

The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments

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ABSTRACT

This article analyses the developing approach of the European Court of Human Rights to the indication of specific non-monetary individual or general remedies and the impact of this practice on the execution of its judgments. It draws on interviews with Judges of the Court and officials in Council of Europe institutions, and a statistical analysis of pilot judgments and judgments that invoke Article 46 of the European Convention of Human Rights issued between 2004 and 2016. The article argues that the Court's remedial practice is fluid and pragmatic, with differences of perspective between Judges. It discusses the factors that influence judicial decision-making, and examines the implications of the Court's remedial approach both for its 'horizontal' relationship with the Committee of Ministers and its 'vertical' relationship with states. It concludes that from both these perspectives, the door is open to continued evolution, if not revolution, in the Court's remedial practice.

KEYWORDS: international human rights, judicial remedies, non-monetary remedies, Article 46, pilot judgments, European Court of Human Rights

ACKNOWLEDGEMENT

The authors thank Professor Philip Leach and Professor Clara Sandoval for their helpful comments.

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1. INTRODUCTION

How far does—or should—the European Court of Human Rights (‘the Court’ or ECtHR) recommend, or require, states to take certain measures after the finding of a violation of the European Convention on Human Rights (‘the Convention’ or ECHR)? This question is of increasing judicial¹ and academic² interest as the Court, driven by states’ failure to implement judgments, has, since the mid-2000s, moved away from its formerly limited, declaratory approach to remedial measures by sometimes being specific, or even prescriptive, in the non-monetary individual measures and/or general measures indicated.³ It has done so both by means of pilot judgments⁴ and judgments invoking Article 46 (on the binding force and execution of judgments), in which the Court indicates remedial measures, often as regards systemic or structural problems, without applying the pilot judgment procedure. For reasons explained below, both types of judgment are included in our analysis.

The Court’s remedial practice forms part of a wider discussion about its role in the post-judgment phase vis-à-vis the Committee of Ministers (CM), the political body charged under Article 46(2) of the Convention with supervising the execution of judgments. Two divided Grand Chamber judgments in 2017, *Moreira Ferreira v Portugal (No. 2) v Portugal*⁵ and *Burmych and Others v Ukraine*,⁶ exposed judicial disagreement on, *inter alia*, the Court’s competence to specify remedial measures, the institutional roles of the Court and the CM in matters of execution, and the legal effect of inserting remedial indications in the operative part of a judgment.

¹ Keller and Marti, ‘Reconceptualizing Implementation: The Judicialization of the Implementation of the European Court of Human Rights’ Judgments’ (2015) 26(4) *European Journal of International Law* 829; Sicilianos, ‘The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments under Article 46 ECHR’ (2014) 32(3) *Netherlands Quarterly of Human Rights* 235.

² Çali, ‘Explaining Variation in the Intrusiveness of Regional Human Rights Remedies in Domestic Orders’ (2018) 16(1) *International Journal of Constitutional Law* 214; Jahn, ‘Ruling (In)directly through Individual Measures?: Effect and Legitimacy of the ECtHR’s New Remedial Power’ (2014) 74 *Heidelberg Journal of International Law* 1; Leach, ‘No Longer Offering Fine Mantras to a Parched Child? The European Court of Human Rights’ Developing Approach to Remedies’ in Føllesdal, Peters and Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013) 142; Mowbray, ‘An Examination of the European Court of Human Rights’ Indication of Remedial Measures’ (2017) 17 *Human Rights Law Review* 451; Paraskeva, ‘European Court of Human Rights: From Declaratory Judgments to Indications of Specific Measures’ (2018) 1 *European Human Rights Law Review* 4.

³ Under Article 46(1) ECHR, a state’s obligation to abide by the Court’s final judgments in cases against it entails, besides the payment of any sums awarded, the adoption, where required, of individual measures to put an end to violation(s) established and erase their consequences so as to achieve as far as possible *restitutio in integrum*; and of general measures preventing similar violations in the future.

⁴ The Court may initiate the pilot judgment procedure where an application reveals the existence of a structural or systemic problem which has given or may give rise to similar applications. In a pilot judgment, the Court identifies both the nature of the problem as well as the type of remedial measures which the state is required to take: see Rule 61 Rules of the European Court of Human Rights, 16 April 2018.

⁵ Application No 19867/12, Merits and Just Satisfaction, 11 July 2017 (Grand Chamber). See Donald and Speck, ‘Judges at Odds over Court’s Authority to Order Remedies’, *Strasbourg Observers*, Blog, 28 July 2017.

⁶ Application Nos 46852/13 et al., Strike Out, 12 October 2017 (Grand Chamber).

A. Specificity and prescriptiveness

This article adopts a two-tier typology distinguishing between, on the one hand, the degree of *specificity* and, on the other hand, the degree of *prescriptiveness* applied by the Court in judgments that are not purely declaratory. *Specificity* refers to the degree of detail contained in the indication of particular non-monetary individual or general measures, whether in the main body or the operative provisions of a judgment: the more specific the judgment, the less discretion remains to the state as to *what* remedial measure is required and possibly also *by when* it should be achieved. Specific non-monetary individual measures⁷ are inherently more ‘discretion-reducing’⁸ than general measures, which commonly include guiding principles or desired outcomes rather than precise measures or means that the state should adopt (see Section 4.A.i).⁹ *Prescriptiveness* is conceptualised as being on a spectrum, ranging from *declaratory* judgments that merely find a violation, to *recommendatory* judgments that provide for remedial indications in the main body of the judgment, to *prescriptive* judgments that contain directions in the operative part. While pilot judgments are inherently prescriptive, Article 46 judgments are commonly recommendatory and only rarely prescriptive (see Section 2.C).¹⁰ We regard the distinction between specificity and prescriptiveness as relevant because prescriptions in the operative part may be unspecific; indeed, the Court may expressly *reject* the option of specificity because of the complexity of domestic legal or policy issues involved, or because the CM is deemed better placed to consider the measures required.¹¹ The distinction matters, too, because directions in the operative part, even if they are relatively imprecise, may, according to a senior Registry official, send a ‘stronger message’¹² to the state than indications elsewhere in the judgment.

We acknowledge, however, that the distinction between recommendatory and prescriptive judgments is contestable in view of judicial disagreement as to the precise legal effect of indicating remedial measures in the operative part as opposed to the main body of a judgment. According to Judge Spano, recommendations ‘have ... only the status of *obiter dicta*, in the form of guidance for the execution process’,¹³ while for Judge Pinto de Albuquerque, ‘obligations imposed in the operative part and those included only in the reasoning ... have the same legal force’.¹⁴ Matters are not clarified by the fact that the Court uses a range of mandatory language both inside and outside the operative part of judgments; indeed, one Judge has lamented that the Court has too often been ‘uneven, confusing

⁷ See, for example, *Youth Initiative for Human Rights v Serbia* Application No 48135/06, Merits and Just Satisfaction, 25 June 2013, at para 32 and operative part, at para 4.

⁸ Jahn, *supra* n 2 at 23. See also Paraskeva, *supra* n 2 at 53; Sicilianos, *supra* n 1 at 246-7.

⁹ See *Samaras and Others v Greece* Application No 11463/09, Merits and Just Satisfaction, 28 February 2012 at para 73, for an indication of general measures that leave significant discretion to the respondent state. By contrast, the general measures indicated in *Ghvtadze v Georgia* Application No 23204/07, Merits and Just Satisfaction, 3 March 2009 at para 105, are very specific.

¹⁰ See, for example, *Lukenda v Slovenia* Application No 23032/02, Merits and Just Satisfaction, 6 October 2005, operative part, para 5.

¹¹ See, for example, *Yuriy Nikolayevich Ivanov v Ukraine* Application No 40450/04, Merits and Just Satisfaction, 15 October 2009, at paras 90-92.

¹² Interview, 8 November 2017.

¹³ Presentation by Judge Robert Spano, Seminar on the Evolving Remedial Practice of the European Court of Human Rights, Strasbourg, 8 November 2017 at 2.

¹⁴ *Moreira Ferreira v Portugal (No. 2)*, *supra* n 5, Dissenting Opinion of Judge Pinto de Albuquerque joined by six others, para 17.

and inconsistent with the substance of the message it wished to convey' to states.¹⁵ As we shall see in 4.A.i and ii, inconsistency on the Court's part may jeopardise the prospects for successful implementation. We discuss at Section 5 the corresponding need for greater consistency in these aspects of judicial practice.

B. Scope and Methodology

Judge Sicilianos observes extra-judicially that the Court generally recommends or prescribes remedial measures, either in a pilot or Article 46 judgment, having considered three factors: the existence of an underlying structural or systemic problem; the type and scale of the execution measure required; and the nature, seriousness and/or persistence of the violation.¹⁶ These factors capture an emerging pattern in the Court's case law, whilst not having been articulated as a set of consistently applied criteria. This article does not attempt to reproduce the excellent analyses of the Court's remedial practice that have been written by Judge Sicilianos and others from a largely jurisprudential perspective,¹⁷ but builds on them in two ways. These relate to, first, our methodology,¹⁸ and, secondly, our focus on the implications of the Court's remedial practice for the *supervision of the execution of judgments* by the CM—an acknowledged research gap.¹⁹

The methodology is innovative in two respects compared to other scholarly work. First, it involved direct engagement with Judges, and officials in the Court's Registry, the Department for the Execution of Judgments of the ECtHR ('Execution Department') and the Secretariat of the CM, in order to ascertain at first-hand their perspectives on the Court's remedial practice. This involved of interviews with three Judges and 12 officials or former officials in Strasbourg, and a public seminar held at the Council of Europe in November 2017, in which a further five Judges participated.²⁰ In addition, our findings are informed by interviews with a range of actors at national level, which focused inter alia on domestic responsiveness to specific remedial indications.²¹

The second innovative aspect of the methodology is a statistical analysis of both pilot judgments and Article 46 judgments issued between 2004 and 2016.²² Some recent studies²³ of the Court's remedial practice have chosen to focus solely on Article 46 judgments on the basis that, as Mowbray

¹⁵ Ibid. at Dissenting Opinion of Judge Kūris joined by three others, para 2.

¹⁶ Sicilianos, supra n 1 at 244.

¹⁷ Supra n 2.

¹⁸ This research was undertaken from 2017 to 2018 as part of the Human Rights Law Implementation Project (HRLIP), see www.bristol.ac.uk/law/hrlip/ [last accessed 8 August 2018], involving the universities of Bristol, Essex, Middlesex and Pretoria and the Open Society Justice Initiative, and funded by the Economic and Social Research Council in the UK [Grant No ES/M008819/1]. The project examined human rights law implementation across Europe, Africa and the Americas, looking at selected judgments and decisions of regional human rights and United Nations treaty bodies.

¹⁹ Keller and Marti, supra n 1 at 839; Mowbray, supra n 2 at 474.

²⁰ Report of Seminar on the Evolving Remedial Practice of the European Court of Human Rights, Strasbourg, 8 November 2017 ('Strasbourg Seminar Report').

²¹ As part of the HRLIP, more than 50 interviews were conducted in Belgium, the Czech Republic and Georgia.

²² The Court issued its first pilot judgment in 2004 in *Broniowski v Poland* Application No 31443/96, Merits, 22 June 2004 (Grand Chamber), which also marked the start of its more frequent use of Article 46, although it had occasionally specified remedial measures before.

²³ See, for example, Mowbray, supra n 2; Paraskeva, supra n 2.

notes,²⁴ the pilot judgment procedure is a separate, codified²⁵ category of judgment. Yet we analyse both because our interest was to capture *every* ruling in which the Court had opted to be specific and/or prescriptive.²⁶

The article proceeds as follows. Section 2 presents our statistical analysis, providing an empirical context for the article. Section 3 explores how Judges decide whether to be specific and/or prescriptive, and identifies developments relating to the Court’s horizontal relationship with the CM and vertical relationship with states, which have led it cautiously to assume a role in the implementation of its judgments. Section 4 assesses perceptions among Strasbourg and domestic actors about the impact of the Court’s remedial approach at the execution stage. It finds that actors within the Court might overstate the risks of a more proactive stance on remedies while other actors vindicate its current, cautious and pragmatic practice and point to the tangible advantages of greater directiveness. Section 5 concludes with an outlook on how the Court’s remedial practice is likely to develop as Judges balance the competing demands of consistency and pragmatism.

2. SPECIFICITY AND PRESCRIPTIVENESS: STATISTICAL ANALYSIS

This section presents statistical findings covering the period 2004 to 2016²⁷ in respect of the frequency with which the Court issued pilot and Article 46 judgments (A); the frequency with which it specified individual or general measures (B); the use of the operative part in Article 46 judgments (C); and any patterns in the use of pilot and Article 46 judgments against particular states and by different sections of the Court (D). Finally, the main trends are summarised (E).

A. Frequency of Judgments Specifying Remedial Measures

Discussion of the Court’s remedial practice is often premised on the assumption—shared by several of our interviewees—that it is *increasingly* specific or prescriptive in its judgments, while acknowledging that such judgments remain a small minority of the total number of adverse rulings.²⁸ We sought to ascertain whether there was proof for this perceived trend, which has led some ‘insiders’ to argue that the Court should cease to refer to remedial indications as being exceptional.²⁹ Between 2004 and 2016, the Court issued 29 pilot judgments and almost six times as many Article 46 judgments

²⁴ Mowbray, *supra* n 2 at 451-2.

