Prescriptive Orders in the Operative Provisions of Judgments by the European Court of Human Rights: Beyond *res judicanda*?

Hans-Joachim Cremer

Does the European Court of Human Rights (the Court) have the power to include in the operative provisions of its judgments prescriptions as to how a respondent State is to act in order to discontinue an on-going violation of a guarantee of the European Convention of Human Rights (the Convention)\(^1\) and/or to redress the situation?

Wouldn’t any person committed to promoting human rights spontaneously answer in the affirmative? To effectively protect human rights, the Court seems to need the competence to make a ‘consequential order’ and thereby determine with binding force how a respondent State shall react to the finding that it is responsible for a violation of a Convention right. But could it be that to give such an order is not included in the Court’s powers? Could it be that prescriptive orders would therefore not share the binding force of a judgment because they do not belong to the *res judicanda*,\(^2\) the matters the Court is called upon to decide?

The following contribution will explore whether the Court is overstepping the limits of its powers by making prescriptive (or consequential) orders. This investigation will start with a sketch of how the Court’s practice has evolved (A.), before assessing the relevance of the question whether the Court might be exceeding the limits of its powers (B.). The examination of the scope of the Court’s powers in making a decision on a violation of the Convention and on the consequences to be drawn from such a violation (C.) will show the *Assanidze* judgment as the point of reference for the Court’s recent practice (C. I.), highlighting both what it means that the respondent State is to abide by a Court judgment finding a violation, although such a

---

1 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222 (as amended by the Protocols Nos. 11 & 14) [ECHR].

2 Using the gerundive ‘*judicanda*’ is not common; it is used here to show that we are concerned with the matters upon which the Court can pronounce with the effect that a case or controversy is settled with binding judicial force – i.e., by a judgment having *res judicata* effect.
judgment is no more than declaratory, and which tasks are entrusted to the Committee of Ministers (C. II.). The critical issues of whether, and if so, how the Convention can be interpreted as providing the Court with the power to include prescriptive orders in the operative part of its judgments will be explored (C. III.). Although the conclusion will be that the Convention can be interpreted in this way, the recent judgment in the case of Volkov sheds some doubt at least on the extent of the Court’s power to prescribe (D.).

A. The Development of the Court’s Practice

Nowadays we see the Court exercising such powers, although the development began slowly. First, during a long period, the Court completely abstained from giving a respondent State found to have violated the Convention, in the operative provisions of a judgment, any binding direction as to how to repair the situation. In a second phase, there was an initially rather hesitant move to indicate how to put an end to a violation, albeit in the reasons of the judgment, before, finally, prescriptive orders in the operative provisions of its judgments have multiplied – with the judgments, as described by Marten Breuer in his fine analysis of the Court’s case-law, oscillating between Article 41 (on just satisfaction) and Article 46 (on the binding force and execution of judgments) of the Convention.

Famously, in 1995, in the Papamichalopoulos case the Court, in deciding on claims of just satisfaction, held that Greece was to return land expropriated de facto to the applicants within six months and, failing restitution, was to pay the applicants pecuniary damages. Ordering the land to be returned could in the context of the judgment well be regarded as an aspect

3 This is not to say that the Court remained silent on the effects of its judgments. Consider *Marckx v. Belgium*, ECtHR Application 6833/74, Judgment of 13 June 1979, para. 58.
solely of just satisfaction\(^7\) – especially as payment in compensation of pecuniary damage was dependent on Greece’s failing to return the land. However, the Court did address questions of Greece’s obligation to abide by the principal judgment, which had found a violation of the right to the protection of property.\(^8\)

In 2004, in the Assanidze case, the Grand Chamber held unanimously that Georgia “must secure the applicant’s release at the earliest possible date”.\(^9\) It ordered Georgia to stop an on-going violation by releasing the applicant from detention. Georgia was held to be violating Article 5 (1) of the Convention as the Supreme Court of Georgia had ordered the applicant’s release;\(^10\) the non-execution of this decision was considered incompatible with Article 6 (1) of the Convention.\(^11\) Although under the heading of “Article 41 of the Convention” and the sub-heading “Damages”, the Court in its “release order” clearly refers to Article 46 of the Convention.\(^12\)

The Grand Chamber decided similarly in Ilaşcu and Others v. Moldova and Russia only a few months later\(^13\) – the Chambers following in line in other cases.\(^14\)

