

# **An Examination of the European Court of Human Rights’ Indication of Remedial Measures**

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## **1. Introduction**

Over recent years the European Court of Human Rights (“the Court” or “the ECtHR”) has become increasingly involved in identifying, either in the text of its judgments or in the operative part of those judgments, remedial measures to respondent States going beyond the payment of just satisfaction to successful applicants. This study will examine the Court’s evolving role in seeking to secure non-financial redress for applicants who have established violations of their rights and freedoms under the European Convention on Human Rights (“the Convention” or “the ECHR”) and its Protocols.<sup>1</sup> The pilot judgment process<sup>2</sup> will not be included in this study as it has a distinct origin in a Committee of Ministers’ (of the Council of Europe) Resolution<sup>3</sup>, together with an express elaboration in the Rules of Court<sup>4</sup> and therefore can be seen as a different category of judgment.<sup>5</sup> Whereas our focus is on those fascinating judgments where the Court has indicated non-financial remedial measures without invoking the pilot judgment procedure. We shall trace the historical development of these cases, the Court’s reasons and justifications for indicating non-financial remedial measures, what factors influence the Court in determining whether to indicate remedial measures in the text of judgments or in the operative section of judgments and the legal foundations of these remedial measures.

## **2. The Court’s changing approach to the indication of remedial measures**

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<sup>1</sup> For my early examination of the financial remedies awarded by the Court see, A. Mowbray, “The European Court of Human Rights’ Approach to Just Satisfaction” [1997] *Public Law* 647. Judge Paulo Pinto de Albuquerque has recently argued that punitive (exemplary) damages are a “necessary instrument for fulfilling the Court’s mission to uphold human rights in Europe and ensuring the observance of the engagements undertaken by the Contracting Parties in the Convention and the Protocols thereto.” “Punitive Damages in Strasbourg”, University of St. Gallen Law School, Law and Economics Research Paper Series, Working Paper No.2016-05 (May 2016) at p. 20. Thanks to my colleague Professor Dirk Van Zyl Smit for alerting me to this paper.

<sup>2</sup> See A. Mowbray, *Cases, Materials & Commentary on the ECHR*, 3<sup>rd</sup> edn (2012) at 54-57 and for a study of this type of judgments, P. Leach *et al*, *Responding to Systematic Human Rights Violations*, (2010).

<sup>3</sup> Res (2004)3 which, *inter alia*, encouraged the Court to highlight “...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.”

<sup>4</sup> Rule 61 “Pilot- judgment procedure”, Rules of Court, 1 June 2015, Strasbourg.

<sup>5</sup> For example the Annual Report of the Committee of Ministers on the *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights* nowadays contains separate Appendix sections listing final pilot judgments and final “judgments with indications of relevance for the execution (under Article 46)”; *infra* n.28.

As Judge Nicolaou has perceptively observed the early jurisprudence disclosed that the original Court considered that its judgments were generally declaratory.<sup>6</sup> For example, in *Marckx v Belgium*<sup>7</sup>, the Plenary Court stated that: the Court's judgment is essentially declaratory and leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation under Article 53 [now 46]."<sup>8</sup> Hence the Court could not annul or repeal the provisions of Belgian law that violated the Convention rights of the mother and daughter applicants. Similarly in *Airey v Ireland*<sup>9</sup>, the Court ruled that:

In addition, whilst Article 6 para. 1 guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations", it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme - which Ireland now envisages in family law matters ... - constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1...<sup>10</sup>

Therefore, the Court's remedial focus was primarily on whether to order the payment of financial just satisfaction to successful applicants.

Later, in the Court's reserved just satisfaction judgment concerning *Papamichalopoulos and Others v Greece*<sup>11</sup>, the Court, in the operative part, ruled that Greece should (within six months) return the applicants' land to them or failing restitution the State should pay a specified amount of compensation for pecuniary damage to the applicants. Judge Nicolaou characterised this as establishing "a new practice"<sup>12</sup> whereby the Court would be willing to order property restitution in favour of successful applicants, who had invoked Article 1 of Protocol No 1 to the ECHR, where it appeared feasible coupled with a fixed amount of pecuniary compensation should the State not return the specified property. This was an early form of specific individual measures of redress being indicated by the Court.

