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THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE EXECUTION OF ITS JUDGMENTS: NEW APPROACHES

Key words: *European Court of Human Rights, judgment of the Court, execution of judgments, indication of specific measures.*

Under Article 46(1) of the European Convention on Human Rights, "the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties". In other words, a State that has violated the Convention must fully and timely execute the judgment of the Court. As established under general international law, a judgment of the Court finding a violation of the Convention imposes on the respondent State three types of obligations: 1) to take steps to put an end to the violation, 2) to make reparation to the victim for the violation in order to restore, as far as possible, the situation before the breach (restitutio in integrum), 3) to adopt general measures to prevent future similar violations (guarantees of non-repetition). Thus, the obligation of the respondent State to execute a Court's

judgment goes well beyond the mere payment of the sums awarded by way of just satisfaction.

The Convention provides that it is the Committee of Ministers of the Council of Europe which shall supervise the execution of the Court's judgments (Article 46(2)). The interpretation of this provision during the first almost 40 years of existence of the Court was that the Committee of Ministers had an exclusive competence in the field of execution. The Court's traditional approach was that "it is not the Court's function to indicate, let alone dictate, which measures should be taken" by the respondent State (Airey v. Ireland (1979)). Requests for reparations other than monetary relief were consistently rejected by the Court. The Court's answer was that the State parties, although bound by the Court's judgments, were free to choose the means of implementing them in their own legal orders. The Court's focus as regards remedies was to order the payment of financial compensation to successful applicants.

This approach changed in the mid1990s. A new practice started in 1995 with the case of Papamichalopoulos v. Greece. It was the first judgment in which the Court gave a broader interpretation of the term "just satisfaction" under Article 41 of the Convention and indicated a measure other than just financial compensation. The case concerned land expropriation in Greece contrary to Article 1 of Protocol 1. In its judgment on just satisfaction the Court held that when it found a breach of the Convention the respondent State was under 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". It added that, in spite of State Parties' "freedom to choose how to implement judgments, "if the nature of the breach allows of restitutio in integrum, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself".

This approach was later upheld in Brumarescu v. Romania (2001), also dealing with restitution of property.

Another category of cases in which the Court started displaying the above-mentioned new approach was related to Articles 5 and 6 of the Convention in which it indicated, as a specific measure, the re-opening of trial proceedings (Gencel v. Turkey (2003), Somogyi v. Italy (2004); Stoichkov v. Bulgaria (2005), Ocalan v. Turkey (2005)). Initially, the Court merely identified or recommended the re-opening as the most adequate form of restitution, later it also ordered such measures in the operative provisions of its judgments (starting from the case of Lungoci v. Romania (2006)).

In 2004 the Court made a significant step forward in its new approach. The was the case of Assanidze v. Georgia, in which the applicant continued to be imprisoned despite having received a presidential pardon in 1999 and having been acquitted by the Supreme Court of Georgia in 2001. The Grand Chamber 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" and that the state thus had to "secure the applicant's release at the earliest possible date". One judge said in his concurring opinion in Assanidze, it would have been illogical and even immoral, to leave Georgia with a choice of

means, when the sole method of bringing the arbitrary detention to an end was to release the applicant (the continued detention, without any legal basis, of a person acquitted in a final judgment nearly three years ago, constituted a flagrant denial of justice). Georgia released Mr Assanidze five days after the Court delivered the judgment.

The Court came to a similar conclusion in Ilascu and others v. Moldova and Russia (2004). The Grand Chamber found a violation of Article 5 and held that "none of the applicants was convicted by "a court", and that a sentence of imprisonment passed by a judicial body such as the Supreme Court of the Moldova Republic of Transnistria could not be regarded as "lawful detention" ordered "in accordance with a procedure prescribed by law". The Court noted that the prolonged detention of the 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. It went on to order to the respondent States to "take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and to secure their immediate release".

There was another important reason for the Court to get more actively involved in the execution process. With new States joining the Convention, the number of complaints lodged with the Court increased enormously. A considerable part of these complaints related to repetitive cases, i.e. complaints concerning the same problem. The Court could not examine every single of these cases without requesting the respective State to bring about necessary structural changes. To address that situation, the Committee of Ministers adopted a resolution in 2004 in which it invited the Court "as far as possible, 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".

The Court's "reply" came just a month later. That was the case of Broniowski v. Poland, a so-called pilot case. Pilot cases address structural or specific problems that may give rise, or are giving rise, to numerous and identical breaches of the Convention by the same State.

Broniowski concerned the property rights of a large group of Poles who had lost their land due to border changes after the Second World War. The Court held that Article 1 of Protocol 1 had been violated and that was due to a systemic defect in the Polish legal order. In its judgment the Court indicated that Poland had to "remove any hindrance to the implementation of the right of the numerous persons affected by the situation... or to provide equivalent redress in lieu". It was the first case in which the Court gave specific indications to remedy a systemic problem.

In 2011 a new rule (Rule 61) was added to the Rules of Court which codified the pilot judgment procedure. So far the Court has issued 29 pilot judgments. The last one was Rezmiveș and others v. Romania (2017) which was related to a structural dysfunction specific to the Romanian prison system.