---

7 Cf. ibid., paras. 38-39.
8 Ibid., para. 34.
10 Ibid., paras. 172-176: There had been no statutory or judicial basis for the applicant’s deprivation of liberty since 29 January 2001.
11 Ibid., paras. 181-184.
12 See the reference to paras. 202-203 in ibid., operative part, para. 14 (a).
13 Ilaşcu and Others v. Moldova and Russia, ECtHR Application No. 48787/99, Judgment (GC) of 8 July 2004, para. 490 & operative part, para. 22.
14 See Charahili v. Turkey, ECtHR Application No. 46605/07, Judgment of 13 April 2010, para. 85 & operative part, para. 7 (a); Tehrani and Others v. Turkey, ECtHR Application No. 32940/08, Judgment of 13 April 2010, para. 107 & operative part, para. 10 (a); Fatullayev v. Azerbaijan, ECtHR Application No. 40984/07, Judgment of 22 April 2010, para. 177 & operative part, para. 6; Del Rio Prada v. Spain, ECtHR, Application No. 42750/09, Judgment of 10 July 2012, paras. 81-83 & operative part, para. 5. See the careful wording in Aleksanyan v. Russia, ECtHR Application No. 46468/06, Judgment of 22 December 2008, operative part, para. 9: “[...] [h]olds that the applicant’s detention on remand should be discontinued”. See also ibid., paras. 238-240). Breuer, Article 46, supra note 4, 600-601, para. 11 (in combination with 602, para. 17), criticizes that the Court does not give due consideration to questions of the incontestability of judgments by domestic courts, although the Court does not have the power to lift, quash or annul such domestic judgments.
In the *Ghavtadze* case the Court held that Georgia was to ensure that the applicant, who was serving a prison sentence, was promptly to be placed in an establishment capable of administering adequate medical treatment for his viral hepatitis C and his pulmonary tuberculosis.\(^{15}\) In the *Sławomir Musiał* case the Court ordered that Poland was to secure at the earliest possible date adequate conditions of the applicant’s detention in a specialized institution capable of providing psychiatric treatment and constant medical supervision for the serious mental disorders the applicant had been diagnosed with.\(^{16}\)

In other cases the Court has ordered respondent States to ensure the enforcement of decisions given by domestic authorities,\(^{17}\) especially courts,\(^{18}\) in favour of the applicants. In *Youth Initiative for Human Rights v. Serbia*, for example, the Court found that “the obstinate reluctance of the intelligence agency of Serbia to comply with the order of the Information Commissioner”, “the domestic body set up precisely to ensure the observance of the Freedom of Information Act 2004”, “was in defiance of domestic law and tantamount to arbitrariness”\(^{19}\) and constituted a violation of Article 10 of the Convention; it ordered the respondent State to ensure that the agency provide the applicant with the requested information.\(^{20}\)

With regard in particular to the reopening of (judicial) proceedings as a very special means of redressing violations in domestic court proceedings, the Grand Chamber in *Verein gegen Tierfabriken (No. 2)* in 2009 pointed

\(^{15}\) *Ghavtadze v. Georgia*, ECtHR Application No. 23204/07, Judgment of 3 March 2009, para. 106 & operative part, para. 3 (a).


\(^{18}\) See, e.g., *Karanovic v. Bosnia and Herzegovina*, ECtHR Application No. 39462/03, Judgment of 20 November 2007, paras. 28-30 & operative part, para. 3 (a) (i); *Poznakhirina v. Russia*, ECtHR Application No. 25964/02, Judgment of 24 February 2005, para. 33 & operative part, para. 4 (a).


\(^{20}\) Ibid., operative part, para. 4. See also ibid., paras. 31-32.
out that “the Court clearly does not have jurisdiction to order such measures”.

Nevertheless, it is common for judgments – especially in cases of procedural defects violating Convention rights – to point out, though only in the reasons, that the reopening of proceedings would in principle be the most appropriate way of redress. Where, in the Lungoci case, the Court for once did order a reopening, the domestic law of civil procedure provided that proceedings be reopened if the European Court of Human Rights found a violation of the Convention.

Finally, in Oleksandr Volkov in 2013, the Court dramatically ordered Ukraine to reinstate the applicant in the post of judge of the Supreme Court of Ukraine at the earliest possible date.

Let me mention in parentheses the ‘pilot judgment procedure’ in which the Court will, in the operative provisions of its judgment, order a respondent State to correct a systemic problem of its legal order through appropriate legal measures and administrative practices, the judgment thereby reaching

---


22 See, e.g., Gençel v. Turkey, ECtHR Application No. 53431/99, Judgment of 23 October 2003, para. 27.

23 Lungoci v. Romania, ECtHR Application No. 62710/00, Judgment of 26 January 2006, para. 56 & operative part, para. 3 (a). Cf. also Huseyn and Others v. Azerbaijan, ECtHR Application Nos. 35485/05 et al., Judgment of 26 July 2011, para. 262, where a consequential order, however, is not made although the Court finds that “the most appropriate form of redress would, in principle, be the reopening of the proceedings in order to guarantee the conduct of the trial in accordance with the requirements of Article 6 of the Convention”. Cf. Claes and Others v. Belgium, ECtHR Application Nos. 46825/99 et al., Judgment of 6 June 2005, operative part, para. 5 (a).