The Grand Chamber of the full-time Court made a significant expansion in the Court's willingness to indicate individual remedial measures in two major judgments issued during 2004. *Assanidze v Georgia*<sup>13</sup>, concerned the continuing imprisonment of the applicant, by Ajarian Autonomous Republic authorities in Georgia, despite the President of Georgia having granted him a pardon and the Georgian Supreme Court quashing the applicant's convictions and ordering his release. The Grand Chamber held that:

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<sup>6</sup> G. Nicolaou, "The New Perspective of the European Court of Human Rights on the Effectiveness of its Judgments" 31 *HRLJ* 269 (2011).

<sup>7</sup> Judgment of 13 June 1979.

<sup>8</sup> *Ibid.* at para 58.

<sup>9</sup> Judgment of 9 October 1979.

<sup>10</sup> *Ibid.* at para 26.

<sup>11</sup> Judgment of 31 October 1995.

<sup>12</sup> *Supra* n.6 at p. 271.

<sup>13</sup> Judgment of 8 April 2004.

198. ...in the context of the execution of judgments in accordance with Article 46 of the Convention<sup>14</sup>, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach...

202. As regards the measures which the Georgian State must take (see paragraph 198 above), subject to supervision by the Committee of Ministers, in order to put an end to the violation that has been found, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, ... *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 25, § 58). This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34).

However, by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it.

203. In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 5 § 1 and Article 6 § 1 of the Convention... the Court considers that the respondent State must secure the applicant's release at the earliest possible date.<sup>15</sup>

The unanimous Grand Chamber went on to repeat that final order in the operative part of its judgment<sup>16</sup>.

Exactly three months later another Grand Chamber, including ten judges who sat in *Assanidze*, gave judgment in *Ilascu and Others v Moldova and Russia*<sup>17</sup>. The latter case was brought by four Moldovan nationals regarding their detention and ill-treatment by the "Moldavian Republic of Transdniestria" authorities (a separatist regime based in the east of Moldova which is supported by Russia, but not recognised by the international community). The Grand Chamber repeated, verbatim, its view on the duties

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<sup>14</sup> This provides: "(1) The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. (2) The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. ...".

<sup>15</sup> *Supra* n. 13 at paras 198-203.

<sup>16</sup> *Ibid.* point 14.

<sup>17</sup> Judgment of 8 July 2004.

of respondent States under Article 46 elaborated in paragraph 198 (above) of *Assanidze*.<sup>18</sup> Then, taking account of its findings that Moldova had failed to discharge its Convention positive obligations<sup>19</sup> towards the applicants and Russia had not taken steps to prevent the applicants continued unlawful detention and ill-treatment:

The Court further considers that any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46 § 1 of the Convention to abide by the Court's judgment. Regard being had to the grounds on which they have been found by the Court to be in violation of the Convention ... the respondent States must take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release.<sup>20</sup>

Again, the Grand Chamber, unanimously, repeated the latter order in the operative part of its judgment.<sup>21</sup>

The above two judgments were major milestones in the Court's evolving role in providing respondent States with precise indications of the remedial measure they should take. As in *Papamichalopoulos* the Grand Chamber included its remedial guidance to the respondent States in the operative parts of these judgments. However, the nature of the individual measures required in the latter cases, to secure the swift release of the applicants from unlawful detention, were of a different kind to the property restitution ordered in *Papamichalopoulos*. The importance of *Assanidze* and *Ilascu* in the remedial history of the Court was recognised in the Committee of Ministers' first annual report on its role of supervising the execution of Court judgments. The report observed that: "The ECtHR may also order the required individual execution measure. The first cases addressing situations of this kind were decided by the ECtHR in 2004, and in both cases the ECtHR ordered the release of applicants who were being arbitrarily detained."<sup>22</sup> In its second annual report the Committee of Ministers added that: "The Court had previously developed some practice in this direction in certain property cases by indicating in the operative provisions that states could choose between restitution and compensation – see e.g. the *Papamichalopoulos and Others* judgment of 31 October 1995 (Article 50)."<sup>23</sup>

The Court's expanding role in the indication of remedial measures was noted by the Committee of Ministers in its 2011 supervision annual report.