²⁵ Rule 61 Rules of Court, *supra* n 4. Prior to that, Committee of Ministers, Res(2004)3, 12 May 2004 invited the Court, *inter alia*, ‘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.’

²⁶ Sicilianos, *supra* n 1 also considers both types of judgment.

²⁷ For reasons of space, we omit discussion of the Court’s use of deadlines in respect of remedial measures, which are a standard feature of pilot judgments but are rarely used in Article 46 judgments.

²⁸ Mowbray, *supra* n 2 at 451; Paraskeva, *supra* n 2 at 46.

²⁹ Keller and Marti, *supra* n 1 at 842; *Moreira Ferreira (No 2)*, *supra* n 5 at Dissenting Opinion of Judge Pinto de Albuquerque joined by six others, para 57; interview, 11 April 2017.

(170).³⁰ Chart 1a shows that from 2004 to 2009, there was an upward trend overall in the number of Article 46 judgments, since when the numbers have fluctuated, peaking, for no apparent reason, in 2014 (when the Court issued 31 Article 46 judgments) and declining in 2015 (when nine were issued). The number of pilot judgments has also fluctuated, although less dramatically, ranging from zero to seven in any given year.

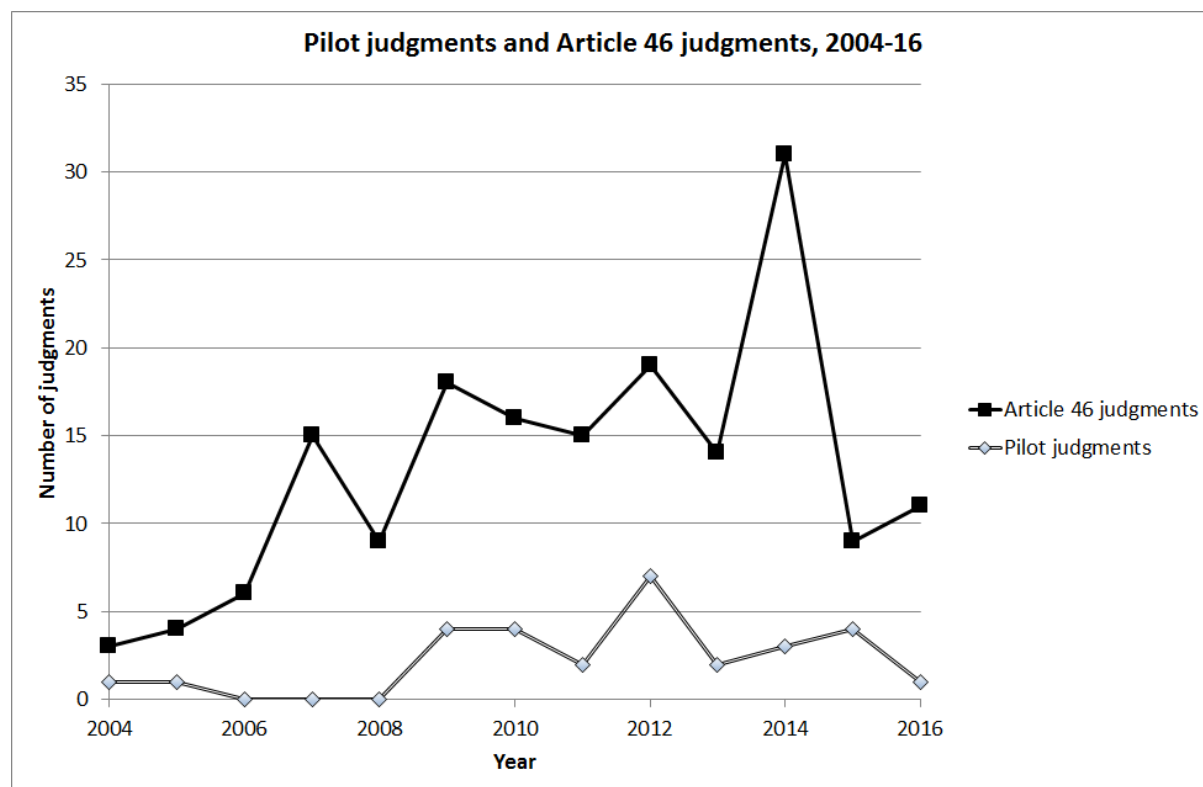


Chart 1a: Total numbers of pilot judgments and Article 46 judgments, 2004-16

Chart 1b shows that in every year from 2004 to 2016, the number of judgments containing specific remedial measures was tiny as a percentage of all adverse Chamber and Grand Chamber judgments. Even at its peak in 2014, this number represented only six per cent of all such judgments (34 out of 548); the average from 2004 to 2016 was just two per cent.³¹ Thus, the figures, at least from 2009 onwards, do not show a significant trend either upwards or downwards but rather a natural

³⁰ Locating Article 46 judgments is difficult, since the allocation of Keywords on the Court’s HUDOC database is unreliable. Thus, having searched for Article 46 judgments on HUDOC, using both ‘Article’ and ‘Keyword’ filters, the results were manually checked. First, we eliminated ‘false positives’, including (i) Chamber judgments specifying remedial measures that were later overturned by the Grand Chamber; (ii) judgments in which the Court had considered specifying remedial measures but ultimately decided not to; and (iii) judgments containing ‘hypothetical’ indications to the effect that removal of an applicant from a state would violate the Convention. Secondly, we sought to identify missing Article 46 judgments, by checking annual reports of the CM, which have since 2013 contained Article 46 judgments that became final in that year; and the Court’s annual reports, which have since 2013 contained a list of ‘judgments with indications of relevance for the execution (under Article 46)’. Finally, we added cases referred to in academic literature or in judgments. We also included nine judgments in which the Court indicated non-monetary remedies in the body of a judgment or in the operative part *without* including an Article 46 chapter (sometimes including these within an Article 41 chapter). We are grateful to Øyvind Stiansen of the University of Oslo for assistance with this aspect of our methodology.

³¹ These percentages were derived by calculating the number of pilot and Article 46 judgments as a proportion of all adverse Chamber and Grand Chamber judgments identified through a HUDOC search.

fluctuation. For the past decade, therefore, it cannot be said that the Court has become increasingly specific or prescriptive.

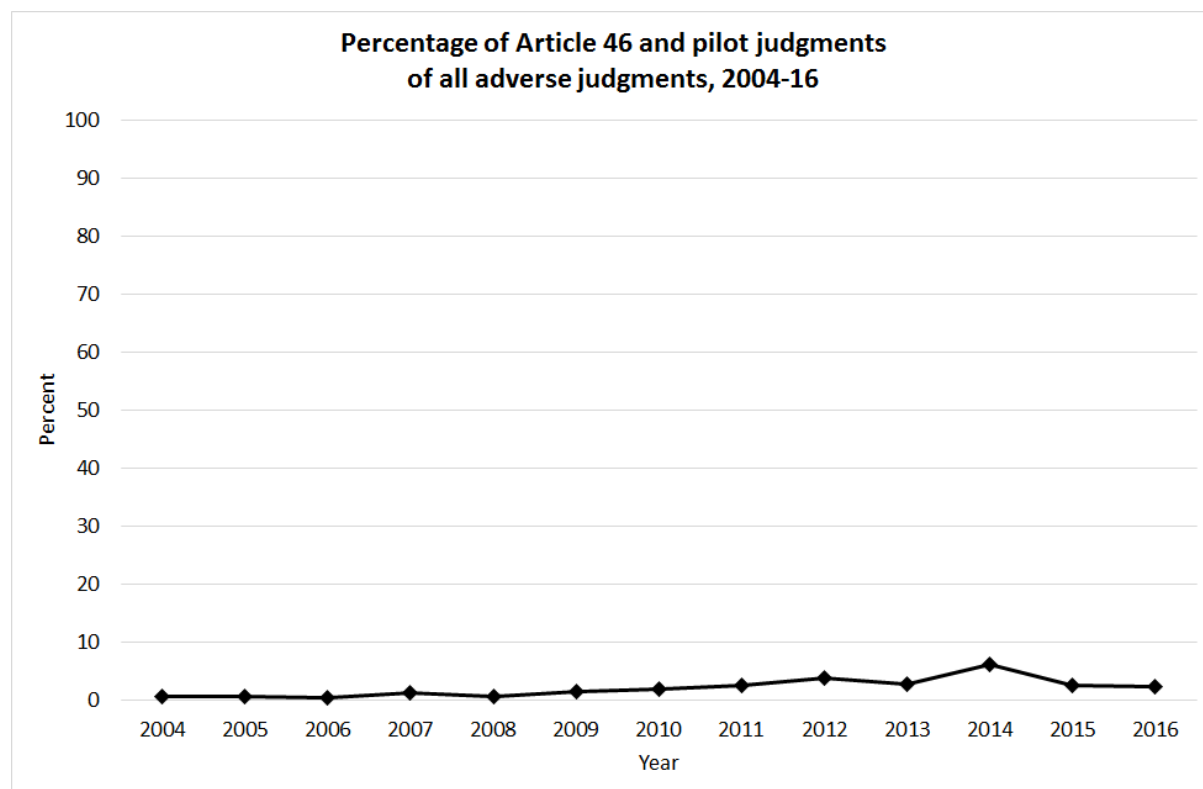


Chart 1b: Article 46 and pilot judgments as percentage of all adverse judgments, 2004-16

B. Use of Individual and General Measures

The two forms of non-monetary remedies provided for under the Convention are individual measures, which are designed to achieve, as far as possible, *restitutio in integrum* for the applicant, and general measures, which address structural or systemic defects identified in the judgment.³² Chart 2a shows that between 2004 and 2016, the Court was more likely to indicate general measures than individual measures in Article 46 judgments (125 compared to 79)³³—a noteworthy finding given the attention that has been focused on the more ‘discretion-reducing’ individual measures.³⁴ While the figures vary annually, reflecting the fluctuations (shown in Chart 1a) in the overall number of Article 46 judgments, there is an upward trend in the Court’s specification of general measures in Article 46 judgments from 2004-16, while for individual measures the trend is almost flat. From 2009 onwards, general measures exceeded individual measures every year apart from 2012. In respect of pilot judgments, Chart 2b shows that out of the total of 29 issued between 2004 and 2016, four contained an order concerning individual measures to be taken (alongside general measures which are an inherent feature of pilot judgments).

³² *Supra* n 3.

³³ A total of 34 Article 46 judgments indicated both individual and general measures, which were counted twice in order to reflect the Court’s *overall* tendency to indicate measures.

³⁴ Mowbray, *supra* n 2 at 458.

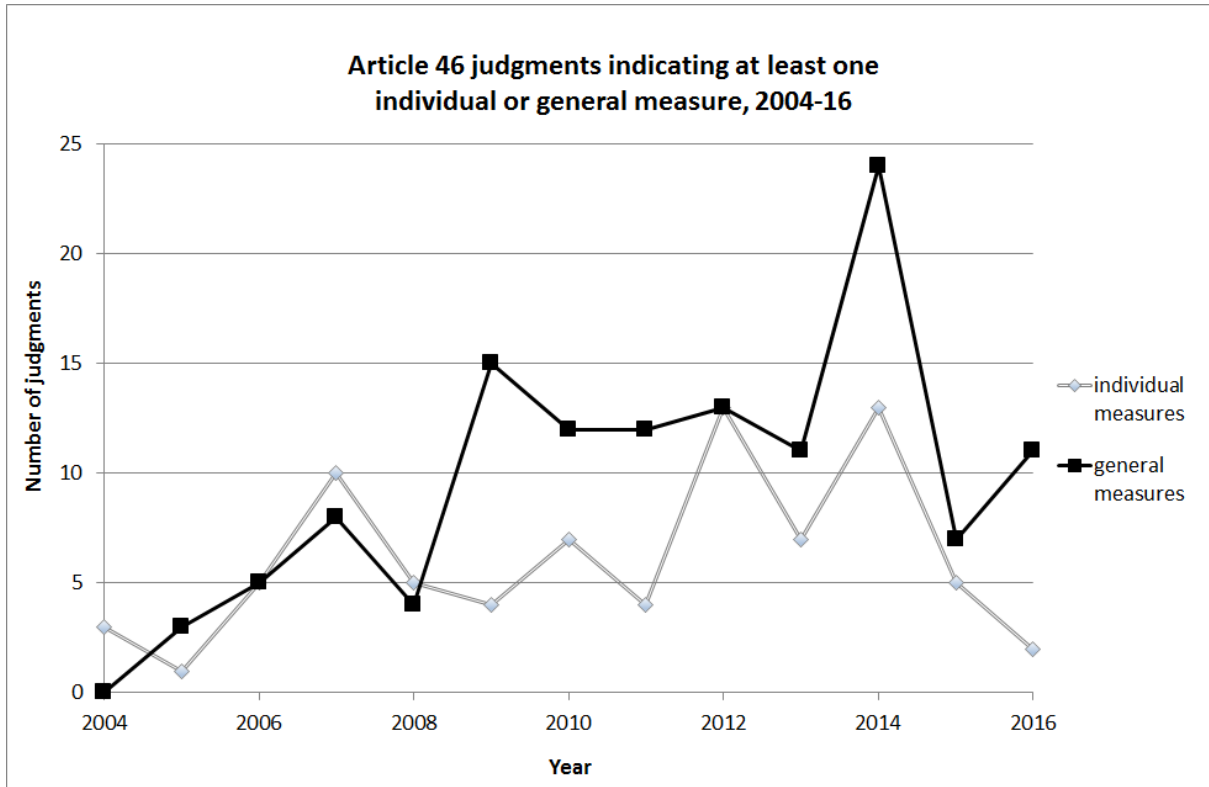


Chart 2a: Article 46 judgments indicating at least one individual or general measure, 2004-16