Cf. also Calmanovici v. Romania, ECtHR Application No. 42250/02, Judgment of 1 July 2008, paras. 162-163, where the Court obviously considers several possibilities of redressing the situation to exist. Breuer, Article 46, supra note 4, 603, para. 19, points to para. 10 of the Joint Concurring Opinion of Judges Rozakis, Spielmann, Ziemele and Lazarova Trajkovska, Salduz v. Turkey, ECtHR Application No. 36391/02, Judgment (GC) of 27 November 2008.

beyond the applicant’s specific case.\textsuperscript{25} In its very first ‘pilot judgment’, the Court in \textit{Broniowski v. Poland} demanded Poland to “secure the implementation of the property right in question in respect of the remaining Bug River claimants [i.e. other than Mr Broniowski] or provide them with equivalent redress”.\textsuperscript{26}

These cases together seem to support a statement by Judge Pinto de Albuquerque in his concurring opinion in \textit{Fabris v. France} that “[t]he Court’s judgments are no longer purely declaratory, but prescriptive”.\textsuperscript{27} However, we should not ignore that this is no more than a picture of the Court’s practice. We might want to leave it at that, simply taking note of this practice.

That picture, however, is not yet complete. Often the Court \textit{refrains} from making a ‘consequential order’ and instead only recommends\textsuperscript{28} or merely ‘indicates’\textsuperscript{29} which measure a respondent State ought to take in order to stop and make good a violation of the Convention. The Court may also spell out a respondent State’s legal obligation under Article 46 (1) of the Convention\textsuperscript{30}, confining this explanation to the \textit{reasons} of the judgment rather than

\begin{flushright}
\textsuperscript{26} \textit{Broniowski v. Poland}, ECtHR Judgment, \textit{supra} note 25, operative part, esp. para. 4.
\textsuperscript{27} \textit{Fabris v. France}, ECtHR Application No. 16574/08, Judgment (GC) of 7 February 2013.
\textsuperscript{28} \textit{Gatt v. Malta}, ECtHR Application No. 28221/08, Judgment of 27 July 2010, para. 59.
\textsuperscript{30} \textit{Al-Saadoon and Muftidi v. United Kingdom}, ECtHR Application No. 61498/08, Judgment of 2 March 2010, para. 171; \textit{Abuyeva and Others v. Russia}, ECtHR Application No. 27065/05, Judgment of 2 December 2010.
\end{flushright}
including it in the operative part.\textsuperscript{31} Such an indication has the nature of a recommendation, thus going ‘beyond \textit{res judicata’}.\textsuperscript{32}

Sometimes the Court after a thorough discussion comes to the conclusion that there is no need for a consequential order.\textsuperscript{33} In \textit{Iskandarov v. Russia} a consequential order was even considered to be excluded: The applicant submitted that the respondent Russian Government should be required to ensure his release from the Tajik prison and his return to the Russian Federation. The Court, however, observed “that the individual measure sought by the applicant would require the respondent Government to interfere with the internal affairs of a sovereign State”,\textsuperscript{34} thus pointing to the legal impossibility of what was sought to be required of the Russian Government.

\textbf{B. Does Adding Prescriptive Orders to the Operative Provisions of a Judgment Exceed the Court’s Powers?}

\textbf{I. Placing Prescriptive Orders in the Held as a Question of Judicial Power}

From a purely \textit{pragmatic} point of view, it seems interesting to know which rules guide the Court in choosing whether to make a consequential order or not, even if only for the reason of predicting decisions. Extending the categories of pronouncements in the operative provisions of judgments, however, also poses a serious \textit{legal problem}: Will a judgment containing consequential orders in its operative provisions go beyond what the Court is \textit{allowed} to decide? Do prescriptive orders in the held go beyond the \textit{res judicanda}? Does the Court truly as of law have the power to make consequential orders at all?

\textsuperscript{31} This is demonstrated by Breuer, Article 46, \textit{supra} note 4, 600-601, paras. 10, 12, 14 & 15, whose reference of cases I have used above.

\textsuperscript{32} As in recent judgments by the Grand Chamber in dramatic cases, in which measures of redress were merely indicated in the reasons of the judgment. See \textit{M.S.S. v. Belgium and Greece}, ECtHR Application No. 30696/09, Judgment (GC) of 21 January 2011, paras. 399-402; \textit{Hirsi Jamaa and Others v. Italy}, ECtHR Application No. 27765/09, Judgment (GC) of 23 February 2012, paras. 209-211.

\textsuperscript{33} See, e.g., \textit{O.H. v. Germany}, ECtHR Application No. 4646/08, Judgment of 24 November 2011, paras. 113-119.