32. The Court's interaction with the Committee of Ministers in the application of Article 46 is in constant evolution. Since a number of years the Court has thus more and more frequently started to assist the execution process in a number of ways, e.g. by providing also itself guidance as to relevant execution measures in its judgments.

33. The Court today provides such recommendations in respect of individual measures in a growing number of cases. It may also, in certain circumstances, where the State does not have any real choice as to the execution measures required, directly itself order the taking of the relevant measure. For example in

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<sup>18</sup> Ibid. at para 487.

<sup>19</sup> More generally see A. Mowbray, *The Development of Positive Obligations under the ECHR by the European Court of Human Rights* (2004).

<sup>20</sup> Supra n.17 at para 490.

<sup>21</sup> Ibid. point 22.

<sup>22</sup> *Supervision of the execution of judgments of the ECtHR, 1<sup>st</sup> Annual Report 2007*, Strasbourg, March 2008, p.17.

<sup>23</sup> *Supervision of the execution of judgments of the ECtHR, 2<sup>nd</sup> Annual Report 2008*, Strasbourg, April 2009, p.19 footnote 6.

case of arbitrary detention, *restitutio in integrum* will necessarily require, among other things, release from detention and in several cases the Court has also ordered such release."<sup>24</sup>

The report cited *Fatullayev v Azerbaijan*<sup>25</sup> as another example of a judgment, this time by a Chamber, where the Court (by a six to one majority, intriguingly no dissenting opinion was issued) ordered in the operative part of its judgment that the respondent State should secure the applicant's immediate release from prison. The Chamber had, unanimously, found violations of Article 10 in respect of the applicant journalist's convictions for publishing controversial views on the Nagorno-Karabakh conflict and foreign-policy decisions.

In its 2012 supervisory annual report the Committee of Ministers replicated the comments in paragraph 32 of the 2011 report (above) with one fascinating addition:

37. The European Court's interaction with the Committee of Ministers, in implementing Article 46, is constantly evolving. For several years now, the Court contributes to the execution process more and more frequently and in various ways, e.g. by providing, itself, in its judgments recommendations as to relevant execution measures (so called *quasi-pilot* judgments or "Article 46 judgments")...<sup>26</sup>  
[italics as in original text]

The report did not define the term quasi-pilot judgments. However, writing extra-judicially, Judge Sicilianos has observed that: "The distinction between pilot and quasi-pilot judgments is not always clear. ...The clearest difference...seems to be of a procedural rather than of a substantive nature, namely that parties are invited to comment upon the application of the pilot judgment procedure according to Rule 61 para.2 of the Rules of Court."<sup>27</sup> For the purposes of our study, as elaborated in the introduction, we shall be focusing on those judgments where the Court has indicated remedial measures in cases not designated as pilot judgments.

The 2013 annual supervisory report noted that whilst pilot judgments were "rare"<sup>28</sup>, only three became final in that year<sup>29</sup>; "...the Court has continued to deploy special efforts to assist execution by including in certain judgments, with reference to Article 46, different indications of relevance for the solution of structural problems."<sup>30</sup> The report went on to disclose that the Court had delivered 11 such judgments in 2010, 22 in 2011, 28 in 2012 and 17 in 2013.<sup>31</sup> Hence we see that numerically there are far

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<sup>24</sup> *Supervision of the execution of judgments and decisions of the ECtHR, Annual Report 2011*, Strasbourg, April 2012, p.19.