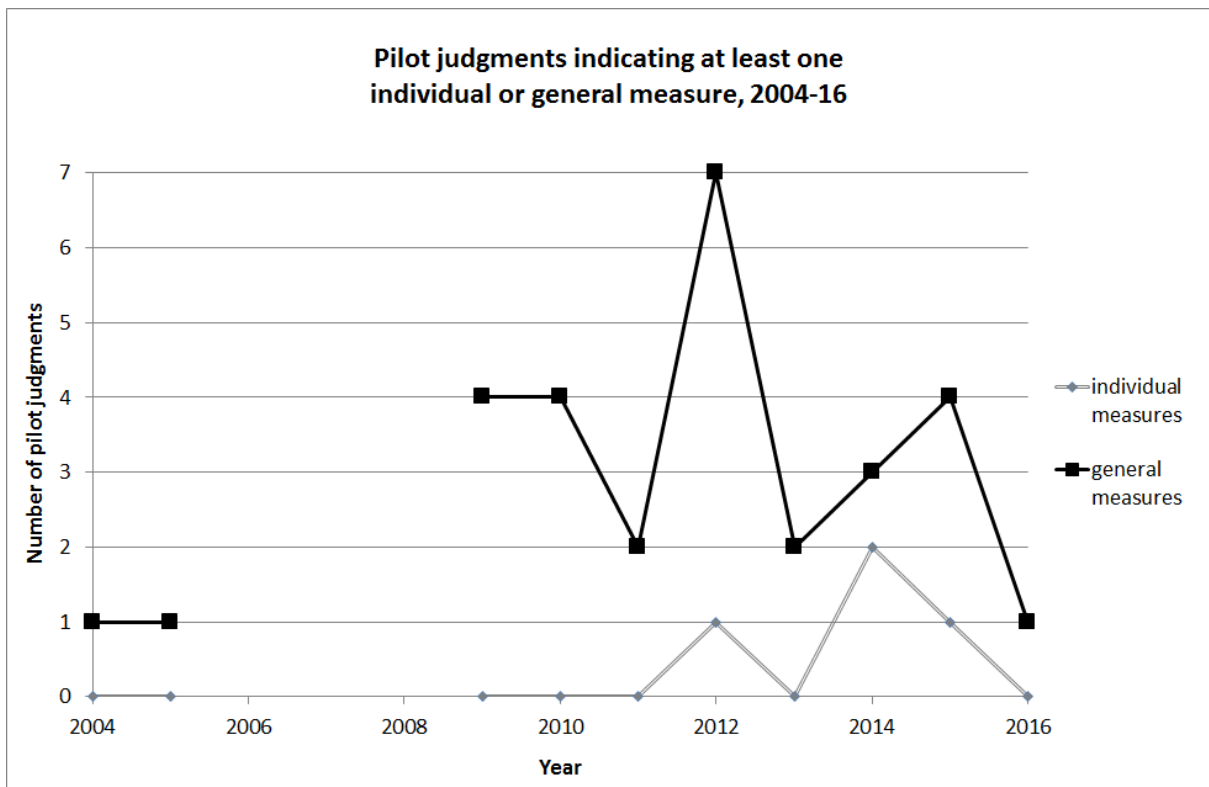


Chart 2b: Pilot judgments indicating at least one individual or general measure, 2004-16

C. Use of the Operative Part

Analysis was conducted to determine how often the Court has chosen to indicate individual and/or general measures in the operative part of Article 46 judgments.³⁵ The Court has always been cautious in its use of operative measures: Chart 3 shows that from 2006 onwards, the Court specified remedial measures in the body of Article 46 judgments far more often than it did in the operative part. Further, there was a decline in the use of the operative part from 2013 to 2016; however, it is premature to assess whether this apparent trend will continue. Further analysis reveals that individual measures, which as shown in Chart 2a are outnumbered by general measures in Article 46 judgments, are over-represented in judgments that indicate measures in the operative part. This may be unsurprising in view of the fact that Judges, wary of ordering an ill-conceived measure (see 3.B.i), feel more comfortable to be prescriptive as regards individual measures, where the nature of the violation tends to leave no real alternative.³⁶

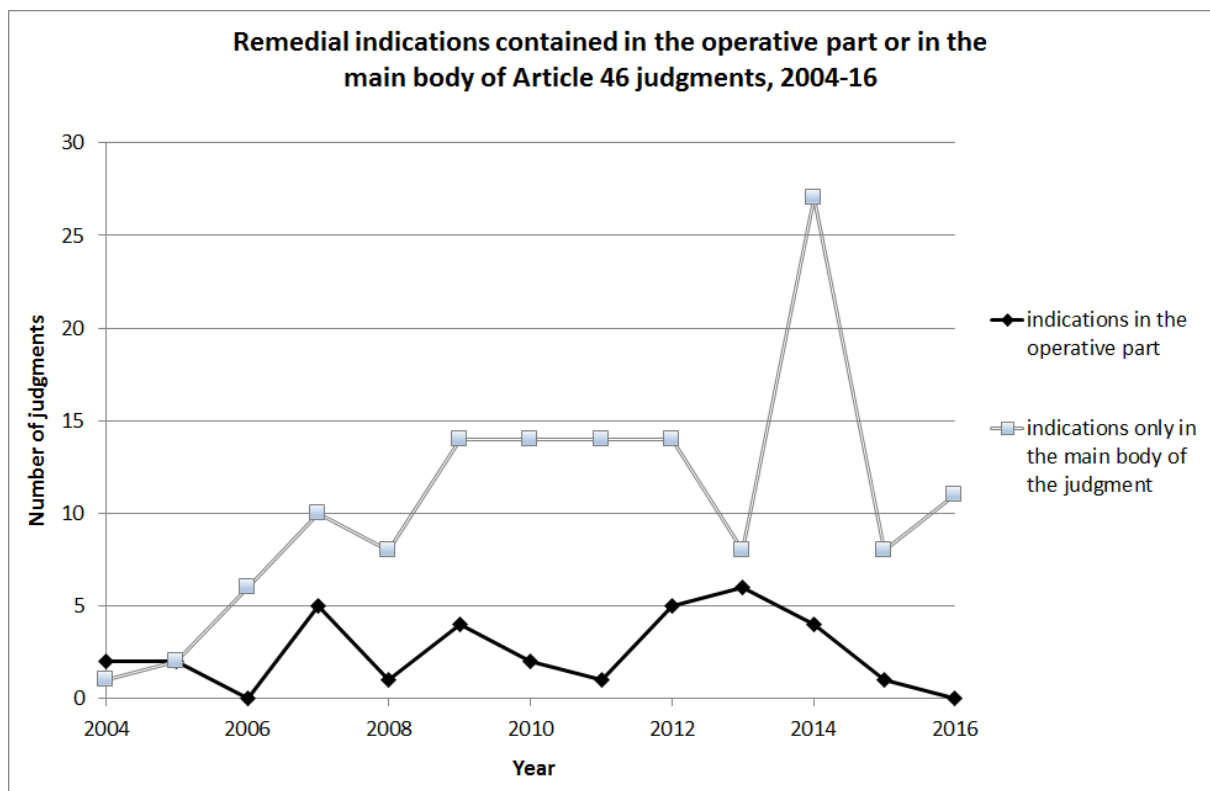


Chart 3: Remedial indications contained in the operative part or in the main body of Article 46 judgments, 2004-16

D. Patterns with Respect to States and Sections of the Court

A question raised during our interviews was whether there are any unusual patterns with regards to either (i) the states against which pilot or Article 46 judgments have been issued or (ii) the tendency

³⁵ Pilot judgments are excluded because they always include indication(s) in the operative part.

³⁶ Jahn, *supra* n 2 at 24. See, e.g., *Assanidze v Georgia* Application No 71503/01, Merits and Just Satisfaction, 8 April 2004 (Grand Chamber), at para 202.

of particular Sections³⁷ of the Court to issue such judgments. The answer is that there appear to be no such unusual patterns.

In terms of respondent states, eight of the ten states that received the highest number of pilot and Article 46 judgments between 2004-16 are also among the ten highest count states for the total number of adverse Chamber and Grand Chamber judgments during that period; with the exception of a few anomalies, it does not appear that any (type of) state has been singled out by the Court in respect of its decision to be specific and/or prescriptive in its judgments—or, conversely, has disproportionately escaped the use of such judgments.³⁸ The fact that the highest count states have *not* received a disproportionate share of judgments with remedial indications might be somewhat unexpected, in view of the preponderance of structural and systemic problems in those states which might be thought to be susceptible to greater specificity and/or prescriptiveness. As we shall see in 3.B.i and ii, one explanation for this finding may be that, in deciding on their remedial strategy, Judges will seek, on a case-by-case basis, to anticipate whether specificity and/or prescriptiveness will indeed aid implementation, and there may be pragmatic considerations for refraining from (or deferring) giving remedial indications. This may be why there is no pattern of any (types of) state being consistently treated in any particular way in respect of the Court’s remedial practice.

Similarly, it cannot be said that there are any ‘rogue’ Sections which issue either a disproportionately high or low number of pilot or Article 46 judgments; rather, the proportion of such judgments issued by each Section roughly corresponds to the overall number of adverse judgments that each has delivered, as indicated below.³⁹

Section of the Court	Percentage of pilot and Article 46 Chamber judgments issued by each Section, 2004-16	Percentage of Chamber judgments finding a violation issued by each Section, 2004-16
Section I	18	24
Section II	28	26
Section III	20	18
Section IV	25	18
Section V	9	14

³⁷ The 47 Judges of the Court are divided into five Sections, each of which is responsible for a certain number of states. We omitted Grand Chamber judgments from this analysis because our interest was in elucidating whether specific (types of) states had been treated differently in terms of specificity and/or prescriptiveness.

³⁸ The ten states against which most Article 46 and pilot judgments were issued in 2004-16 were: Turkey (with a combined total of 29), Russia (22), Romania (15), Bulgaria (13), Poland (12), Ukraine (11), Italy (10), Serbia (10), Greece (9) and Albania (9). Of these, only Albania and Serbia were not among the ten highest count states, identified by a HUDOC search. A total of 29 states had had at least one Article 46 or pilot judgment delivered against them; 18 states had not been a party to either type of case.

³⁹ Note that the composition of the Sections changed during the period under review.

E. Conclusion

Judgments specifying remedial measures remain a small fraction of the Court's case law and their use has—contrary to some perceptions—not increased in recent years but rather fluctuates year-by-year. Further, the Court indicates general measures far more often than individual measures in both Article 46 and pilot judgments. The use of the operative part of Article 46 judgments to specify remedies is low—and perhaps declining. Rather, it is the Court's established practice to indicate remedial measures more often in the main body of Article 46 judgments. Finally, there is no evidence to suggest a disproportionate use—or avoidance—of specific or prescriptive judgments either in respect of particular states or by certain Sections of the Court.

3. THE COURT'S CAUTIOUS STEPS INTO THE EXECUTION FIELD

How did the situation outlined above come about? This section explores on what basis the Court decides upon its remedial approach during the judgment phase; that is, the point in time when a Chamber or Grand Chamber examines the materials before it and makes an assessment on the merits. We identify growing recognition that the Court *has* a role in the execution of its own judgments (A.i), which is reflected in increasing interaction between the Court and the CM (A.ii). We then explore the factors that influence Judges' decision to, occasionally, go beyond issuing purely declaratory judgments (B), notably their limited knowledge of the situation on the ground (B.i); expectations regarding the receptiveness of the respondent state to remedial indications (B.ii) and considerations relating to the institutional set-up under the Convention (B.iii). We conclude that, while these factors might be perceived as closing the door to greater specificity and prescriptiveness, the door is left ajar by the Court's strengthening resolve to address problems of non-implementation, combined with corresponding calls from the Execution Department for it to do so (B.iv).

A. Changing Perceptions of the Court's Role

(i) *Growing recognition that there is a role for the Court regarding execution*

The Court's remedial approach was traditionally premised on the view that execution is the exclusive realm of the CM, with no role whatsoever for the Court.⁴⁰ Indeed, the Court continues to refer to its judgments as being 'essentially declaratory',⁴¹ and our interviewees detected a presumption among Judges and Registry officials that judgments should be as declaratory as possible unless the nature of the violation found demands otherwise. However, we also found growing awareness among Judges and Court staff that the indication of remedies and the use of mandatory language in a judgment may affect the prospects for its implementation, and a view that the Court *ought* to be conscious of execution matters. This was, our interviews suggest, prompted by the realisation that specificity and prescriptiveness were a means to address systemic or structural human rights deficiencies that were

⁴⁰ Mowbray, *supra* n 2 at 2; Sicilianos, *supra* n 1 at 236.

⁴¹ Among the most commonly cited is *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (No. 2)* Application No 32772/02, Merits and Just Satisfaction, 30 June 2009 (Grand Chamber) at para 61.

threatening to overwhelm the Court with repetitive applications.⁴² This led, in 2004, to the introduction of the pilot judgment procedure and, simultaneously, an increased use of remedial indications under Article 46 (see 2.A), out of concern to handle repetitive cases more efficiently and to aid states in discharging their obligations under Article 46 ECHR⁴³—a concern manifested in the statistics, which evince that the number of general measures far outweighs the number of individual measures recommended or prescribed by the Court (see 2.B).