\textsuperscript{34} \textit{Iskandarov v. Russia}, Application No. 17185/05, Judgment of 23 September 2010, para. 161 (for the applicant’s submission see \textit{ibid.}, para. 153).
For it makes a difference if a judgment goes beyond merely ‘indicating’ measures which a respondent State might take and places, in its operative part, an order specifying the measures to be taken in order to redress the violation of a Convention right: Whatever is included in the operative provisions shares the binding force of the judgment. Consequently, when a judgment does not, as was the consistent practice up until Papamichalopoulos, restrict its holding to there being a violation of the Convention, the Court seems to be extending its powers. Can it do so on its own? Do not its powers reach only so far as the States Parties have submitted to the Court’s jurisdiction? Might there be a case of assumption of powers ultra vires?

II. The Legal and Practical Relevance of the Court’s Respecting the Limits of its Powers

This is more than an interesting theoretical question. Despite any enthusiasm about ‘constitutional’ traits, the Convention still is a treaty of public international law, albeit a traité loi, the foundation of which continues to be the consensus (though not in a psychological sense) of the States Parties. Consensus as the basis of treaty obligation is – though only negatively – mirrored by the possibility of denouncing the Convention, which its Article 58 concedes to every High Contracting Party.

For an international tribunal it is essential how far States have submitted to its jurisdiction, thereby accepting the Court’s powers and establishing their obligation to abide by the Court’s judgments. Therefore, it is hardly amazing that the Court’s judgments themselves have been sensitive to this legal issue and will in any case of a prescriptive order explicitly give reasons

35 Apart from granting just satisfaction and deciding on costs and expenses.
36 However, according to M. Koskenniemi, From Apology to Utopia (2005), 333, “[t]he conflict between consensualism and non-consensualism and the ultimately unsatisfactory nature of both is clearly visible in two competing understandings of why treaties bind. According to a subjective approach treaties bind because they express consent. An objective approach assumes that they bind because considerations of teleology, utility, reciprocity, good faith or justice require this.”
37 From here there is also a link to the possibility of a State’s ceasing to be a member of the Council of Europe according to the Statute of the Council of Europe, 5 May 1949, Arts. 7 & 8, 87 UNTS 103, 108 – as the case may be, either by withdrawal or by a decision of the Committee of Ministers –, which also ends the State’s being a party to the Convention (Art. 58 (3) of the Convention (supra note 1)).
of a general kind for including it in the operative provisions of the judgment. In the case of Oleksandr Volkov v. Ukraine it was Judge Yudkivska, the Judge sitting for Ukraine, herself who addressed the question of the legal basis for prescriptive orders supportively in her Concurring Opinion. 38

What is more, the true ‘power’ of the judgments by the Court may very well lie in the moral pressure they exert: The eyes of people in the States Parties rest on the government of a State found to have violated the Convention. But does not the moral appeal of the Court’s judgments decisively depend on the Court’s being an international court of law and thus on the people’s conviction that its decisions, both as to substance and as to procedure, are strictly based on law? 39 Does not the moral pressure thus depend on the Court’s strictly abiding by the law?

So, let us look at the law governing the Court’s powers ‘to decide’.

C. The Scope of the Court’s Powers to Pronounce on the Question of a Violation of the Convention and its Consequences

I. The Assanidze Judgment as the Point of Reference

Recently, in Oleksandr Volkov v. Ukraine 40, the Court has included an express order of how to repair a situation in conflict with the Convention. What echoes in the reasons and seems essentially to form the point of reference for the Court’s case law up until today is the Grand Chamber’s Assanidze C.

---

39 Cf. High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (20 April 2012), available at http://hub.coe.int/20120419-brighton-declaration (last visited 31 January 2014), para. 21: “The authority and credibility of the Court depend in large part on the quality of its judges and the judgments they deliver.” See also ibid., para. 25 (c) whereby the Conference “[w]elcomes the steps that the Court is taking to maintain and enhance the high quality of its judgments and in particular to ensure that the clarity and consistency of judgments are increased even further; welcomes the Court’s long-standing recognition that it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart without cogent reason from precedents laid down in previous cases; and in particular, invites the Court to have regard to the importance of consistency where judgments relate to aspects of the same issue, so as to ensure their cumulative effect continues to afford States Parties an appropriate margin of appreciation”.
judgment, which itself draws on Papamichalopoulos and Others v. Greece (Article 50), as refined through the case law developed in between. In the Volkov judgment, however, a clear sub-heading appears: “A. Indication of general and individual measures”, albeit placed under the overall heading: “IV. Application of Articles 41 and 46 of the Convention”. Nevertheless, there is reason to believe that the Court regards its consequential orders to stand in the context of Article 46 of the Convention.

The relevant part of the Volkov judgment reads:

“193. In the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which the Court finds a breach of the Convention imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, inter alia, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach [...].

194. The Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment [...]. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States to secure the rights and freedoms guaranteed under the Convention (Article 1) [...].