<sup>25</sup> Judgment of 22 April 2010.

<sup>26</sup> *Supervision of the execution of judgments and decisions of the ECtHR, 6<sup>th</sup> Annual Report 2012*, Strasbourg, April 2013, p.28.

<sup>27</sup> L-A. Sicilianos, "The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments Under Article 46 ECHR", 32 *Netherlands Quarterly of Human Rights* 235 (2014) at p. 240.

<sup>28</sup> *Supervision of the execution of judgments and decisions of the ECtHR, 7<sup>th</sup> Annual Report 2013*, Strasbourg, March 2014, p.11.

<sup>29</sup> *Ibid.* at p.67.

<sup>30</sup> *Ibid.* at p. 11.

<sup>31</sup> *Ibid.* footnote 4.

more Court judgments indicating remedial measures in quasi-pilot /Article 46 judgments than in formal pilot judgments. The report continued that the Court’s “support” for execution via remedial indications in Article 46 judgments: “...has been well received both by the states concerned and the Committee of Ministers when supervising execution of the Court’s judgments, even if it is evident that many choices and problems appear only once the execution process has been engaged.<sup>32</sup> For the first time the 2013 annual report also included a separate statistical appendix (1.E Judgments with indications of relevance for execution) that listed 1. Pilot judgments final in 2013 and 2. Judgments with indications of relevance for the execution (under Article 46) final in 2013. This welcome new section can be seen as another demonstration of the importance of these Article 46 judgments. Indeed during 2014 the Court went on to deliver another 23 such judgments<sup>33</sup> and 13 further judgments were pronounced in 2015<sup>34</sup>.

### 3. The Court’s contemporary indication of non-financial remedial measures

Using the 2013, 2014 and 2015 supervisory annual reports lists of Article 46 judgments we can study these cases to discover important aspects of the Court’s contemporary approach to indicating remedial measures. In doing so we will, in part, be responding to Judge Sicilianos’ call for an “analytical study” of “this important practice”.<sup>35</sup> The first question we can address is what types of remedial measures are being indicated by the Court in modern times? The two well-established forms of non-financial remedies under the ECHR are individual measures which are designed to provide redress for the Convention violations suffered by the specific applicant, for example securing the release of Assanidze<sup>36</sup> and general measures, such as the enactment of legislation reforming the status of judges<sup>37</sup>, that address the systemic defects disclosed in a judgment.

#### Article 46 judgments final in 2013

Type of Remedy	Individual Measures	Individual and General Measures	General Measures
Numbers of cases	4	5	8

#### Article 46 judgments final in 2014

Type of Remedy	Individual Measures	Individual and General Measures	General Measures
Number of cases	5	1	17

<sup>32</sup> Ibid. at p.11.

<sup>33</sup> *Supervision of the execution of judgments and decisions of the ECtHR, 8<sup>th</sup> Annual Report 2014*, Strasbourg, March 2015, Appendix 4B.

<sup>34</sup> *Supervision of the execution of judgments and decisions of the ECtHR, 9<sup>th</sup> Annual Report 2015*, Strasbourg, March 2016, Appendix 4B.

<sup>35</sup> Supra n.27 at pp. 237-8.

<sup>36</sup> Supra n.13.

<sup>37</sup> As Ukraine did following the judgment in *Oleksandr Volkov* infra n.44 and see the *European Human Rights Advocacy Centre Annual Report 2015*, Middlesex University (2016), p.17.

Article 46 judgments final in 2015

Type of Remedy	Individual Measures	Individual and General Measures	General Measures
Number of cases	1	4	8

So fascinatingly we learn that although much of the attention regarding the Court's development of indicating remedial measures has been directed at the elaboration of individual measures, in recent years the most common form of indicated remedy has been that of general measures. This is even more remarkable when we remember that these are not pilot judgments which, of course, are directly concerned with cases revealing systemic failings that require general remedies to resolve the underlying defect in the national legal or administrative arrangements.