(ii) Increasing interaction between the Court and the Committee of Ministers

The imperative to aid execution is reflected in intensified contact between the Court and the CM, which takes three forms. First, interlocutors pointed to increasing staff mobility between Strasbourg institutions; a small number of Registry lawyers who had temporarily been seconded to the Execution Department or the Secretariat of the CM were said to have returned to the Court with an awareness of execution problems and the capacity to create a new structural link between the Department and the Registry.⁴⁴ Secondly, in 2016, some previously seconded lawyers started to deliver training to other Registry officials about how implementation may be affected by the way in which a judgment is drafted. One trainer highlighted the need to sensitise Registry staff to the work of the CM;⁴⁵ for example, to prevent the redundant use of the ‘Öcalan clause’ (concerning the re-opening of criminal proceedings following an unfair trial⁴⁶) in cases where the state routinely allows for re-opening at the applicant’s request (as most do)⁴⁷ or, conversely, random omissions of the clause in cases where the state cannot confidently be expected to reopen proceedings should the applicant so desire. The training, she confirmed, had helped to dispel ‘[the myth that] execution doesn’t work’, or is not the Court’s concern. A Judge concurred, stressing that drafting lawyers today possess greater aptitude to identify, in collaboration with the Judge Rapporteur,⁴⁸ cases in which an Article 46 chapter may be warranted.⁴⁹

The third factor is an intensified flow of information from the CM and the Execution Department to the Court. This takes three forms: first, information on the execution of judgments has become more accessible, notably through the HUDOC-EXEC database⁵⁰ and the CM’s annual reports,⁵¹ allowing Registry staff ‘to follow what they are doing on the other side’.⁵² Specifically, HUDOC-EXEC enables

⁴² Interview, 28 June 2017. See also Keller and Marti, *supra* n 1 at 830; Leach, *supra* n 2 at 161.

⁴³ See also Mowbray, *supra* n 2 at 18.

⁴⁴ One interlocutor from the Court, interviewed on 3 May 2018, added that the secondment of Registry staff to other Council of Europe bodies, such as the office of the Commissioner for Human Rights, had also created useful synergies.

⁴⁵ Interview, 19 April 2017.

⁴⁶ *Öcalan v Turkey* Application No 46221/99, 12 May 2005 (Grand Chamber) at para 210.

⁴⁷ Steering Committee for Human Rights, *The longer-term future of the system of the European Convention on Human Rights*, June 2016, para 152.

⁴⁸ The Judge Rapporteur is designated by the relevant Section or Grand Chamber President to examine an individual application and to, *inter alia*, ‘submit such reports, drafts and other documents as may assist the Chamber or the Committee or the respective President in carrying out their functions’ (Rule 49 § 3 (c) of the Rules of Court, *supra* n 4).

⁴⁹ Interview, 13 June 2017.

⁵⁰ The HUDOC-EXEC database (hudoc.exec.coe.int) was launched in January 2017 and includes documents relating to execution of both pending and closed cases.

⁵¹ See, most recently, Council of Europe, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2017, 11th Annual Report of the Committee of Ministers*, Strasbourg, March 2018.

⁵² Interview, 3 May 2017.

Judges and drafting lawyers to learn about the state of implementation of earlier judgments relating to a question before them. Secondly, thematic debates organised by the CM and involving Registry staff provide opportunities to consider the interplay between the judgment and post-judgment phases.⁵³ Thirdly, recent years have seen a few informal tripartite meetings between senior members of the CM's Secretariat, Heads of Divisions of the Execution Department and Registrars of the Court,⁵⁴ to 'raise the awareness of the Registry, as drafters of the judgments, of the potential problems that the judgment may trigger in the field of execution'.⁵⁵ Two Judges informed us that their respective Sections had also had irregular occasional meetings with senior staff of the Execution Department, and one was planning to repeat this exercise. A former senior Registry official underscored the need for such meetings, lamenting continuing misconceptions among some Judges who 'divorce themselves from the reality of the whole picture [of execution]'.⁵⁶

Where growing awareness of execution prompts the Court to consider providing remedial guidance, the Judge Rapporteur enjoys significant leeway to suggest a course of action in terms of specificity and/or prescriptiveness.⁵⁷ They will give instructions for drafting, following which a more collaborative process will ensue—involving the drafting lawyer and/or the quality-checking Registrar⁵⁸ as well as the Judge Rapporteur—before the draft is presented to the relevant judicial formation. Ultimately, the decision about whether to give specific remedial indications is a judicial one.⁵⁹ Meanwhile, the Office of the Jurisconsult, among whose functions is to review, before the deliberation of a judicial formation, the draft judgments and to make suggestions in terms of the case law,⁶⁰ may, for example, propose that reference be inserted to certain reforms or developments relating to the implementation of a previous case on the same matter. The Deputy Jurisconsult, interviewed in April 2017, confirmed that the Office strives to ensure coherence in respect of the Court's jurisprudence on Article 46 (as well as Article 41) ECHR just as it does regarding substantive provisions.

In summary, growing awareness of the execution process and an increasing flow of information and expertise from the Execution Department and CM to the Court appear to signal a new phase in the relationship between the two institutions. We shall see in the following that this has allowed the Court to form more realistic expectations as to a state's likely receptiveness to remedial directions, even as it remains mindful not to undermine the principle of subsidiarity or disrupt the institutional balance established by the Convention.

⁵³ See, e.g., Council of Europe Committee of Ministers, Thematic debate on conditions of detention, 13 March 2018, CM/Inf(2018)4.

⁵⁴ Interview, 13 April 2017.

⁵⁵ Interview (a), 2 May 2017.

⁵⁶ Interview, 19 April 2017.

⁵⁷ Interviews, 2 (b), 3 and 17 May 2017.

⁵⁸ The role of the drafting lawyer is to assist the Judge in drafting reports and judgments for the Court. In doing so, they should follow the instructions of the Judge, adhere to the Court's case-law and follow the internal instructions issued for drafting. The role of the quality checking Registrar is to ensure that the drafting lawyer has complied with the above requirements. The check includes both legal and linguistic quality.

⁵⁹ Interview, 3 May 2017. See also 3.B.iii.

⁶⁰ In accordance with Rule 18 of the Rules of Court, *supra* n 4, the Jurisconsult is responsible for ensuring the consistency of the Court's case law.

B. Factors Affecting Judges' Remedial Strategy

This section identifies factors which inform the Court's decision on whether (and how) to indicate remedies. These relate to both the vertical relationship between the Court and the states parties, as well as the horizontal relationship between the Court and the CM.

(i) *The Court's (limited) knowledge of the complexities on the ground*

The first reason why Judges are cautious is their awareness that by giving remedial indications, they are straying into policy-based analysis requiring a contextualised understanding of the political and legal environment in the respondent state. One Judge identified a particular risk that ill-conceived *general* measures could discredit the Court and frustrate implementation because,

you are examining extraneous factors which are not in front of you, and ... you are making ... a speculative assessment of what is the best way to move forward domestically and what are the capabilities of the state in question.⁶¹

Judges had an 'instinctive aversion' to indicating remedies based on mere speculation, and this was exacerbated by the fact that in Article 46 cases, unlike in pilot judgments,⁶² the issue of remedies is almost never part of the pleadings of the parties to a case before the Court.⁶³ Proposals to address this issue are discussed at section 5. We note, however, that even on those rare occasions when the applicant *does* invite the Court to give specific remedial indications, Judges may still decline to do so.⁶⁴

A Registry official confirmed the difficulty of assessing the ramifications of remedial indications on the domestic plane: '[T]he Court's vision of the whole situation is narrower than [that of] the Committee of Ministers',⁶⁵ given the latter's experience in supervising the implementation of general measures across states and the Execution Department's corresponding ability to provide assistance drawn from good practices from other states.⁶⁶ A Judge added that states may emulate each other's good practice, 'but this is ... happening in the process of execution, not in the Court.'⁶⁷ It has been noted that the ECtHR, having jurisdiction over 47 states, recognises how remote it is from circumstances on the ground.⁶⁸ Interviewees in Strasbourg were also aware of this. As one Judge noted:

⁶¹ Interview, 13 June 2017.

⁶² Where the Court is considering applying the pilot judgment procedure, the parties are invited, pursuant to Rule 61(2) of the Rules of Court, to submit their views on whether the application resulted from a structural or systemic problem, and to provide information which the Court may subsequently draw from to identify the nature of the shortcoming(s) and the type of remedial measures required.

⁶³ Strasbourg Seminar Report, *supra* n 20 at 3.

⁶⁴ *Abu Zubaydah v Lithuania* Application No 46454/11, Merits and Just Satisfaction, 31 May 2018, para 683 (where the Court endorsed some, but not all, of the measures sought by the applicant). By contrast, see the very detailed Article 46 chapter in *Aslakhanova v Russia* Application Nos 2944/06 et al, Merits and Just Satisfaction, 18 December 2012, which appears to have been substantially informed by the applicants' pleadings.

⁶⁵ Interview, 8 November 2017.

⁶⁶ A core task of the Execution Department is to advise and assist the CM in its functions, under Article 46 (2) of the Convention, of supervising the execution of the Court's judgments.

⁶⁷ Interview, 23 May 2017.

⁶⁸ Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (2015) 40(1) *Yale Journal of International Law* 1 at 23.

[S]ometimes we don't know enough about the specific situation in a country so we have to be ... careful ... that we are not imposing too much on the state because each state is different.... And [we should not] replace the legislator—that would be difficult as well.⁶⁹

For the Court to make a determination about suitable general measures even in complex matters seems *least* problematic where the Court is merely clarifying which of a range of possible actions identified by the parties themselves it endorses.⁷⁰ This will most often be the case where reforms are already underway or being debated at the domestic and supranational level, in the context of the judgments pending before the CM. This reaffirms the view taken by several interlocutors within the Court that the decision about whether to adopt a pilot or an Article 46 judgment will be influenced by the 'history of execution'⁷¹ where there have been similar cases. Our interviews confirmed that Judges may not content themselves in this scenario with merely appraising ongoing reform processes, but seek to inject urgency into the reforms and/or influence their direction, by seeking out willing actors at the domestic level (see 4.B.i).

We found agreement among our interlocutors in the Court that their capacity to appraise the domestic policy context is aided not only by the heightened transparency of the Execution Department and CM, but also by the 'national Judge' sitting in the relevant Chamber or Grand Chamber formation,⁷² whose inside view was deemed 'essential' to help the Court gauge the feasibility of suggested remedial measures.⁷³

Yet, the Court is aware not only of its *geographical* distance from events on the ground, but also the lapse in *time* between the facts at the origin of an application and judicial determination of the case, especially in the absence of any reference to remedial measures in the pleadings. This means that by the time the Court examines an application on the merits, any remedial indication—designed for the future—may have become obsolete.⁷⁴ This recognition has led Judges to adopt a pragmatic approach to indicating remedies, avoiding a one-size-fits-all approach. Notably, indications as regards general measures in complex, technical cases such as those under Article 1 of Protocol No. 1 to the ECHR (the right to peaceful enjoyment of property) concerning, for example, restitution for properties nationalised under communist regimes, will rarely be very specific, but instead tend to leave wide discretion to the state to determine precisely what is the most appropriate remedial action.⁷⁵

Finally, in cases concerning structural shortcomings, Judges will ordinarily discuss *when* would be the optimal moment to move beyond merely declaring a(nother) violation. For example, Judges sometimes adopt an Article 46 judgment as a precursor to a pilot judgment, highlighting an emerging

⁶⁹ Interview, 23 May 2017.

⁷⁰ Strasbourg Seminar Report, *supra* n 20 at 11.

⁷¹ Interview, 3 May 2017.

⁷² Interview, 1 December 2016; interview (b), 2 May 2017; interview, 29 June 2017.

⁷³ Interview, 1 December 2016.

⁷⁴ Interview, 28 June 2017.

⁷⁵ One of the Judges we interviewed expressly cautioned against the use of specific remedies in such cases (interview, 23 May 2017). At the same time, the degree of specificity within the Court's Article 46 chapters in *some* of these cases is remarkable; see, for example, *Eltari v Albania* Application No 16530/06, Merits, 8 March 2011, at para 99 and the subsequent pilot judgment in *Manushaqe Puto and Others v Albania* Application Nos 604/07 et al., Merits, 31 July 2012, at paras 111-118.

structural or systemic problem, and '[putting] the government on notice' that the Court may be left with no option but to escalate the matter.⁷⁶

(ii) *Anticipated state reaction: Risk of pushback?*

Our interviewees further suggest that the Court's caution about using pilot and Article 46 judgments stems from a concern that states may push back against remedial indications which are viewed as imposing unrealistic expectations or interfering unduly with domestic decision-making.⁷⁷

Against this background, the Court recognises that it would be futile to order remedies which will foreseeably not be implemented, and it will seek to draw inferences as to the likelihood of the state engaging, in good faith, in the implementation process from its previous record.⁷⁸ This is particularly true as regards pilot and Article 46 judgments using prescriptive language in the operative part. One Judge explained that the Court would usually refrain from issuing a pilot judgment unless the state had signalled its ability and willingness to cooperate,⁷⁹ adding: '[Capacity and political will] are cumulative conditions and very often they are not met so then a pilot procedure is useless.'⁸⁰ The same strategic considerations may influence decisions about prescriptive individual measures of redress, as a Registry official ventured:

[I]f we think the individual measure indicated will not be followed, the Court will be reluctant to introduce that in the operative part... It could put in question the legitimacy of the Court... The Court indicates such measures that [it] thinks will be executed.⁸¹

Yet other interviewees within the Court took a more nuanced view about how appropriate it was to allow concerns regarding possible backlash to influence its remedial practice. Based on the premise that states ought to accept *some* indications, the Judges will seek to ascertain where their 'breaking point' is, which, as one Judge noted, varies from case to case and from state to state.⁸² He insisted that the Court should take

a principled view on the types of situation that merit the Court providing for individual or general measures and the possible backlash in a state should not be a relevant factor. Whether that backlash occurs or not is simply an issue of reality and how that goes back and forth is a difficult situation to assess...