---

41 Assanidze v. Georgia, ECtHR Judgment, supra note 9, paras. 198 & 202-203.
42 Papamichalopoulos and Others v. Greece (Article 50), ECtHR Judgment, supra note 6.
44 Oleksandr Volkov v. Ukraine, ECtHR Judgment, supra note 24.
195. However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a violation it has found to exist. In such circumstances, it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned [...]. In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate a specific measure [...]."

II. The Finding of a Violation of the Convention by the Court, Abiding by a Judgment by the Respondent State and Supervising the Execution of the Judgment by the Committee of Ministers

A central point is that the Court regards its judgments to be “essentially declaratory in nature”. The Convention itself contains no provision expressly defining which categories of pronouncements can be in the operative provisions of a judgment. Only from Article 41 of the Convention can we derive that where the application is well-founded the Court, as to the substance of an admissible application, will ‘find’ that there has been a violation of the Convention or its protocols. In practice, such findings are specified by naming the Convention article and sometimes by saying how it was vi-

46 See, e.g., Verein gegen Tierfabriken Schweiz (VgT) (No. 2) v. Switzerland, ECtHR Judgment, supra note 21, para. 61.
47 We might expect more information from the Rules of Court, available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (last visited 31 January 2014). These (see Rule 74 (1) (i), ibid., 40), however, do not specify which ‘operative provisions’ can be included in a judgment (although some detail is given by Rule 61 (3) & (4) (ibid., 34) to the operative part of pilot judgments). Only the Practice Directions, issued by the President of the Court according to Rule 32 of the Rules of Court (ibid., 18) on 28 March 2007, contain a paragraph, which stands under the heading of “Just Satisfaction Claims” and reads: “The Court’s awards, if any, will normally be in the form of a sum of money to be paid by the respondent Contracting Party to the victim or victims of the violations found. Only in extremely rare cases can the Court consider a consequential order aimed at putting an end or remedying the violation in question. The Court may, however, decide at its discretion to offer guidance for the execution of its judgment (Article 46 of the Convention).” President of the ECtHR, Practice Direction: Just Satisfaction Claims, available at http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf (last visited 31 January 2014), 4, para. 23 (emphasis added).
olated. The Court is obviously addressing this kind of finding when it characterizes its judgments as declaratory.

Early on in its case history, the Court pronounced that a decision cannot of itself annul or repeal provisions of law\(^\text{48}\) or the judgment of a domestic court.\(^\text{49}\) The Court will not require a respondent State to annul disciplinary sanctions imposed on applicants.\(^\text{50}\) Nor will it even direct a respondent State to make a mere formal declaration, as requested in the Dudgeon case, that the applicant, if he were to apply for civil service employment in Northern Ireland, “would not be discriminated against either on grounds of homosexuality or for having lodged his petition with the Commission”.\(^\text{51}\) Insofar, the Court has no power to issue injunctions.

However, if the Court’s judgments are declaratory, the meaning of Article 46 (1) of the Convention might seem unclear when it says: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.” But, as the Papamichalopoulos judgment tells us,\(^\text{52}\) this must be read in the light of general principles of public international law.\(^\text{53}\) Thus the respondent State has “a legal obligation \textit{under that provision} to put an end to the breach\(^\text{54}\) and to make reparation for its consequences in such a way as to restore as far as possible the situation existing

\(^{48}\) Marckx v. Belgium, ECtHR Judgment, \textit{supra} note 3, para. 58.

\(^{49}\) Pakelli v. Germany, ECtHR Application No. 8398/74, Judgment of 25 April 1983, para. 45.

\(^{50}\) \textit{Le Compte, Van Leuven and De Meyere v. Belgium}, ECtHR Application Nos. 6878/75 \textit{et al.}, Judgment of 18 October, para. 13 (also dealing with sentences passed in criminal proceedings).


\(^{52}\) Papamichalopoulos and Others v. Greece (Article 50), ECtHR Judgment, \textit{supra} note 6, para. 34. Very clearly addressed by Verein gegen Tierfabriken (VgT) v. Switzerland (No. 2), ECtHR Judgment, \textit{supra} note 21, para. 86.

\(^{53}\) As to this, see Breuer, Article 46, \textit{supra} note 4, 598, para. 2.

\(^{54}\) Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Art. 30 (a), Yearbook of the International Law Commission (2001), Vol. II (2), 26, 28. The Commentary (para. 2 concerning Art. 29, \textit{ibid.}, 88) shows that the obligation of cessation is connected to, one might even say: has its root in, the “continuing obligation to perform an international obligation”; it can therefore be seen as part of the ‘primary’ obligation, although there “simply a function of the duty to comply with the primary obligation”, i.e., that “the question of cessation only arises in the event of a breach” and that “[w]hat must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to remedies” (para. 6 concerning Art. 30, \textit{ibid.}, 89).
before the breach”.

