the applicant. The Court recalled that the Committee of Ministers may review indications in the execution process when objective factors came to light after the delivery of the Court's judgments which should be considered in the supervision process.

In its landmark judgment of *Liu v. Russia* (2011), the Court has reiterated its approach to the institutional balance with the Committee, whilst developing its role in prescribing specific individual and/or general measures in accordance with Article 46. In particular, it ruled that "the powers assigned to the Committee of Ministers by Article 46 are not being encroached on where the Court has to deal with relevant new information in the context of a fresh application […]. It also notes that in the case of *Mehemi v. France* […] it examined a new application while its first judgment in respect of the same applicant was still pending before the Committee of Ministers under Article 46 of the Convention. […] The Court therefore considers that it is not prevented from examining the applicants' complaints concerning the new developments which occurred after the Court's judgment […] became final while that judgment is still pending before the Committee of Ministers under Article 46" (para.65).

Beyond these specific issues, it is worth highlighting that the indication of specific measures by the Court facilitates the task of the Committee of Ministers by encouraging negotiations with the respondent States at the supervisory stage, as well as by providing an additional degree of clarity in the execution process. Similarly, the role of the Committee of Ministers in this process remains paramount and the Court's prescriptive approach complements rather than supersedes this role.

[**CATEGORIES** OF SPECIFIC MEASURES UNDER A.46]

Let me now turn to the third part of my presentation – namely, an analysis of key case-law developments where the Court has indicated specific individual or general measures under Article 46 of the Convention. I will begin with an analysis of cases where the Court prescribed specific individual measures to respondent States and will then proceed to examine some specific general measures indicated by the Court under Article 46. Finally, I will briefly touch upon situations where the Court has prescribed both general and individual measures in the execution of its judgments.

[*Individual measures*]

When an established breach continues to have negative impacts on the applicant which cannot be redressed through pecuniary compensation, the Court may find it useful or necessary to indicate to the respondent State the measures to be taken with a view to ending the situation at the root of such breach.

For this purpose, a reopening of the proceedings can constitute a useful means to redress the effects of a violation where there were serious shortcomings in the procedure followed by national courts, in breach of the requirements under Article 6 of the Convention. This was the case, for instance, in the judgment of *Sejdovic v. Italy* dated 1st of March 2000, concerning the conviction *in absentia* of an applicant who had not to be found and was declared a runaway, without having informed him of the proceedings against him. I hereby quote paragraph 126 of the Court's ruling which states that "The Court accordingly considers that, where, as in the instant case, an individual has been convicted following proceedings that have entailed a breach of requirements of Article 6 of the Convention, a retrial or reopening of the case, if requested, represents in principle an appropriate way of redressing a violation".

In some exceptional cases, the Court goes beyond a mere recommendation and orders the reopening of proceedings in the operative part of its judgment, where it is possible under the national law and civil procedure. In the judgment of *Lungoci v. Romania* of 26th of January 2006, the Court advised the reopening of proceedings in the case of an applicant who had been deprived of a tribunal established by law. Notably, in its reasoning the Court declared that where the domestic proceedings had been found in breach of Article 6 of the Convention, the respondent State was under the obligation to place the applicant in a situation equivalent to that which the applicant would have found themselves, had the breach not occurred. The Court thus concluded that the only available remedy in the case at hand was for the Romanian government to open new proceedings which met the requirements of Article 6. To this day, different views remain within the Court as to whether it may or, indeed, sometimes should, indicate that domestic authorities reopen proceedings in certain cases.

The Court has also indicated specific individual measures in the context of unlawful detention in breach of Article 5 of the Convention. In *Assanidze v. Georgia* on 8 April 2004, the Grand Chamber of the Court held in the operative part of its judgment that "the respondent State must secure the applicant's release at the earliest possible date" (para. 14(a)), in addition to the payment of just satisfaction. This was the first time that the Court ordered the immediate release of a detainee – and it did so with clear reference to Article 46. Similarly, in *Iliascu and Others v. Moldova and Russia* on 8th of July 2004 the Court ordered the release of arbitrarily detained applicants and held 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" (para.490). In the case of *Kavala v. Turkey* of 10th of December 2019, the Court specifically ordered the respondent authorities to ensure the immediate release of the applicant, on the basis of Article 46. It is clear from this case-law that the Court is willing to give specific orders where it considered that respondent governments cannot reasonably claim discretion in the matter.

More recently, the Court has indicated specific individual measures based on the protection of family life under Article 8 of the Convention. For example, in the case of *Gluhakovic v. Croatia* of 12 April 2011, the Court ordered the respondent State in the operative part of its judgment to "secure effective contact between the applicant and his daughter at a time which is compatible with the applicant's work schedule and on suitable premises […]" (at 3).

In the context of a violation of Article 10, the Court in *Youth Initiative for Human Rights v. Serbia* on 25th of June 2013, indicated a specific direction, including a deadline, for the respondent government to "ensure, within three months from the date on which the judgment becomes final […] that the intelligence agency of Serbia provide the applicant with the information requested" (operative part, at 4).

Many such indications were also given in the context of extradition and expulsion. This was the case, for instance, in *M.A. v. France* on 1st of February 2018, where the Court indicated, on the basis of Article 46, that in expulsion cases diplomatic assurances should be obtained from the destination country that an applicant will not be subjected to treatment contrary to Article 3 upon return (para. 91).