The Court has also dealt with systemic or structural problems in the State Parties without formally resorting to the pilot judgment procedure. These are so-called quasi-pilot cases. The distinction between pilot and quasi-pilot judgments is not always clear. But it seems that the main difference is of a procedural nature. When dealing with pilot cases, the Court must invite the parties to comment upon the application of the pilot judgment procedure according to Rule 61(2) of the Rules of the Court. Furthermore, in quasi-pilot cases the Court usually does not prescribe general measures in the operative part.

Petukhov v. Ukraine (No. 2) can be given as one the most recent examples to quasi-pilot cases (March 2019). In this case the Court found a violation of Article 3 of the Convention on account of the irreducibility of the applicant's life sentence. The Court emphasised that this violation affected many people: there were already over sixty similar applications pending before the Court and many others might follow. The Court added that the present case, in so far as it concerns the irreducibility of a life sentence, discloses a systemic problem calling for the implementation of measures of a general character. The nature of the violation found under Article 3 of the Convention suggests that for the proper execution of the present judgment the respondent State would be required to put in place a reform of the system of review of whole-life sentences. The mechanism of such a review should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds and should enable whole-life prisoners to foresee, with some degree of precision, what they must do to be considered for release and under what conditions, in accordance with the standards developed in the Court's case-law.

Another Ukrainian quasi-pilot case is Ignatov v. Ukraine (2017). In that case the Court found a violation of Article 5 of the Convention, which was recurrent in the case-law concerning Ukraine. In this regard, one should mention the 2011 Kharchenko judgment, in which the Court had found similar violations of Article 5 § 1 (c), 3 and 4 of the Convention. The Court held in Ignatov that the issues stemmed from legislative lacunae and the respondent State was invited to take urgent action to bring its legislation and administrative practice into line with the Convention.

In this context, I would like to mention also the judgment in the case of Tomov and others v. Russia which was delivered in April 2019. The Court held that the problem of inhuman and degrading conditions of prisoner transportation in Russia was a recurrent structural problem. The Court had found a similar violation in more than fifty cases. Currently, more than 680 prima facie meritorious applications against Russia are now pending before the Court which feature, as their primary or secondary grievance, a complaint of inadequate conditions of transport. Of those, 540 applications were lodged in 2018. The Court recommended a wide range of general measures to tackle the said structural problem, in particular, reducing allocation to remote detention facilities, review of the normative framework and adaptation of vehicles, and ordered in the operative part of the judgment to make available, within eighteen months, a combination of effective

domestic remedies in respect of complaints about conditions of transport that have both preventive and compensatory effects.

Although the Court's practice regarding the indication of specific remedial measures is not always consistent and coherent, one could nevertheless single out the following criteria for the Court getting thus involved in the execution process: a) the measure ordered is the only step to be taken to remedy the violation (it is when the nature of the violation found is such as to leave no real choice as to the measures required to remedy it); b) the urgency of putting an end to the violation; c) the gravity of the violation found; d) the occurrence of a continuing violation; and e) the existence of a systemic or structural problem. The first four criteria are related to the indication of individual measures, and the last one is applicable to situations in which the Court deems necessary to recommend or order general measures.

As regards the nature and variety of specific measures indicated by the Court, here are some examples:

Individual measures:

a) release of a person unlawfully detained (Assanidze (2004), Ilascu and others (2004), Yakisan v. Turkey (2007), Aleksanyan v. Russia (2008), Tehrani and others v. Turkey (2010), Fatullayev (2010), Del Rio Prada v. Spain (2013), S.K. v. Russia (2017), Şahin Alpay v. Turkey (2018), Selahattin Demirtaş v. Turkey (No. 2) (2018));

b) restitution in property cases (Papamichalopoulos v. Greece (1995), Brumarescu v. Romania (2001), Karanovic v. BiH (2007 – to transfer the applicant to the pension fund);

c) maintaining effective family contact (Gluhakovic v. Croatia (2011) – in the operative part: the authorities should ensure effective contact of the applicant with his daughter at a time compatible with his work schedule and on suitable premises)

d) reinstatement to former position (Oleksandr Volkov (2013); in Aliyev v. Azerbaijan (2018) the Court was less straightforward: it said that it should be left to the Committee of Ministers to supervise the adoption of measures aimed, among others, at restoring his professional activities);

e) disclosure of information (Youth Initiative for Human Rights v. Serbia (2013) - in the operative part: the State should ensure that the Serbian intelligence agency provide information to the applicant NGO about the number of people who had been the subject of electronic surveillance within three months).

f) obtaining diplomatic assurances (M.A. v. France (2018)):

g) bringing to a close the pending criminal investigation (Abu Zubaydah v. Lithuania (2018), Al-Nashiri v. Romania (2018))

As regards general measures indicated by the Court, they are mainly related to amending or repealing the relevant legislation (Vyerentsov v. Ukraine (2013), Berkovich and others (2018 – a ban on the private travel of persons who have had access to State secrets); Navalnyy v. Russia (2018), Zelenchuk and Tsytsyura v. Ukraine (2018 – "The Court stresses that the problem underlying the violation of Article 1 of Protocol No. 1 concerns the legislative situation itself. The Court considers that the respondent State

should take appropriate legislative and/or other general measures to ensure a fair balance between the interests of agricultural land owners on the one hand, and the general interests of the community". Under Article 41: "The Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non pecuniary damage sustained by the applicants. However, should the respondent State unreasonably delay adoption of the requisite general execution measures, this may, with the passage of time, lead to a situation where awards under Article 41 may eventually become warranted, at least for some categories of agricultural land owners".