This is what to ‘abide by’ a judgment means. And this is what is to be supervised by the Committee of Ministers as the ‘execution’ of the judgment (Article 46 (2) of the Convention).

What is more, the Court considers that “in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment” and accepts that the Contracting States have “discretion as to the manner of execution of a judgment”. Such discretion, one might say, turns the execution of a judgment into something ‘political’—which makes it all the more conclusive for the Convention to place the task of ‘supervising execution’ in the hands of the ‘political’ institution of the Committee of Ministers. This is an element of a kind of ‘separation of powers’ between the Committee and the Court—with the consequence that, whenever the Court makes a consequential order directed at specifying a respondent State’s obligation under Article 46 (1) of the Convention, it is reaching over into the ‘realm’ assigned to the Committee (which the Explanatory Report to the 14th Protocol to the Convention characterizes as “the competent organ for supervising execution of the Court’s judgments”)—if you will: reaching beyond res judicanda into the sphere of execution. Is the Court thereby overstepping its limits?

55 Assanidze v. Georgia, ECtHR Judgment, supra note 9, para. 198 (emphasis added).
56 Cf. ibid.
57 Thus the obligation to abide by the judgment is interpreted as an obligation of result.
58 Assanidze v. Georgia, ECtHR Judgment, supra note 9, para. 202 (emphasis added).
59 Cf., with a view to the pilot judgment procedure, the Separate Opinion of Judge Zagrebelsky, joined by Judge Jaeger, Hutten-Czapska v. Poland, ECtHR Application No. 35014/97, Judgment (GC) [Friendly Settlement] of 28 April 2008 (speaking of “the balance provided in the Convention system between its own role and that of the Committee of Ministers”), and the Concurring Opinion of Judge Ziemele, Hutten-Czapska v. Poland, ECtHR Judgment, supra note 59 (stating “that the Committee of Ministers is much better equipped to monitor than the Court”).
60 Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, reprinted in Council of Europe (Steering Committee for Human Rights) (ed.), Reforming the European Convention on Human Rights: A Work in Progress (2009), 693, 709-710, para. 100. See also Verein gegen Tierfabriken Schweiz (VgT) (No. 2) v. Switzerland, ECtHR Judgment, supra note 21, para. 84.
III. A Critical Approach to an Expansive Interpretation of the Court’s Powers under the Convention

There would be no assumption of powers *ultra vires* if we could find convincing legal arguments in favour of the Court’s competence to include consequential orders in the operative part of its judgments.

Although we cannot find such a competence in the *wording* of the Convention, we might point to the *general function* of the Court according to Article 19 of the Convention: The Court is set up “[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”.

But Article 19 does not of itself establish powers of the Court. It gives no more than a guideline for the interpretation of existing powers. The object and purpose of setting up the Court is no ‘undetectable extension charm’ (which only Harry Potter’s friend, Hermione Granger, could provide us with).

Teleological interpretation is no magic box from which we can draw rules of law as we like. Article 19 alone is not the foundation of the power to issue consequential orders.

Perhaps a *systematic or context argument* might help. The 14th Protocol to the Convention introduced infringement proceedings by which the question whether a respondent State has failed to abide by a final judgment can be referred to the Court. The Explanatory Report reveals the idea behind this: The obstinate High Contracting Party “continues to need, far more than others, the discipline of the Council of Europe”.

And infringement proceedings are a new possibility “of bringing pressure to bear”. However, this instrument is placed in the hands of the Committee of Ministers, who may call upon the Court only after serving formal notice on that party and by a decision adopted by a majority vote of two thirds of the representatives.

---

63 Explanatory Report to Protocol No. 14 to the Convention, *supra* note 60, 709-710, para. 100.
64 *Ibid.*
entitled to sit on the Committee. Only the Committee of Ministers can trigger infringement proceedings; the Court cannot act on its own initiative! The Court can only react.

In terms of context, Article 41 of the Convention shows that the Court may scrutinize a case also as to the ‘reparation’ of a violation in the internal law of the respondent State. Though only with a view to awarding just satisfaction, the Court thus nevertheless is allowed to assess the legal situation in the respondent State in terms of what possibilities there are to redress the situation (in order to find out whether the internal law of the respondent State allows only partial reparation to be made).

It does not seem accidental that the Court – first in Papamichalopoulos – has made ‘indications’ of how to redress a violation in the reasons of judgments concerning questions of just satisfaction. The Court, however, will order a respondent State to take certain measures in the operative part of a judgment if the Court has found the nature of the violation to “be such as to leave no real choice as to the measures required to remedy it”. Only if the scope of measures narrows down to one, does the Court assert the competence “to indicate a specific measure” in the held of the judgment.