At the same time, capturing the delicate balance that must be achieved by the Court, he added that, 'if we're going to have a situation where the Court provides for remedial measures which are consistently being rejected, what is the point of the whole enterprise?'

This type of strategic thinking by the Court about the likely efficacy of its remedial approach in a given case might create an actual or perceived risk that applicants in certain cases or states may be less likely to see the Court recommend or prescribe specific remedies. In fact, Judges have avoided

⁷⁶ Interview, (b), 2 May 2017. The interviewee noted that this strategy had been followed in cases against Malta concerning rent control and in Albanian restitution cases.

⁷⁷ See, for example, Leach, *supra* n 2 at 177-8.

⁷⁸ Interview, 25 April 2017.

⁷⁹ Interview, 23 May 2017.

⁸⁰ *Ibid.*

⁸¹ Interview, 3 May 2017.

⁸² Interview, 13 June 2017.

either disproportionately singling out or excluding certain states from a more directive approach, as evinced by the statistics presented at Section 2.D. For the time being, then, we have found no evidence that the Court is seen to have trodden more lightly with ‘unreceptive’ states; rather, its overriding purpose is to achieve the best possible outcome for the victim (and potential future victims) by using a variety of remedial strategies. As Judges develop their remedial practice, this imperative must prevail, lest pragmatism should lead to different levels of redress for applicants in different states.

(iii) Concern about institutional balance

A third consideration which informs Judges’ strategic thinking about remedies is a concern to respect the institutional balance between the Court and the CM. This concern cuts in two directions: the Court is anxious to protect (and be seen to protect) judicial independence and, at the same time, it does not want to be viewed as encroaching upon the CM’s primary role in supervising the execution of judgments.

Judicial independence

We saw in Section 3.B.i. that there is an increasing level of ‘awareness-raising, sensitisation [and] familiarisation’⁸³ about execution among actors within the Court. Nevertheless, our interviews reveal that the Court has been sensitive to the need to keep a firewall between itself and the CM during the judgment phase. As one Judge ventured:

The concern at the Court is always [about] independence. Of course, at the level of the Registry, there is a lot of back and forth, but the Judges themselves—we do our jobs and we are not influenced by politics. That is a very ‘holy’ line that we want to take.⁸⁴

While this does not preclude *any* contact, it imposes clear restrictions on *what* contact there can be: it ought to be formal interaction on thematic areas rather than ‘backdoor discussions’ on specific cases prior to the Court issuing its judgment. Encouraging Registrars to maintain contact with the Heads of Divisions working on ‘their’ countries within the Execution Department is not seen as undermining the Court’s independence. However, the Execution Department will never advise, or be asked to advise, on a particular judgment which is in the process of examination by a judicial formation.⁸⁵ The fact that drafting lawyers and Judges play their cards close to their chest can cause problems, as laid bare in the 2017 case of *Burmych and Others v Ukraine*. Here, a Grand Chamber—having examined the Court’s role under Article 46—decided, by ten votes to seven, to strike out more than 12,100 applications in order for them to be dealt with by the CM in the framework of its supervision of the general measures required to implement *Yuriy Nikolayevich Ivanov v Ukraine*,⁸⁶ a pilot judgment concerning prolonged non-enforcement of domestic court decisions. The CM and the Execution Department appear to have been blindsided by what a former Council of Europe official called an ‘earthquake’ decision.⁸⁷ Judge Yudkivska et al., in their joint dissenting opinion in *Burmych*, note that

the Committee of Ministers was not at all consulted with a view to specifying the relevant mechanisms and arrangements for transferring thousands of undecided applications to them.

⁸³ Interview (b), 2 May 2017.

⁸⁴ Interview, 13 June 2017.

⁸⁵ Interview, 13 April 2017.

⁸⁶ *Supra* n 11.

⁸⁷ Interview, 19 October 2017.

... Regrettably, this does not necessarily point to constructive dialogue and division of powers between the Court and the Committee of Ministers.⁸⁸

It appears, then, that the firewall between the two institutions is most accurately described as a semi-permeable structure, allowing for information to flow freely from the execution side to the Court, but not so freely in the opposite direction.

The Court's authority to order remedies: encroachment upon the Committee of Ministers' role?

The Court's preparedness to be specific and/or prescriptive is also curbed by Judges' awareness of the need not to unduly encroach upon the CM's role under Article 46. We found ample evidence that Judges are sensitive to the fact that 'each actor has been assigned its particular functions under the Convention', to quote a senior Court official.⁸⁹ Given that the Convention, under Article 46(2), places the responsibility for supervising the execution of judgments with the CM, the Court 'will be extremely reluctant to be seen to be acting *extra legum* or *ultra vires*'.⁹⁰ This may explain why Strasbourg interlocutors were eager to establish the Court's authority in the domain of execution by recalling that it was the states parties themselves, represented in the CM, that first invited the Court in 2004⁹¹ to 'assist states in finding the appropriate solution' to structural and systemic dysfunctions. Judge Sicilianos (writing extrajudicially) regards this resolution, together with two subsequent CM recommendations, as evidence of states acquiescing to the Court's authority to indicate remedial measures.⁹²

It is appropriate here to differentiate between pilot judgments and Article 46 judgments. Whereas the legal basis for the pilot judgment procedure is no longer contested,⁹³ commentators observe that some Judges' caution may stem in part from a lack of confidence about the scope of powers conferred on them by the Convention.⁹⁴ It is true that neither Article 46 nor Article 41 ECHR⁹⁵ *explicitly* confer a power on the ECtHR to indicate specific non-monetary individual or general measures. Moreover, the Court's practice direction on just satisfaction claims restricts its competence by stipulating that

[o]nly 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).⁹⁶

Nevertheless, most Judges would subscribe to the view that pronouncing themselves on the remedial implications of a violation is within the Court's remit. Judge Sicilianos, writing extrajudicially,⁹⁷ points to three Convention provisions which serve as a legal basis for such practice: Article 46, Article 19

⁸⁸ *Burmych*, supra n 6, Joint Dissenting Opinion of Judges Yudkivska and six others, para 11.

⁸⁹ Interview (b), 2 May 2017.

⁹⁰ *Ibid.*

⁹¹ *Supra* n 25.

⁹² Sicilianos, supra n 1 at 258-260.

⁹³ This is not to suggest that states have not occasionally been opposed to the application of the pilot judgment procedure in specific cases. See, e.g., *W.D. v Belgium* Application No 73548/13, Merits, 6 September 2016 at para 157.

⁹⁴ See, inter alia, Leach, supra n 2 at 145.

⁹⁵ Keller and Marti, supra n 1 at 841, note that the Court initially recommended individual measures under Article 41, whereas today it invokes Article 46 for individual and general measures alike. But see supra n 30.

⁹⁶ ECtHR, Just satisfaction claims, practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007 [emphasis added].

⁹⁷ Sicilianos, supra n 1 at 253-7.

(concerning the role of the Court to ensure respect for the Convention), and Article 32 (pursuant to which the Court is competent to rule upon its own jurisdiction where this question is disputed). The last of these provisions has been invoked by the Court on those rare occasions when there have been challenges to its jurisdiction to indicate implementation measures.⁹⁸ Moreover, there is no evidence of states refusing to give effect to a ruling by suggesting that the Court had acted *ultra vires*: as one official within the Registry noted, 'I have never heard [the Court] being criticised for having a weak legal basis for Article 46'.⁹⁹ In particular as regards individual measures, our interviewees even suggest that a broader notion of authority to specify remedial action might be coming to the fore inside the Court, whereby Judges and Registry staff today see few limits to the types of individual measures they are competent to indicate. As one Judge argues:

The way that the Court's case law has developed, the position now is that the Court reserves its right, or [considers that it] has the competence, to provide for *any* individual measure which it considers directly necessary to remedy the finding of a violation.¹⁰⁰

A remarkable example of Judges' readiness to innovate is the stipulation that Lithuania, which had hosted secret detention sites run by the Central Intelligence Agency, should 'make further representations' to the United States—a non-Council of Europe member state—with a view to removing or at least limiting the effects of multiple Convention violations suffered by the applicant.¹⁰¹

Yet, such judicial creativity remains contested.¹⁰² While Judge Pinto de Albuquerque challenges the oft-repeated axiom that the Court's judgments are 'essentially declaratory in nature',¹⁰³ other Judges assert that 'the Court is invested with *no* competence, *of any kind*, in the field of the execution of judgments'¹⁰⁴ (emphasis added). This throwback to the traditionalist view of the Court's role is manifestly at odds with clear signals emanating from the Execution Department, which is open to a more proactive stance of the Court on remedies. These signals have penetrated the walls of the Human Rights Building, which houses the Court. According to one Judge, the message from the Execution Department

is always about precision, about detail, about being as clear as possible so that their lives are made easier. Because if they get something very vague, they do not know what to say to the state...¹⁰⁵

Another Judge said that senior representatives on the execution side believe that, 'the best strategy [is for] the Court to give as much indication as possible ... in order to push politically in the Committee of Ministers.'¹⁰⁶ A third had received information that the Execution Department 'would of course welcome more prescriptive-type reasoning—it simply helps them in their work and we are well aware of that.'¹⁰⁷

⁹⁸ Ibid at 257.

⁹⁹ Interview, 17 May 2017.

¹⁰⁰ Interview, 13 June 2017.

¹⁰¹ *Abu Zubaydah*, supra n 64 at 681.

¹⁰² See the excellent synthesis of the competing viewpoints in Sicilianos, supra n 1 at 249-52.

¹⁰³ *Moreira Ferreira (No 2)*, supra n 5 at Dissenting Opinion of Judge Pinto de Albuquerque joined by six others, para 3.

¹⁰⁴ *Moreira Ferreira (No 2)*, supra n 5 at Joint Dissenting Opinion of Judge Raimondi and six others, para 4.

¹⁰⁵ Interview, 29 June 2017.

¹⁰⁶ Interview, 23 May 2017.

¹⁰⁷ Interview, 13 June 2017.

(iv) Specificity and prescriptiveness: Door half open or door half shut?

Judges' remedial strategy in any given case is affected by a variety of factors, which sometimes pull in opposite directions. In order to avoid ill-designed measures, Judges will seek to ascertain, before adopting an Article 46 or pilot judgment, how susceptible the respondent state is likely to be to a directive judgment. We have seen that, in doing so, the Court—acutely aware of its geographical and temporal distance from the case at hand—is wary not to be seen as overreaching its judicial function, either by unduly curbing states' discretion or encroaching upon the role of the CM. These factors, which would seem to close the door to the Court being directive in its judgments, are offset by Judges' developing sense of responsibility—fostered by signals of encouragement from the Execution Department—to address problems of non-implementation and uphold the interests of victims by way of specificity or prescriptiveness. What is more, increasing interaction between the Court and the CM appears to have boosted Judges' confidence in their ability to make well-informed assumptions about the likely impact of remedial directions, so that, in sum, the door remains open for the Court to adopt a more proactive stance on indicating remedies.

4. IMPACT OF THE COURT'S REMEDIAL PRACTICE ON THE EXECUTION PROCESS

What, then, is the basis for the view of many Strasbourg specialists that execution is positively affected by specificity and/or prescriptiveness, and is it shared by others? The following discussion captures the perspective of Strasbourg actors (A) and actors at the domestic level (B), which will allow us to assess how far the principal reasons for the Court's cautiousness identified in section 3 are borne out by evidence at the execution stage. We shall see that, both sets of actors identified tangible benefits to the execution process that had accrued from the Court's decision sometimes to be specific and/or prescriptive, whereas risks were largely framed in hypothetical terms or seen as confined to isolated examples. Taken as a whole, our interviewees vindicated what they saw as the Court's cautious and pragmatic remedial practice, whilst not advocating a decisive turn towards greater specificity or prescriptiveness.

A. The View from Strasbourg

(i) Benefits of specificity and/or prescriptiveness

Interlocutors in Strasbourg identified two principal benefits of specificity and/or prescriptiveness: providing guidance to support good faith efforts towards implementation; and mitigating bad faith attempts to evade or delay the consequences of adverse judgments.