The next issue we can examine is the importance level of judgments containing remedial indications. The Court's HUDOC database of judgments classifies all judgments into four categories of importance. The Bureau of the Court (comprised of the Court's President, Vice-Presidents and Section Presidents), acting on recommendations from the Court's Jurisconsult, determine the most important judgments which will be published in the official Reports and Decisions of the Court ("case reports").<sup>38</sup> "Level 1 cases" are classified as of "high importance" as they "make a significant contribution to the development, clarification or modification of the Court's case-law, either generally or in relation to a particular State."<sup>39</sup> "Level 2 cases" are those of "medium importance" which while not making a significant contribution to the case-law, nevertheless go beyond merely applying existing case-law."<sup>40</sup> "Level 3 cases" are deemed to be of "low importance" as they are of "little legal interest, namely judgments and decisions that simply apply existing case-law".<sup>41</sup>

Article 46 judgments final in 2013

Type of Remedy	Individual Measures	Individual and General Measures	General Measures
Importance Level of Cases: Case Reports	1	3	1
Level 1			2
Level 2	3	1	5
Level 3		1	

<sup>38</sup> HUDOC User Manual, Strasbourg, 2012, p.11.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid. at p.12.

<sup>41</sup> Ibid.

Article 46 judgments final in 2014

Type of Remedy	Individual Measures	Individual and General Measures	General Measures
Importance Level of Cases: Case Reports			4
Level 1	1		2
Level 2	2	1	11
Level 3	2		

Article 46 judgments final in 2015

Type of Remedy	Individual Measures	Individual and General Measures	General Measures
Importance Level of Cases: Case Reports			
Level 1			
Level 2	1	4	5
Level 3			3

Again these results are intriguing as they demonstrate that the indication of general measures is not confined to the most important categories of judgments but also extends down into lower levels of cases.

The final aspects of the contemporary practice we shall examine statistically are the importance level of cases where the Court indicates remedial measures in the operative part of its judgments and the nature of those remedies. In these relatively rare cases the Court is seeking to place the greatest legal responsibility on respondent States to comply with the specified remedial indications.

Remedial Indications Given in Operative Part of Judgments Final in 2013

Type of Remedy	Individual Measures	Individual and General Measures	General Measures
Importance Level of Cases: Case Reports	2	1	1
Level 1			
Level 2	2		
Level 3			

During 2014 the Court only prescribed remedial measures in the operative part of two final judgments. Both of those cases were Level 1 judgments, one judgment indicated individual measures and the other case indicated general measures. In 2015 just one final judgment prescribed remedial measures, that was a Level 2 case and individual measures were specified. So we can deduce that operative part indications do tend to be found in the higher importance levels of cases (6 prescribed in Case Reports and Level 1 judgments compared with 3 prescribed in Level 2 judgments). However, it is notable that there has been a dramatic decline in the annual numbers of final judgments containing operative part remedial indications over the last three years.



We shall now focus our attention on the contemporary jurisprudence in order to discover important features of the Court's reasoning concerning the indication of remedial measures. We will begin with ascertaining the reasons given by the Court for indicating remedial measures. The first reason we can identify in a number of cases is that the application discloses a systemic problem in domestic legal or administrative arrangements. A classic example of the Court giving Article 46 indications as the application revealed a systemic problem in national legislation was *Statileo v Croatia*<sup>42</sup>. The applicant landlord owned a flat in Split and he complained that national law prevented him obtaining an adequate rent for his flat. The Court was unanimous in finding a breach of his right to protection of property. However, as well as awarding him several thousand euros compensation for pecuniary and non-pecuniary damage the Court ruled that:

Whilst in finding a violation of Article 1 of Protocol No. 1 to the Convention in the present instance the Court has primarily focused on the particular circumstances of the applicant's case, it adds by way of a general observation that the problem underlying that violation concerns the legislation itself and that its findings extend beyond the sole interests of the applicant in the instant case... This is therefore a case where the Court considers that the respondent State should take appropriate legislative and/or other general measures to secure a rather delicate balance between the interests of landlords, including their entitlement to derive profit from their property, and the general interest of the community – including the availability of sufficient accommodation for the less well-off – in accordance with the principles of the protection of property rights under the Convention... In this connection the Court has noted that legislative reform is currently under way... It is not for the Court to specify how the rights of landlords and lessees...should be balanced against each other. The Court has already identified the main shortcomings in the current legislation, namely, the inadequate level of protected rent in view of statutory financial burdens imposed on landlords, restrictive conditions for the termination of protected lease, and the absence of any temporal limitation to the protected lease scheme...<sup>43</sup>

So the Court identified a number of defects in the domestic legislative scheme regulating rents and recognized that those failings had implications going beyond the complaint lodged by the applicant. Therefore, the Court went on to indicate that the respondent State should take general remedial measures. However, given the need to balance the potentially conflicting interests of landlords and tenants, the Court did not seek to prescribe the specific details of the legislative reform that was necessary for Croatia enact.

A dramatic example of the Court indicating remedial measures when it had found repeated failings in the judicial and parliamentary processes involved in the dismissal of a Supreme Court judge occurred in *Oleksandr Volkov v Ukraine*<sup>44</sup>. The Ukrainian Higher Council of the Judiciary (HCJ) had decided to submit to Parliament that the applicant should be dismissed from the judiciary. Subsequently a parliamentary vote approved his dismissal. He had then unsuccessfully challenged his dismissal before the Higher Administrative Court (HAC). At Strasbourg the Chamber was unanimous in finding, *inter alia*, several violations of Article 6(1) during the proceedings against applicant; including the appearance of personal bias regarding some members of the HCJ who participated in the proceeding against the applicant, a lack of appropriate guarantees of objective impartiality at the parliamentary committee stage of those proceedings and the absence of safeguards concerning the independence and impartiality of the HAC when considering the applicant's challenge to his dismissal. Alongside ordering the individual measure of

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<sup>42</sup> Judgment of 10 July 2014.

<sup>43</sup> *Ibid.* at para. 165.

<sup>44</sup> Judgment of 9 January 2013.

the applicant's reinstatement as a Supreme Court judge (discussed further below at p.16) and reserving the issue of pecuniary damage for his financial losses, the Chamber stated that:

...the present case discloses serious systemic problems as regards the functioning of the Ukrainian judiciary. In particular, the violations found in the case suggest that the system of judicial discipline in Ukraine has not been organised in a proper way, as it does not ensure sufficient separation of the judiciary from other branches of State power. Moreover, it does not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence, the latter being one of the most important values underpinning the effective functioning of democracies.

200. The Court considers that the nature of the violations found suggests that for the proper execution of the present judgment the respondent State would be required to take a number of general measures aimed at reforming the system of judicial discipline. These measures should include legislative reform involving the restructuring of the institutional basis of the system. Furthermore, these measures should entail the development of appropriate forms and principles of coherent application of domestic law in this field.<sup>45</sup>

Hence the case had exposed fundamental organisational weaknesses in the Ukrainian judicial disciplinary system that needed legislative and attitudinal changes to meet the basic requirements of the ECHR.

A different form of systemic judicial failure prompted the Court to indicate general measures in *Barta and Drajko v Hungary*<sup>46</sup>. The applicants complained about the unreasonable length of time the criminal tax fraud proceedings against them had taken. It was nearly four years after they had been charged that the District Court convicted and fined them. The united Chamber found a breach of the reasonable time guarantee contained in Article 6(1) of the Convention and awarded the applicants nearly double their fines in non-pecuniary damages. Furthermore, the Chamber noted:

...that the violation of the applicants' right to a trial within a reasonable time is not an isolated incident, but rather a systemic problem that has resulted from inadequate legislation and inefficiency in the administration of justice.

...Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the large number of persons affected.