Thus we might, methodologically, think of the Court’s power to make consequential orders as implied by the Convention – whether we describe such a power as inherent in the power to give a judgment or as a supple-

---

65 Ibid. recommends that the Committee of Ministers bring infringement proceedings only in exceptional circumstances. The Explanatory Report continues saying that it appeared necessary to give the Committee of Ministers, as the competent organ for supervising execution of the Court’s judgments, a wider range of means of pressure to secure execution of judgments as up until the 14th Protocol the ultimate measure available to the Committee of Ministers was recourse to Art. 8 of the Council of Europe’s Statute (suspension of voting rights in the Committee of Ministers, or even expulsion from the Organisation), which was “an extreme measure, which would prove counter-productive in most cases”.

66 Papamichalopoulos and Others v. Greece (Article 50), ECtHR Judgment, supra note 6.

67 Oleksandr Volkov v. Ukraine, ECtHR Judgment, supra note 24, para. 195.

68 Ibid.

mentary power (‘Annexkompetenz’). Since, in the cases in which the Court will make a consequential order, the respondent State has no choice other than to take one form of action, the Court seems neither to be adding anything to the respondent State’s obligations under Article 46 (1) of the Convention nor to be ‘usurping’ any power which might belong to the Committee of Ministers, but rather assisting it in its task of supervising the execution of the judgment. On the other hand, if there is but one solution to repairing the violation, pointing it out could just as well be done by the Committee of Ministers – so the implication is not a necessary one. Nevertheless, the Court might be regarded as better suited to ‘ensure’ the observance of the obligation to abide by the judgment (remember Article 19!), having the greater authority – or should we more precisely say ‘moral’ authority?

Another argument reinforcing the Court’s capacity to issue consequential orders is what I call the dialogical method of developing the law of the Convention. It has to do with ‘evolutive interpretation’ and is inspired by the writings of former Judge Rudolf Bernhardt. It has two starting points. Firstly, the distinction between an interpretation of the law and the making of new law is not seldom difficult to make. The second has to do with the creation of an international court within a treaty system: If in the interpre-

---


71 In terms of strict logic. Dissenting Opinion of Judge Sir Gerald Fitzmaurice, Golder v. United Kingdom, ECtHR Application No. 4451/70, Judgment of 21 February 1975, para. 34: “Generally speaking, at least in this type of provision, an inference or implication can only be regarded as a ‘necessary’ one if the provision cannot operate, or will not function, without it.”


tation of treaties “subsequent practice in the application of the treaty”\cite{74} is of relevance, for a traité loi which installs an international tribunal for deciding single cases, the case-law of such a tribunal needs to be taken into account when searching for the present meaning of treaty provisions. This case-law shapes the treaty’s interpretation – and rightly so, if we adopt the position of the German Federal Constitutional Court: With a view to the Luxembourg European Court of Justice, the German Bundesverfassungsgericht in 1987 pointed out that, in Europe, the judge has never merely been “la bouche qui prononce les paroles de la loi”\cite{75} The Constitutional Court found that in the light of common European legal tradition it would be wrong to deny the Luxembourg Court the power of ‘Rechtsfortbildung’, i.e., of – evolutively – developing the law. No less can hold true for the European Court of Human Rights in Strasbourg.

The Court\cite{76} may thus interpret the Convention in a dynamic way, pressing forward, taking the lead – albeit in a methodologically sound way, i.e. by means of judicial arguments and within the limit that the Court’s “normative innovations” must not go beyond what the States Parties can, under the principle of bona fides, be assumed to have agreed to as the normative contents of the Convention.\cite{77} Here, once again, consensus proves relevant, although the question is whether the States Parties can in good faith be thought of as

\begin{itemize}
\item \textbf{74} Cf. Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31 (3) (b), 1155 UNTS 331, 340 according to which there shall be taken into account, together with the context of a treaty, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. The Vienna Convention was first argumentatively used in Golder v. United Kingdom, ECtHR Judgment, supra note 71, para. 29.
\item \textbf{75} Kloppenburg, German Federal Constitutional Court, Case No. 2 BvR 687/85, Decision of 8 April 1987, 75 BVerfGE 223, 243-244 (para. 57): “Roman law, English common law, the Gemeine Recht [in Germany] were, in large parts, legal creations by the judges, just as in more recent times the development of general principles of administrative law by the Conseil d’État in France or in Germany the general rules of administrative law, large parts of labour law and the security rights in private transactions.” (translation by the author).
\item \textbf{76} Although it has no power of authentic interpretation.
\item \textbf{77} Cf., as to the methodological Unschärfe of treaty interpretation, M. Koskenniemi, supra note 36, 333, 342. Using the principle of bona fides, as proposed here, to define the outer limits of what can be assumed to have been agreed by the parties, might be paradigmatic of exactly this constant shifting between a subjective and an objective approach to treaty interpretation.
\end{itemize}
having agreed to what the Court develops, a question to which there is no factual, no psychological, but only a normative answer.\textsuperscript{78}

When the Court gives the Convention an evolutive interpretation which appears as essentially ‘new’ and cannot – even reconstructively – be thought of as derived from the Convention with the instruments of traditional methodology,\textsuperscript{79} it becomes relevant whether or not the States Parties follow and accept the ‘new’ contents which the Court has acknowledged the Convention to contain. Should the States be unwilling to do so, they can, in cases concerning them, whether as a respondent State or by way of a third party intervention according to Article 36 of the Convention, oppose the new interpretation – from which the Court ought to back off if no consensus comes about (consensus remaining the necessary basis of Convention law).