Providing guidance to states that are willing to implement

Even where a respondent state acts in good faith to give effect to an adverse ruling, there may be uncertainty or disagreement as to what the judgment requires.¹⁰⁸ In such situations, as Keller and Marti note, ‘clarity as to the precise obligations arising out of an adverse judgment may have positive effects on compliance’.¹⁰⁹ This positive effect was confirmed by several interlocutors in Strasbourg. An interviewee from the Court’s Registry ventured that: ‘The more [a state is] ... advised, the more likely it is that the state—if it is a law-abiding, rule of law state—will do what is necessary.’¹¹⁰ One effect of specificity and prescriptiveness is to strengthen the hand of conscientious domestic actors in the face of financial or technical obstacles to implementation. In such cases, as an official within the Secretariat of the CM observed, it ‘can be really useful ... to have it clearly pinpointed what the country is supposed to do because the country *wants* to do it. There’s a political will to do it’.¹¹¹

Another senior official argued that a degree of specificity by the Court can facilitate dialogue between domestic actors and the Execution Department since ‘it creates at least a presumption of what the direction should be’, adding that remedial indications need not be ‘extremely prescriptive’.¹¹² This suggests that the Execution Department will be less concerned with where, in the judgment, the measures are spelled out, that is, whether the judgment is prescriptive or recommendatory. The same official ventured that specificity is helpful for states because ‘they see what the Court expects’, an observation confirmed by a Government Agent who argued that, while the Court should limit—and justify—its indication of specific remedial measures, it should, at the same time, ‘remain very attentive to giving clear, precise and adequate guidance’ in its judgments.¹¹³ This observation implies a distinction between judgments which are specific and/or prescriptive, and judgments which ‘diagnose’ the root causes of a violation without going so far as to specify remedial measures or invoke Article 46. This diagnostic aspect¹¹⁴ may be as persuasive to domestic actors as remedial indications *per se*, and the distinction between the two may not always be readily apparent.¹¹⁵ The above mentioned CM official confirmed the positive effect of the Court even merely identifying ‘where the problems are’, arguing that this ‘creates a kind of obligation of *result* whereas it leaves the choice of *means* to the state.’¹¹⁶ Judgments that *do* contain Article 46 stipulations may likewise only go as far as specifying the outcome rather than the means,¹¹⁷ suggesting that there is a

¹⁰⁸ Council of Europe Directorate of Internal Oversight, Evaluation of the Council of Europe Support to the Implementation of the ECHR at National Level, Final Report, 30 January 2017, Evaluation(2017)20 at para 61.

¹⁰⁹ Keller and Marti, *supra* n 1 at 840.

¹¹⁰ Interview, 11 April 2017.

¹¹¹ Interview, 17 May 2017.

¹¹² Interview (a), 2 May 2017.

¹¹³ Presentation by Isabelle Niedlispacher, Government Agent in respect of Belgium and former Chair of the Committee of Experts on the System of the ECHR (DH-SYSC) at the Seminar on the Evolving Remedial Practice of the European Court of Human Rights, Strasbourg, 8 November 2017, at 3.

¹¹⁴ See CM Res(2004)3, *supra* n 25. The Court’s diagnostic role is also reflected in Article 46(3) ECHR through which member states empowered the CM, by virtue of Protocol No 14 amending the Convention, to request the interpretation of a judgment by the Court if it considers that implementation is hindered by a problem of interpretation.

¹¹⁵ We are grateful to Antoine Buyse, Professor of Human Rights at Utrecht University, for this insight.

¹¹⁶ Interview (a), 2 May 2017.

¹¹⁷ See, for example, *Vasilescu v Belgium* Application No 64682/12, Merits and Just Satisfaction, 25 November 2014.

blurred line between purely ‘diagnostic’ judgments and Article 46 judgments, and that the Court may not be entirely consistent in respect of when it decides to invoke Article 46.

Applying pressure on unwilling actors

Remedial indications are viewed not only as assisting conscientious state actors, but also as reducing the scope for recalcitrant actors to frustrate implementation, by making non-implementation easier to identify. This renders states more susceptible to pressure both at the supranational and domestic level, shrinking their ‘leeway for justifying non- or partial compliance’ and thereby improving accountability.¹¹⁸

The potential for specificity and prescriptiveness to increase accountability is especially relevant in the Convention system, in which the onus is principally on governments to identify suitable remedies, under the CM’s supervision.¹¹⁹ Governments may use the absence of specific remedies as an excuse to propose the narrowest possible solution to the dysfunctions identified by the Court. As one Judge noted, ‘states that do not want to implement sometimes use the vagueness of the Court’s analysis as a pretext’.¹²⁰ Another Judge likewise observed that states acting in bad faith will ‘take advantage’ of inconsistency in the Court’s language, effectively telling the Court ‘you did not express your will clearly enough and we don’t feel bound by the judgment’.¹²¹ By implication, as a former senior Court official observed:

[W]here there is an Article 46 chapter, people within the Execution Department and the other governments would be pleased that their conversations could focus on the remedies that the Court has mentioned, and that they can request the state, in their implementation plan, to reflect these remedies.¹²²

The same interviewee noted that this effect is yet more pronounced in the case of prescriptive judgments, which may achieve results even in politically sensitive cases. A notable example was *Del Río Prada v Spain*, in which the Court ordered Spain to release ‘at the earliest possible date’ a woman convicted of multiple terrorist offences on the basis of violations of Article 7 (no punishment without law) and Article 5(1) (no unlawful detention).¹²³ The former senior Court official ventured that where indications are in the operative part:

[T]he Committee of Ministers will feel that there is nothing to discuss. The Court has ordered it, and that’s that.... [In] *Del Río Prada*, the Spanish government ... let the person out [immediately].... It was ordered by a court, it’s an international court, its orders are binding, so they felt they had no option.¹²⁴

By the same token, another former senior Court official, now working in the Secretariat of the CM, argued that it would have been useful had the Court been specific and prescriptive in the case of *Ilgar*

¹¹⁸ Keller and Marti, supra n 1 at 840.

¹¹⁹ Department for the Execution of Judgments of the European Court of Human Rights, *Supervision of the execution of judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Modalities for a twin-track supervision system*, 6 September 2010, CM/Inf/DH(2010)37.

¹²⁰ Interview, 13 June 2017.

¹²¹ Interview, 29 June 2017.

¹²² Interview, 11 April 2017.

¹²³ Application No 42750/09, Merits and Just Satisfaction, 21 October 2013 (Grand Chamber).

¹²⁴ Interview, 11 April 2017.

Mammadov v Azerbaijan,¹²⁵ concerning the politically-motivated arrest and pre-trial detention of Mr Mammadov, an opposition politician, in which the Court found multiple violations of Article 5 of the Convention (right to liberty) and a violation of Article 18 (restriction on rights for unauthorised purposes) in conjunction with Article 5.¹²⁶ Unlike *Del Río Prada*, the *Mammadov* judgment did not stipulate that the applicant should be released. Noting this apparent inconsistency, the interviewee argued that

it would have been very useful for the Court to have said very clearly ... ‘and Ilgar Mammadov must now be released immediately’ because we’ve had to have a whole legal argument with Azerbaijan within the Committee of Ministers about what the implications are [of] the judgment.

To the extent that the Court’s decision not to be either specific or prescriptive has emboldened Azerbaijan in its obstructive behaviour, the deleterious consequences have been laid bare with the decision of the CM in December 2017 to invoke, for the first time, the infringement procedure under Article 46(4) of the ECHR, on the grounds of Azerbaijan’s prolonged refusal to achieve as far as possible *restitutio in integrum* by releasing Ilgar Mammadov¹²⁷—a demand made by the CM in its first examination of the case three years earlier and reiterated in numerous decisions and Interim Resolutions thereafter.¹²⁸ However, even judgments that do prescribe individual measures may not immediately yield the desired results, as exemplified by *Fatullayev v Azerbaijan*,¹²⁹ in which the Court ordered the release from prison of a wrongfully-sentenced journalist on the basis of violations of Article 10 (freedom of expression) and Article 6 (right to a fair trial)—a result that was not immediately forthcoming,¹³⁰ despite overwhelming pressure from the Council of Europe and elsewhere.¹³¹

Even if not all specific and/or prescriptive judgments bear fruit, a positive consequence may be to enhance dialogue during the CM’s quarterly human rights (DH) meetings, at which government representatives examine the execution of ECtHR judgments. A senior official within the CM highlighted the ‘tremendous effect’ that specificity and prescriptiveness can have in framing the discussion among the ministers’ deputies, since ‘[b]oth the respondent state and other member states, in the framework of the collective guarantee of the system, position themselves on the basis of what the Court has said.’¹³² Judgments recommending or prescribing general measures aimed at remedying structural or systemic problems were seen as especially helpful in identifying solutions to shared problems, thereby

¹²⁵ Application No 15172/13, Merits and Just Satisfaction, 22 May 2014.

¹²⁶ Interview, 17 May 2017.

¹²⁷ Interim Resolution CM/ResDH(2017)429, 5 December 2017. Article 46(4) ECHR empowers the CM to refer to the Court the question of whether a state has failed to fulfil its obligation to execute a judgment.

¹²⁸ Documents are available from HUDOC-EXEC (see supra n 50). Ilgar Mammadov was conditionally released from detention on 13 August 2018; see Human Rights Watch, ‘Freed at Last from Prison, but not Free in Azerbaijan’, 13 August 2018.

¹²⁹ Application No 40984/07, Merits and Just Satisfaction, 22 April 2010.

¹³⁰ Ibid. at operative para 6. Mr Fatullayev was only released following a presidential decree of 26 May 2011 pardoning him and many others (see Ministers’ Deputies Decision, CM/Del/Dec(2011)1115/4, 8 June 2011). However, it is uncertain as to how far his release may be attributed directly to the prescriptive order in the ECtHR judgment.

¹³¹ Leach, ‘The European System and Approach’ in Sheeran and Rodley (eds) *Routledge Handbook of International Human Rights Law* (2013).

¹³² Interview (a), 2 May 2017.

making the supervision process more cooperative.¹³³ A Court official who was previously seconded to the Execution Department had, for instance, witnessed within DH meetings the sharing of expertise on remedying inhuman or degrading conditions of detention, occasioned by the Court's pilot judgment in *Varga and Others v Hungary*,¹³⁴ which made reference to the detailed remedial indications in the *Torreggiani and Others v Italy*¹³⁵ pilot judgment.¹³⁶

In respect of identifying the impact of specificity and prescriptiveness on the execution process, however, a note of caution is required. This is because specific and/or prescriptive judgments are almost invariably supervised by the CM under the more intensive 'enhanced' procedure as part of the twin-track approach adopted in 2011,¹³⁷ meaning that they are debated more frequently at DH meetings. Moreover, given their complexity, the Execution Department will usually intensify its efforts to provide targeted technical assistance to the respondent state.¹³⁸ Insiders observe that the combined effect of these tools—remedial indications and the enhanced supervision procedure—is bearing fruit. As noted by a Court official who previously worked in the Execution Department:

[T]he type of replies you get from states to these judgments [containing remedial orders] ... has been geared up a level ... because of two things: ... indicative measures and the way it works with the twin-track procedure process. And it's definitely meant that states engage in discussions about the enhanced cases during the Committee of Ministers' meetings.¹³⁹

At the same time, the CM's *modus operandi* presents a methodological difficulty, for it makes it hard to identify the impact of specificity or prescriptiveness as such, separately from the effect of the more proactive monitoring that occurs under enhanced supervision. This may explain why there are so few studies that attempt to quantify how the Court's remedial indications influence execution.¹⁴⁰ Our qualitative methodology precludes any such assessment; we may conclude, however, that in the view of actors both within the Court and the CM, specificity and prescriptiveness have—by means of both 'carrot' and 'stick'—assisted the execution process.

(ii) *Risks of specificity and/or prescriptiveness*

Notwithstanding these advantages, we have seen (at Section 3.B.i) that Judges and officials of the Court are acutely aware of 'getting it wrong' when they specify or prescribe remedial measures. Actors on the execution side are also aware of the consequences of an ill-judged remedial indication in terms of frustrating the execution process and making any failure to comply more visible, with potentially

¹³³ Interview (b), 2 May 2017.

¹³⁴ Applications Nos 14097/12 et al., Merits and Just Satisfaction, 10 March 2015.

¹³⁵ Applications Nos 43517/09 et al., Merits and Just Satisfaction, 8 January 2013, referred to at paras 49, 76, 103, 105 and 107 of *Varga and Others*, *ibid*.

¹³⁶ Interview, 19 April 2017.

¹³⁷ Department for the Execution of Judgments of the European Court of Human Rights, Supervision of the execution of judgments and decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan – Modalities for a twin-track supervision system, 6 September 2010, CM/Inf/DH(2010)37.

¹³⁸ *Ibid* at paras 20-21.

¹³⁹ Interview, 19 April 2017.