The way how the Court indicates specific measures is different. The Court may simply give recommendations (which appear in obiter dictum) or make concrete orders by inserting them in the operative part. Many judges and academicians are of the opinion that indications that are not included in the operative part of judgments do not impose legal obligations upon States. In my view, this question is not a straightforward one. Let us take one example. If the Court finds that the domestic legislation is not compatible with the Convention, whatever formulation it uses to bring the respondent State's attention to that problem, or even if the Court says nothing about remedial action, it is clear that that legislation can no longer be applied.

Talking about the active involvement of the Court in the execution process – some authors call this as "judicialisation of the implementation" – one should also mention situations when the Court intervenes in the post-judgment phase.

According to the well-established case-law, Article 46(2) precludes the Court from verifying whether a State has complied with the obligations deriving from a Court's judgment. Complaints brought under Article 46 and alleging a State's failure to execute a judgment are declared inadmissible ratione materiae. Thus, the Court said in Bochan v. Ukraine (No. 2) that "the question of compliance by the High Contracting Parties with the Court's judgments falls outside its jurisdiction if it is not raised in the context of the "infringement procedure" provided for in Article 46(4)(5) of the Convention".

But it does not mean that measures taken by a respondent State for executing a judgment fall outside the jurisdiction of the Court. There are situations when the Court may intervene in the post-judgment phase.

First – The Court may accept follow-up applications which raise relevant new information not heard by the Court in its first judgment. In this regard, we can mention Bochan (No. 2) case. Relying on the Court's first judgment of 2007, the applicant asked the Supreme Court of Ukraine to reconsider her case. But her appeal was dismissed. She came back to Strasbourg complaining that the reasoning of the Supreme Court contradicted with the 2007 judgment. The European Court of Human Rights considered that this particular complaint is not about the outcome as such or the effectiveness of the national courts' implementation of the Court's earlier judgment but rather about the manner in which the decision had been reached in the domestic proceedings. This sufficed for the Court to find that the applicant's application raised a "new issue" under Article 6(1) of the Convention which it is competent to examine.

Second – The Court may intervene in the context of examining whether friendly settlements reached after the adoption of a pilot judgment were based on the respect for human rights required by Article 37(1). In Hutten-Czapska v. Poland (friendly settlement), the Court approved a settlement "having regard to both the general measures for addressing the systemic problem that had been identified and the individual measures afforded to the applicant under the agreement.

Third – the re-opening of clone cases, which had been frozen pending the adoption of a pilot judgment, offers a similar means by which the Court can review and respond to the non-adoption of implementing measures indicated in a pilot judgment. Rule 61(8) of the Rules of Court reads: "Subject to any decision to the contrary, in the event of the failure of the Contracting Party concerned to comply with the operative provisions of a pilot judgment, the Court shall resume its examination of the applications which have been adjourned in accordance with paragraph 6 above".

Fourth – another way of intervention of the Court in the post-judgment phase is provided for in Article 46(4). This is so-called infringement proceedings.

It should be borne in mind that the power of the Court to indicate execution measures is not unlimited. This competence of the Court is complementary to the powers of the Committee of Ministers in the field of execution. It is necessary to maintain the institutional balance provided for in the Convention.

Finally, I would like to briefly touch upon the question of so-called "negative" indications of the Court. In some cases the Court, having found a violation, in particular, of Article 8 of the Convention, nevertheless specifically stated that the finding a violation should not lead the respondent State to perform relevant action in the execution process. For example, in R.S. v. Poland (2015), having held that the respondent State had failed to secure to the applicant the right to respect for his family life, noted the following: "as the children will soon reach the age of majority, there is no basis for the present judgment to be interpreted as obliging the respondent State to take steps ordering their return to Switzerland". In another case (K.J. v. Poland (2016)), the Court found a violation of Article 8 and observed that "as the child has lived with her mother in Poland for over three years and a half, there is no basis for the present judgment to be interpreted as obliging the respondent State to take steps ordering the child's return to the United Kingdom". A similar observation was made by the Court in the case of Adzic v. Croatia (2 May 2019).

By way of conclusion, I would like to emphasise that the increased role of the Court in the execution of its judgments has proved to be effective. Indication of specific measures should be an integral component of the Court's remedial strategy. The Court should specify measures tailored to the applicant's situation in order to bring about restitutio in integrum whenever possible and appropriate. Providing specific remedies is a means for helping the respondent State fulfil its obligations to abide by a judgment and facilitate the monitoring task of the Committee of Ministers.