This might be more easily accepted where the substantive contents of individual human rights guarantees are concerned (the classical example being the right of access to a court read into Article 6 (1) by the \textit{Golder} judgment) – rather than in the field of procedural law. However, when we take the creation of the \textit{pilot judgment procedure}, one of the most dramatic moves by the Court, which considerably extends the prescriptive content of the operative part of judgments, we see that it was the Member States who, through recommendations by the Committee of Ministers, induced the Court to take this evolutionary step.\textsuperscript{80} Here a consensus of the High Contracting Parties further to develop the Convention’s procedural law seems to show clearly.

But what about individual consequential or prescriptive orders? Has the Court’s capacity, where there is only one way to correct a violation, to include such an order in the operative part of a judgment ever been contested by a High Contracting Party? If not (and this seems to be the case as Judge Villiger has just pointed out in his contribution),\textsuperscript{81} this practice of the application of the Convention has obviously been accepted – at least inciden-

\textsuperscript{78} See Cremer, \textit{Regeln der Konventionsinterpretation}, \textit{supra} note 72, 177-178, para. 24.
\textsuperscript{79} See \textit{ibid.}, 210-243, paras. 60-109, arguing that in many cases allegedly ‘evolutive’ interpretation can be regarded as no more than consistent state-of-the-art-legal interpretation of the Convention guarantees, the ‘dynamic’ impression rooting less in expansive interpretation of norms than in the application of ‘familiar’ human rights provisions to dramatically new factual situations.
\textsuperscript{80} See \textit{Broniowski v. Poland}, ECtHR Judgment, \textit{supra} note 25, paras. 191-192.
\textsuperscript{81} M. E. Villiger, \textit{Binding Effect and Declaratory Nature of the Judgments of the European Court of Human Rights: An Overview}, in this volume.
tally, perhaps even by a consistent pattern of acceptance and thus to the effect that there has been dynamic Rechtsfortbildung creating new law. The Convention’s procedural rules have been evolutively developed and expanded.

D. Need for More Contemplation Shown by the Prescriptive Order in the Volkov Case

From the outside, it is unclear whether Ukraine’s request for the Volkov case to be referred to the Grand Chamber according to Article 43 (1) of the Convention addressed the question of the Court’s competence to issue consequential orders. However, the Grand Chamber’s panel rejected the request.\(^{82}\) Obviously the five judges on the panel were not of the opinion that the case raised any “serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance”.\(^{83}\)

In a way this is puzzling. Does the Volkov case not give good reason to reconsider consequential orders in individual cases? Remember: The Court unanimously held “that Ukraine shall secure the applicant’s reinstatement in the post of judge of the Supreme Court at the earliest possible date”.\(^{84}\) This was done because the applicant’s dismissal was judged to be a violation of his fair-trial rights under Article 6 (1)\(^{85}\) as applied not under its “criminal head”\(^{86}\) but as to the determination of the applicant’s civil rights. The case fell within the scope of Article 6 (1) because the Court regarded the Ukrainian High Council of Justice, the parliamentary committee, and the plenary meeting of Parliament, in combination, to be performing a judicial function.\(^{87}\)

Furthermore, the Court saw an unjustified\(^{88}\) interference with the applicant’s private life, understood as his social, especially professional, rela-


\(^{83}\) ECHR, Art. 43 (2), supra note 1.

\(^{84}\) Oleksandr Volkov v. Ukraine, ECtHR Judgment, supra note 24, operative part, para. 9.

\(^{85}\) Ibid., paras. 103-131, 135-140, 143-147, 150-159.

\(^{86}\) Ibid., paras. 92-95.

\(^{87}\) Ibid., para. 90.

\(^{88}\) Ibid., paras. 166-187.
tionships with other persons, having “tangible consequences for material well-being of the applicant and his family”. The applicant’s reinstatement in the post of judge of the Supreme Court ordered on these grounds amounts to restoring the original composition of a domestic court of law, deciding who is to be a judge, and who is to participate in the exercise of domestic judicial power. Is it really for the Court to reach so far down into the institutional settings in the domestic sphere of a State Party?

For the sake of human rights and for the sake of the rule of law, I – however, not without hesitation and the impression that there is some judicial brainwork and critical thinking to be done – tend to say: Yes.

89 Ibid., para. 166.