¹⁴⁰ One such (unpublished) study finds that judgments with remedial indications are implemented more rapidly than comparable judgments without such indications, having controlled for case and country characteristics: see Stiansen, 'Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments', paper presented at the 2018 Annual Meeting of the International Studies Association, 23 March 2018 (on file).

damaging repercussions for the authority of the Convention system. Such judgments may be counterproductive if they decrease the flexibility of the CM and its Execution Department during the post-judgment phase. A Court official who temporarily worked in the Execution Department noted that such judgments may be problematic because

execution is half a political process and half a legal one. [T]here are [potentially] lots of ways that the state can go to get [the required] result and an indicative measure can undermine that.¹⁴¹

This risk was identified by several interviewees as being greater in respect of general measures than individual measures where, as an official in the Execution Department noted, ‘you should have more leeway and ... provide more possibilities for the state to propose solutions.’¹⁴²

Another concern was expressed that, if the Court is prepared to specify or prescribe (individual or general) measures in certain cases, states might interpret the *absence* of remedial indications in other similar cases as suggesting that no such measures are required. Such an inference drawn from the Court’s silence may be erroneous—but, as we have seen in *Mammadov*, all too tempting for a recalcitrant state. Moreover, states may in good faith misinterpret the absence of specific indications, or they may inadvertently regard specific indications that are (for whatever reason) non-exhaustive or insufficiently ambitious as setting a ‘maximum on what the state owes the victim’.¹⁴³ This risk of an ill-judged remedial indication leaving a victim under-compensated was implicitly addressed by one Government Agent, prominent within the CDDH, who asked:

Can we rely on the [completeness] of ... the advice or even prescription by the Court? I think the answer is ‘never’ because [more measures may be required] and this really depends on ... dialogue with the Committee of Ministers.¹⁴⁴

To be aware of this risk is not necessarily to call for either more or less specificity or prescriptiveness on the part of the Court; rather, it implies the need for consistency and transparency in the Court’s use of such indications, in order that caution on the Court’s part is not used by states as a pretext for inaction. At the same time, it should not be assumed that when the Court remains silent on remedial measures, then so should the CM. Indeed, both current and former staff of the Execution Department emphasised that the execution process is sufficiently flexible to accommodate instances in which, either by action or omission, the Court is seen to have occasionally erred.

Such instances were, in fact, rarely raised by our research participants and none considered ill-judged remedial indications to be more than occasional lapses, or to have significantly hampered execution. One example was the Court’s Article 46 indication in *McDonnell v UK*,¹⁴⁵ concerning delays in inquest proceedings into the death of the applicant’s son in prison. The judgment required the UK to take ‘all necessary and appropriate measures’ to ensure compliance with the procedural requirements of Article 2 ECHR (right to life), ‘in the present case and in cases concerning killings by the security forces in Northern Ireland.’ A Registry official, who previously worked in the Execution

¹⁴¹ Interview, 19 April 2017.

¹⁴² Interview, 28 June 2017.

¹⁴³ Neuman, ‘Bi-Level Remedies for Human Rights Violations’ (2014) 55(2) *Harvard International Law Journal* 323 at 338.

¹⁴⁴ Interview, 22 June 2017.

¹⁴⁵ Application No 19563/11, Merits and Just Satisfaction, 9 December 2014 at para 93.

Department, described the Article 46 chapter as ‘completely irrelevant’ because the applicant’s son’s death was unrelated to the legacy of the Troubles in Northern Ireland, adding, however, that the CM had responded flexibly by deciding to continue its supervision of delays in non-legacy inquests separately from delays in legacy inquests.¹⁴⁶ Criticism was also levelled at the unusual degree of specificity and prescriptiveness in *Youth Initiative for Human Rights v Serbia*.¹⁴⁷ Here, the Court ordered the Serbian intelligence agency to provide the applicant with unlawfully-withheld information on the use of surveillance. The former Deputy Registrar of the Court argued that the prescriptive measure—especially since the Court’s jurisprudence was not settled, at the time, on whether Article 10 (right to freedom of expression) protects the right to access to state-held information¹⁴⁸—was ‘really quite wrong’ and ‘flew in the face of [the Court’s] own principles’.¹⁴⁹ The order was, however, implemented.¹⁵⁰

A third example offered was *Oleksandr Volkov v Ukraine*, in which the Court—unanimously—took the unprecedented step of ordering Ukraine in the operative provisions to reinstate a Supreme Court judge ‘at the earliest possible date’ after he had been unfairly dismissed, in addition to general measures to rectify systemic problems as regards the functioning of the Ukrainian judiciary.¹⁵¹ Here, strikingly, interviewees in Strasbourg disagreed as to the wisdom of this prescription. One Judge ventured that the Court ‘went too far’ since it was ‘too tricky to order an individual measure without hearing [from] all the involved persons’.¹⁵² By contrast, an official in the Execution Department described the Court’s approach as a ‘timely and pertinent indication for the execution process’, and ‘a success story ... from the point of view of the specificity of the indication’,¹⁵³ given that Mr Volkov was ultimately reinstated¹⁵⁴ and that significant progress has been achieved in respect of the general measures required, including both legislative and constitutional reform.¹⁵⁵

These differing assessments of *Volkov* illustrate the way in which the still evolving nature of the Court’s remedial practice, driven by the imperative to aid execution, is open to interpretation based as much upon its (perceived) efficacy as conformity with a normative desire for consistency for its own sake. The contradictory views may also reflect the disagreement within the Court as to the legal effect of where in the judgment a specific measure is indicated.¹⁵⁶ At the same time, *Volkov* was the *only* pilot or Article 46 judgment referred to in such dichotomous terms. Overall, interviewees in both the Court and the CM viewed the benefits of specificity and prescriptiveness as outweighing the potential downsides, whilst not proposing any abrupt change to the Court’s practice.

¹⁴⁶ Email correspondence following up interview of 19 April 2017: see Ministers’ Deputies Decision, 9 December 2015, CM/Del/Dec(2015)1243/H46-25, at para 8.

¹⁴⁷ *Supra* n 7.

¹⁴⁸ This question was not settled until *Magyar Helsinki Bizottság v Hungary* Application No 18030/11, Merits and Just Satisfaction, 8 November 2016 (Grand Chamber).

¹⁴⁹ Interview, 11 April 2017.

¹⁵⁰ Resolution CM/ResDH(2018)71, 21 February 2018.

¹⁵¹ Application No 21722/11, Merits, 9 January 2013, at operative para 9 and para 202.

¹⁵² Interview, 23 May 2017.

¹⁵³ Interview, 28 June 2017.

¹⁵⁴ Ministers’ Deputies Decision, 12 March 2015, CM/Del/Dec(2015)1222/22.

¹⁵⁵ Ministers’ Deputies Decision, 7 June 2018, CM/Del/Dec(2018)1318/H46-28, at paras 3-5.

¹⁵⁶ *Supra* nn 13 and 14.

B. Domestic Viewpoints on Specificity and Prescriptiveness

If Strasbourg actors are largely positive about the Court's developing remedial approach, can the same be said of actors at the domestic level? This section examines evidence as to how specific and/or prescriptive judgments are received domestically by (i) state actors and (ii) non-state actors. We have seen (at 3.B.ii) that the Court, in recommending or prescribing remedial measures, is wary of inviting accusations by state actors of undermining the principle of subsidiarity through judicial overreach. At the same time, it may be expected that non-state actors would welcome greater directiveness as a way of exerting leverage over unwilling state actors. We shall see that neither of these expectations is fully borne out, as both state and non-state actors are more realistic and more attuned to the dilemmas facing the Court than this dichotomy would suggest.

(i) State actors: evidence of pushback?

It is perilous to generalise about the perspective of actors across the 47 Council of Europe states on the Court's remedial practice; yet we detected no *pattern* of pushback against directiveness on the part of the Court.¹⁵⁷ We shall examine, first, the view of states parties to the Convention as expressed in reports and declarations issued under the auspices of the CM and, secondly, the perspective from the capitals (principally, Government Agents), so far as it can be ascertained.

Reports and declarations of the CM

As noted at 3.B.iii, it was states parties, represented in the CM, that in 2004 originally invited the Court to assist states to find 'appropriate solutions' to underlying systemic problems.¹⁵⁸ They returned to the issue in the 2016 CDDH report on the longer-term future of the Convention system,¹⁵⁹ which reiterated that the execution process 'could be facilitated' if the Court were to 'indicate more clearly in its judgments which elements ... constituted the direct sources of the finding of the violation'.¹⁶⁰ This appears to endorse the type of 'diagnostic' judgment referred to in 4.A.i, which may or may not involve the inclusion of an Article 46 chapter; hence, the CDDH report neither condones nor criticises the use of Article 46 as such. The CDDH did not, however, support a proposal to formalise a practice whereby the Court would routinely 'indicate general measures in its judgments';¹⁶¹ and nor did it endorse indication of individual measures 'beyond these exceptional cases, where the nature of the violation found may ... leave no real choice as to the measure(s) ... required to remedy it'.¹⁶² It also discarded a reform proposal (which would arguably have severely hampered the work of the CM) to allow the Court to expressly indicate in appropriate cases that, apart from the payment of any just satisfaction awarded, no other measures (individual or general) appear to be required.¹⁶³ Taken as a whole, the CDDH report does not imply any criticism of the Court's current remedial practice, yet is reluctant to see any regular or formalised recourse to the indication of general measures which, as noted at 2.B, constitute a majority of the Court's specific and/or prescriptive judgments.

¹⁵⁷ This finding echoes that of Sicilianos, *supra* n 1 at 258-260.

¹⁵⁸ *Supra* n 25.

¹⁵⁹ Steering Committee for Human Rights, *supra* n 47.

¹⁶⁰ *Ibid.* at para 144.

¹⁶¹ *Ibid.* at para 163.

¹⁶² *Ibid.* at para 145.

¹⁶³ *Ibid.* at para 164.

In respect of other collective expressions of the CM's will, it is striking that none of the declarations arising from high-level conferences,¹⁶⁴ from Interlaken in 2010 to Copenhagen in 2018, refers expressly to the Court's remedial practice. This is despite the emphasis placed on the principle of subsidiarity, especially at Brighton in 2012 and Copenhagen in 2018, which might have been expected to prompt concerns about the Court curtailing states' margin of appreciation regarding execution. Conversely, the emphasis in Brussels in 2015 on the 'shared responsibility' between states parties, the Court and the CM to implement the Convention, could have been a spur to encourage the Court to get *more* involved in the execution of its own judgments, including through greater directiveness. The silence on the issue in the declarations suggests that the Court's remedial practice has simply not registered at the political level within the CM. By contrast, the favourable references in the CM's Annual Reports to the Court's role in assisting the execution process through its recommendation of remedial measures may reflect the fact that CM officials, through their daily interactions with states, are more attuned to the implications of this incremental, yet significant, development of the Court's practice than their political masters.¹⁶⁵

The view from the capitals

Given the difficulty of identifying the variety of perspectives across 47 states, we first sought the view of Government Agents who, by virtue of their roles in the CDDH, are well-situated to make an informed assessment of the 'mood music' surrounding the Court's remedial practice.¹⁶⁶ These sources, like the CM's collective pronouncements, broadly endorsed the Court's current practice but cautioned against a decisive shift towards greater directiveness.

Vít A. Schorm, Government Agent in respect of the Czech Republic, emphasised the value of dialogue during the execution process, both between domestic stakeholders and between the domestic and supranational levels.¹⁶⁷ Combined with technical assistance from the Execution Department, he ventured, dialogue yields solutions that may not be initially apparent even to the Government Agent and still less to Judges in Strasbourg:

I think ... that if the Strasbourg Court were to become more prescriptive, it would create many difficulties. [The CM] is far better equipped because you can really have an informal talk with the Secretariat, ... and if you really don't know what to do, you can try to find a solution with them.

Isabelle Niedlispacher, the Belgian Government Agent, agreed that 'most other Government Agents and most national actors would in general not welcome a *more* specific and prescriptive approach by the Court' due to the 'risk of confusion between the role of the Court and the role of the Committee of Ministers.'¹⁶⁸ Nevertheless, she ventured that clear remedial directions could boost the negotiating power of pro-implementation authorities to, for example, get resources allocated for the execution of a judgment. The Court seems well aware of this: an interviewee in the Registry ventured that: 'If we're

¹⁶⁴ Department for the Execution of Judgments of the European Court of Human Rights, Political Declarations: High-level conferences, available at: www.coe.int/en/web/execution/political-declarations [last accessed 25 June 2018].

¹⁶⁵ See, e.g., CM Annual Report 2017, supra n 51 at paras 39-40.

¹⁶⁶ We acknowledge, however, that the views expressed are not representative of all Government Agents or other state actors.

¹⁶⁷ Interview, 22 June 2017.

¹⁶⁸ Niedlispacher presentation, supra n 113 at 3.

getting the message back from the Agent that it's useful to have very prescriptive or directive judgments, then I think we should support that.¹⁶⁹

The Court's increased sensitivity to execution matters can thus be said to extend to an awareness of the need to identify 'allies' in the respondent state. As one Judge argued:

I think this is a legitimate strategy of the Court: giving some impetus to the implementation process and help[ing] some groups on the national level to have some political force—but not to be too decisive on the question of *how* a certain result to be achieved.¹⁷⁰

This approach is endorsed by officials on the execution side: one interviewee within the CoE's Directorate General Human Rights and Rule of Law observed that the Court's decision to be specific or prescriptive can have 'a very potent impact' on the domestic debate. One former official from the Execution Department, speaking about Belgium, noted that

often, when the Court says there is a systemic problem ... [domestic officials] totally agree, and they are ... happy to have some help from the Court, and ... additional arguments coming from Strasbourg to help get other national interlocutors on board.¹⁷¹

Frequently, when the Court opts to specify general measures, it has already explored the systemic problem at the origin of many similar cases. Such remedial practice, then, does not disavow the importance of dialogue at the execution stage, but seeks to 'channel the discussions' in a particular direction.¹⁷² A compelling example is the pilot judgment in *W.D. v Belgium*,¹⁷³ concerning the internment of mentally-ill offenders, which was described by one academic observer as the 'only way to get a structural solution'.¹⁷⁴ Although before the Court the government initially opposed the application of the pilot judgment procedure (on the basis that the issue of internment did not affect an entire category of people and was already being resolved),¹⁷⁵ several interviewees noted that the judgment decisively strengthened the hand of those actors, including the responsible unit within the Ministry of Justice, who were pushing for comprehensive reform.