Other examples of precise indications of measures under Article 46 can be found in the field of the right to property.

The abovementioned cases, albeit rather rare, show that the Court does not shy away from indicating very specific individual measures in relation to different rights and guarantees afforded by the Convention and its Protocols. This is especially the case when the adoption of such measures appears to be the only feasible way to achieve the effective execution of the judgment in question.

Let me now examine situations where the Court has indicated general measures under Article 46 of the Convention.

[*General measures*]

In some cases, the violation of the Convention resulted from a particular piece of domestic legislation or the absence thereof. In such scenarios, the violation is occurring or risks occurring in similar situations – so the Court observes that general measures at the domestic level are required to preclude future violations. The aim of these general measures should thus be such as to remedy the Court's finding of a violation in relation to a general practice affecting a group of individuals, and ensure that the Convention system is not compromised by a large number of similar applications stemming from the same root cause.

When indicating general measures under Article 46, the Court has set out its views in language stemming from recommendatory to mandatory.

At other times, the Court confines itself to simply suggesting the nature of measures to be taken, leaving a wide margin of appreciation to the respondent government as to the content of said measures. In *M.C. and Others v. Italy* on 3rd of September 2013, the Court invited the State to set out a timeframe within which it would undertake to guarantee, through legal and administrative measures, the effective and prompt implementation of the violated rights.

In other cases, the Court provides alternative solutions and suggests more concrete measures to be taken in accordance with Article 46. It occasionally also integrates a comparative case-law analysis amongst Contracting Parties to its recommendations. This was the case in *Michelioudakis v. Greece* on 3rd of April 2012, where the Court compared legislations from several Contracting Parties regarding

redress and reparation for undue procedural delays, to prescribe the measures to be taken by the respondent government in order to compensate the applicant for the prejudice caused by the excessively lengthy penal procedure in the domestic system.

Sometimes the Court provides stronger indications as to the general measures to adopt in executing its judgments, such as the administrative and/or legal reforms to be taken for this purpose. *In Dimitras and Others v. Greece* on 3rd of November 2011 for instance, the Court asked the respondent State to amend the relevant provisions of the Code of Criminal Procedure in order to enable witnesses to opt for a 'civil oath' without revealing their religious beliefs or providing any additional explanation.

Finally, in a few cases, the Court may indicate the very essence of the execution measures under Article 46. In this context, the Court's ruling usually contains an in-depth analysis of the structural deficiencies in the respondent State. In *Ananyev and Others v. Russia* on 10th of January 2012, the Court analysed the systemic failure on the part of the respondent State to investigate disappearances in the North Caucasus and provided specific guidance as to the measures to be taken in that regard.

[*Both general and individual measures*]

An overview of Article 46 indications by the Court would not be complete without a brief analysis of scenarios where the Court's judgments combined both individual and general measures.

For example, in the *M.D. and Others v. Malta* case of 17th of July 2012, the Court held that "authorities should provide a procedure allowing [the applicant] the possibility to request an independent and impartial tribunal to consider whether the forfeiture of her parental authority [was] justified" (para. 89). In addition to this specific individual measure, the Court recommended that "the respondent State envisage taking the necessary general measures to ensure the effective possibility of access to a court" (para.90). The more recent judgment of *McCaughey and Others v. United Kingdom* on 16th of July 2013 contains a paragraph in its operative part which reads as follows:

"The Court holds unanimously […] that the Government take, as a matter of some priority, all necessary and appropriate measures to ensure, *in the present case* and *in all similar cases* concerning killings by the security forces in Northern Ireland where inquests are pending, that the procedural requirements of Article 2 are complied with expeditiously" (para 4 (c)).

[**CONCLUDING REMARKS**]

It is clear from a closer look at its recent Article 46-related case-law that the Court has been increasingly involved in the execution of its own judgments – notably through the indication of specific individual and/or general measures to be taken in order to correct a defect identified in the national system.

Though it is incontestable that the Committee of Ministers bears primary responsibility in the supervision of execution, the Court has increasingly used its complimentary competence in this field, on the basis of Article 46 of the Convention.

In this respect, Steven Greer has identified three advantages relating to the Court's supervisory activity. Firstly, compliance with judgments will be less open to political negotiations in the Committee of Ministers. Secondly, execution of a judgment containing Article 46 indications is easier to monitor – both by the Committee and by other relevant bodies such as NGOs and other national human rights agencies. Finally, in these cases, a failure by the respondent authorities to comply effectively should in principle be easier to enforce (both by the applicant and by other interested bodies) through the domestic legal process, as an authoritatively recognised Convention violation.

Similarly, in its 2015 report the PACE Committee on Legal Affairs and Human Rights has applauded the Court's increasingly proactive role in the execution and implementation of its judgment, and referred approvingly to the "strengthened interaction" between the Court and the Committee of Ministers.

As such, this proactive approach can be celebrated as a positive development, provided that the Court's interventionism maintains and respects the institutional balance between different organs of the Council of Europe and remains in adherence with the principle of subsidiarity enshrined in the Convention.

It remains that this move to a more supervisory approach is a paramount step towards better and timelier implementation of the Court's judgments.

Those developments should be further reflected upon with the view to enhancing the effectiveness of the Convention system. I therefore look forward to today as an opportunity for exchange in this regard.

I thank you for your time and wish us a fruitful exchange.