The Court is, in this sense, aware of speaking with precision to particular state actors, such as Government Agents, since as one Court official put it, 'Agents *do* ... [compare] cases either within the country or between countries'.¹⁷⁶ This creates an imperative for the Court to be consistent in its remedial practice. At the same time, the fact that many domestic actors lack specialised knowledge of the more nuanced or technical aspects of the Court's judgments¹⁷⁷ may partly explain the lack of political pushback against directive judgments. The Court's occasionally intrusive remedial practice

¹⁶⁹ Interview, 17 May 2017.

¹⁷⁰ Interview, 23 May 2017. See also Leach, *supra* n 2 at 151.

¹⁷¹ Interview, 25 November 2016.

¹⁷² Interview (a), 2 May 2017.

¹⁷³ *Supra* n 93.

¹⁷⁴ Interview, 9 November 2016.

¹⁷⁵ *Supra* n 93 at para 157.

¹⁷⁶ Interview, 17 May 2017.

¹⁷⁷ On the question of parliamentarians' knowledge, see Donald, 'Parliaments as Compliance Partners in the European Convention on Human Rights System' in Saul, Føllesdal and Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (2017) 75 at 103.

has simply not become a ‘political’ issue for states unlike, say, its dynamic interpretation of the Convention, which has frequently provoked accusations of judicial overreach.¹⁷⁸

(ii) The pragmatism of non-state actors

It may be expected that civil society actors, to the extent that they are attuned to developments in Strasbourg case law, would seek to maximise their leverage over state actors, and would thus encourage greater directiveness on the part of the Court. Indeed, some civil society interlocutors did express a preference for such an approach. According to a representative of the League of Human Rights in the Czech Republic, the strategic nature of its litigation, which aims at structural or systemic reforms, means that ‘it would be great if [the Court] were more specific. For us, that would be a lot more helpful’.¹⁷⁹ A representative of the Georgian Young Lawyers’ Association likewise ventured that,

it’s always better ... if the Court writes down directly what kind of measure [the] government [should] take... [I]t makes our work easier because ... the government has no discretion whether to apply this measure or that.¹⁸⁰

At the same time, an NGO activist involved in the case of *Identoba and Others v Georgia*,¹⁸¹ concerning the state’s failure to protect demonstrators from, and effectively investigate, homophobic violence, argued that it would have been unrealistic for the Court to specify the general measures required to effect systemic reform in areas such as police behaviour and changing prejudicial societal attitudes: the Court had elucidated the origins of the violation, ‘and that gives the ground to the [CM] to produce the ... more specific recommendations about what [Georgia] should do ... in terms of institutional reforms’.¹⁸²

A similar degree of realism was evident in comments by an academic member of the Committee of Experts on the Execution of ECtHR judgments, a consultative body formed by the Czech Government Agent to recommend general measures in appropriate cases; she ventured that, while clarity is essential,

[t]here is always a risk that if [the Court is] too specific [it will] be seen as interfering too much into the discretion that should be left to the state... If you deprive [states] of that they will not ... be willing to have a dialogue ... because they will feel like this is a dictate.¹⁸³

While these comments may not represent the spectrum of civil society perspectives, they undermine any assumption that civil society actors necessarily have unrealistic expectations of what Judges can achieve. Rather, they suggest a pragmatic approach which demands an appropriate degree of specificity *either* on the part of the Court *or* the CM. At the same time, no civil society interviewee raised the issue of specificity and prescriptiveness of their own motion, suggesting that the Court’s remedial practice (and, indeed, the execution process as a whole) is not at the forefront of their concerns or is poorly understood.

¹⁷⁸ Finnis, ‘Judicial Law-making and the “Living” Instrumentalisation of the European Convention on Human Rights’ in Barber, Ekins and Yowell (eds), *Lord Sumption and the Limits of the Law* (2016) 73.

¹⁷⁹ Interview, 20 June 2017.

¹⁸⁰ Interview, 25 April 2017.

¹⁸¹ Application No 73235/12, Merits and Just Satisfaction, 12 May 2015.

¹⁸² Interview, 17 January 2017.

¹⁸³ Interview, 21 June 2017.

In sum, while neither state nor non-state actors advocated any radical change in the Court's remedial approach, nor did they strongly criticise it. Thus, the political space within which the Court may develop its practice might be broader than supposed. It is to this future development that our final section turns.

5. CONCLUSION—NAVIGATING THE TENSION BETWEEN CONSISTENCY AND PRAGMATISM

The Court's case law on Article 46 is not 'fossilised in the past',¹⁸⁴ but is fluid and evolving.¹⁸⁵ This has included considerable creativity as to the nature of the remedies indicated.¹⁸⁶ Still, it is important not to overstate the extent of jurisprudential innovation, since (as established at 2.A) specific and prescriptive judgments remain a small fraction of the Court's case law. Amid no little judicial dissension, how is the Court's remedial approach likely to develop—and what direction *should* it take? This section considers these questions through the prism of the tension between a normative desire for consistency and the requirement for pragmatism dictated by the Court's overriding desire to facilitate implementation of its judgments in the interest of actual and potential victims.

Throughout this article, we have identified a number of areas of judicial disagreement, inconsistency or procedural frailty. Conflicting visions about the Court's remedial practice have created, as one Judge ventured, 'a rather haphazard case law ... when we are, on a case-by-case basis, looking into the possibilities of saying something more than simply declaring a violation.'¹⁸⁷

We have identified that specific remedial measures (regardless of their place in a judgment) are worded in various ways, sometimes using imperative language, and at other times a less emphatic tone (1.A). Nor do Judges agree as to whether remedial indications in the reasoning have the same legal force as directions in the operative provisions (1.A). We have also alluded to inconsistencies as regards the invocation of Article 46, there being a blurred line between judgments containing indications under that provision and purely 'diagnostic' judgments (4.A.i). Arguably more far-reaching repercussions arise from inconsistency whereby the Court does not always stipulate specific, non-monetary individual measures even when there appears to be only one possible form of redress, as the case of *Mammadov v Azerbaijan* (discussed at 4.A.i) reveals, and from cases in which the Court is occasionally perceived to have erred in its recommendations or prescriptions (see 4.A.ii).

These factors suggest that the Court's remedial practice is in flux, or, as a Registry official opined, 'a learning process for everybody—states, Court and Committee of Ministers'.¹⁸⁸ The Court's practice has reached 'a certain maturity', she added, but is far from stable. The question then arises as to how problematic some degree of instability is. We have seen that actors in Strasbourg, and notably at the

¹⁸⁴ *Moreira Ferreira v Portugal (No 2)*, supra n 5 at Dissenting Opinion of Judge Pinto de Albuquerque joined by six others, para 57.

¹⁸⁵ See *Sidabras and Others v Lithuania* Application Nos 50421/08 et al., Merits and Just Satisfaction, 23 June 2015, at Concurring Opinion of Judge Keller, para 1.

¹⁸⁶ Supra n 101.

¹⁸⁷ Interview, 13 June 2017.

¹⁸⁸ Interview, 19 April 2017.

ECtHR, appear to be more concerned about (actual or hypothetical) inconsistency than domestic actors are. However, Government Agents and other informed state actors were also said to be aware of contradictions, creating a risk that states will, for example, use the absence of remedial indications, or vagaries in the use of terminology, to frustrate implementation (see 3.B.i; 4.A.i and ii). We concur, therefore, with a Judge who ventured that the Court's 'already rich' case law on remedies would benefit from consolidation,¹⁸⁹ which in turn will require Judges to find common ground on contentious areas.

How far, then, should the Court go to achieve such consolidation, given that codification of its practice would inevitably constrain its flexibility to act on a case-by-case basis? Our interlocutors, both in Strasbourg and at state level, eschewed the idea of reforming the Convention itself, since to do so would open a Pandora's box in a climate of hostility to the Court within some states.¹⁹⁰ Moreover, such reform was viewed as unnecessary, given that states have not challenged the Court's authority to be specific or prescriptive.¹⁹¹

There was reluctance, too, to reform the Rules of Court, save for one proposal to institutionalise a process whereby the parties to a case would be invited to make submissions on the matter of remedies, in order to create a more informed basis for the Court's assessment of possible measures under Article 46.¹⁹² One Judge ventured that the Court is increasingly able to identify those cases in which it would be assisted by pleadings on the remedial issue, adding:

I do think this is something we need to reflect upon because there is a procedural weakness at the remedial stage when that issue is not fully transparent and fully argued ... and that may necessitate changes of the Rules of Court.¹⁹³

Another Judge endorsed this view, since discussion with the parties to a case yields remedial measures that are better adapted to domestic context and prevents the Court from inadvertently producing any 'surprises'.¹⁹⁴ Indeed, the benefits of the Court systematically inviting submissions on remedial measures may go further still if such a practice were to encourage states to think more proactively about implementation even while a case is pending before the ECtHR. Likewise, civil society organisations could take it upon themselves to engage with the implementation process more actively than they presently tend to do, both domestically and supra-nationally. Certainly, judicial appetite for submissions on remedies creates every incentive for applicants to indicate proactively, from the start, what measures they deem necessary—and for civil society actors to consider this dimension not only in their briefings to DH meetings,¹⁹⁵ but also in third party interventions before the Court.

This proposal aside, we detected great caution about tying the Court's hands by seeking to codify its remedial practice. Such concern is well-founded given Judges' evident desire to maximise their leverage on a case-by-case basis. A senior Registry official argued that apparent inconsistency is

¹⁸⁹ Interview, 29 June 2017.

¹⁹⁰ See, e.g., Council of Europe Parliamentary Assembly, Recommendation 2129 (2018), Copenhagen Declaration, appreciation and follow-up, 26 April 2018, para 5.

¹⁹¹ *Supra* n 99.

¹⁹² There is nothing to preclude applicants from doing so now, as they have indeed done occasionally; see, for example, *Aslakhanova*, *supra* n 64.

¹⁹³ Interview, 13 June 2017. See also Keller and Marti, *supra* n 1 at 845.

¹⁹⁴ Interview, 29 June 2017.

¹⁹⁵ See the work of the European Implementation Network at: www.einnetwork.org [last accessed 19 June 2018].

frequently ‘an attempt to be ... flexible and adjust to the national circumstances’,¹⁹⁶ at the same time as assisting the CM in its execution function. Moreover, as noted at 2.D, judicial pragmatism has *not* led to anomalies with certain states receiving either a disproportionately large or small number of specific and/or prescriptive judgments. Pragmatism, then, does not denote appeasement: the fact that Judges decide upon their remedial approach in anticipation of a state’s reaction has not, we submit, led them to be unduly accommodating of uncooperative states or to sacrifice the interests of victims. Nor, we recall, is there clamour for reform of the Court’s practice from the CM or the Execution Department; on the contrary, a senior official within the CM argued that it would be ‘premature to expect the Court to take a definitive stand’ on its remedial practice and that such a development might even *create* tensions with the CM where none exist.¹⁹⁷

Barring such reform, it seems certain that the Court’s remedial approach will continue to evolve. It is an open question as to whether that will be in the direction of the Inter-American Court of Human Rights, which is recognised as taking the boldest approach to reparations of all supranational human rights bodies,¹⁹⁸ or whether those forces within the Court (and beyond) will prevail who want to see Judges exercise restraint and even return to a practice of issuing purely declaratory judgments.¹⁹⁹ That such debates are live within the Court was underscored by a Judge who observed that ‘some Judges really want to push’ and regard the Inter-American Court as an exemplar.²⁰⁰ The same Judge added, however: ‘I think this Court has a different tradition and ... we have to accept that there is another—political—body and that the execution primarily is its competence. So we have to be careful.’

Our research suggests that, at this juncture, the Court is likely to chart a middle course, neither foreclosing the evolution of this aspect of its case law, nor accelerating the pace of change. As it does so, we submit that continued—and even intensified—contact with the CM and Execution Department, as well as other Strasbourg institutions concerned with implementation, will be crucial to ensure that the Court becomes ever more sensitised to matters of execution. At the same time, Judges are evidently aware of the need to maintain a realistic view of their relative position in the ensemble of judicial and political actors both at the national and supranational level, in keeping with the principle of subsidiarity. One Judge correctly notes that, in an enforcement system based upon ‘political will and pressure’ it is justifiable for a supranational court to take into account the need for remedial measures to be ‘persuasive and acceptable to the stakeholders’, since ultimately, ‘the system doesn’t work unless the recipients are willing to acquiesce to the ... judicial power that is at play here’.²⁰¹ Encouragement from the Execution Department and the absence of any sustained challenge by states suggest that, as Judges navigate the course between consistency and pragmatism, they enjoy a wider political latitude than they might suppose—space that they may well use to meet the imperative of promoting execution in the interests of actual and potential victims. The door is firmly open to evolution, if not revolution, in the Court’s remedial practice.

¹⁹⁶ Interview, 8 November 2011.

¹⁹⁷ Interview (a), 2 May 2017.

¹⁹⁸ See, for example, Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond’ (2008) *Columbia Journal of Transnational Law* 351.

¹⁹⁹ *Supra* n 104.

²⁰⁰ Interview, 23 May 2017.

²⁰¹ Interview, 13 June 2017.