...To prevent future violations of the right to a trial within a reasonable time, the respondent State should take all appropriate steps, preferably by amending the existing range of legal remedies or creating new ones, to secure genuinely effective redress for violations similar to the present one.<sup>47</sup>

Here the systemic failure was the product of both defective legislation and weaknesses in the operation of the criminal justice process and general measures were necessary to remedy the Convention violations.

It is not only newer State Parties to the ECHR who have been found to have persistent failings in their judicial systems that prompt the Court to indicate general remedies. For example in *McCaughey and Others v UK*<sup>48</sup>, the Chamber identified

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<sup>45</sup> Ibid. at paras. 199-200.

<sup>46</sup> Judgment of 17 December 2013.

<sup>47</sup> Ibid. at paras. 42, 47 and 49.

<sup>48</sup> Judgment of 16 July 2013.

systematic delays in Northern Irish inquests examining deaths caused by actions of the security forces. The applicants had two relatives shot dead by members of a specialist unit of the British Army outside a suspected arms dump of the IRA during 1990, the latter organisation publicly announced the deceased were “volunteers” on “active service” at the time of their deaths. Eventually, after numerous court proceedings brought by the applicants, the inquest jury delivered its verdict in 2012; but the jurors were not able to reach unanimous views on a number of key issues surrounding the killing of the applicants’ relatives. The Chamber, unanimously, decided that there had been a breach of the procedural duty implicit in Article 2 of the Convention because of the excessive investigation delays. Furthermore the Chamber observed that: “the carrying out of investigations, including holding inquests, into killings by the security forces in Northern Ireland has been marked by major delays. It further considers that such delays remain a serious and extensive problem in Northern Ireland.”<sup>49</sup> Therefore, in the operative part of its judgment, the Chamber held that, “the Government take, as a matter of some priority, all necessary and appropriate measures to ensure, in the present case and in similar cases concerning killings by the security forces in Northern Ireland where inquests are pending, that the procedural requirements of Article 2 are complied with expeditiously.”<sup>50</sup>

The second common reason why the Court indicates remedial measures is because the violation(s) disclosed in the application may generate significant numbers of future complaints to the Court unless general measures are taken to solve the underlying problem. In *Suso Musa v Malta*<sup>51</sup>, the Sierra Leone national had been detained for eighteen months following his irregular entry to Malta by boat and the rejection of his claim for asylum. The united Chamber upheld the applicant’s claims that his detention and lack of effective judicial remedies to challenge his incarceration violated Articles 5(1) and 5(4) of the Convention. In addition to ordering the payment of 24,000 euros compensation for his non-pecuniary damage the Chamber determined that:

...the problems detected in the applicant’s particular case may subsequently give rise to numerous other well-founded applications which are a threat to the future effectiveness of the system put in place by the Convention...The Court’s concern is to facilitate the rapid and effective suppression of a defective national system hindering human-rights protection. In that connection, and having regard to the situation which it has identified above ... the Court considers that general measures at national level are undoubtedly called for in execution of the present judgment.

122. In the instant case the Court considers that it is necessary, in view of its finding of a violation of Article 5 § 4, to indicate the general measures required to prevent other similar violations in the future. It observes that it has found a violation of Article 5 § 4 on account of the fact that none of the remedies available in Malta could be considered speedy for the purposes of that provision. Thus, the Court considers that the respondent State must above all, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism which allows individuals taking proceedings to determine the lawfulness of their detention to obtain a determination of their claim within Convention-compatible time-limits, but which nevertheless maintains the relevant procedural safeguards...

123. The Court notes that it has also found a violation of Article 5 § 1 on account in particular of the duration of the applicant’s detention coupled with the inadequate conditions at the barracks where he was held. Having regard to that finding, the Court recommends that the respondent State envisage taking the necessary general measures to ensure an improvement in those conditions and to limit

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<sup>49</sup> Ibid. at para. 144.

<sup>50</sup> Ibid. point 4(c).

<sup>51</sup> Judgment of 23 July 2013.

detention periods so that they remain connected to the ground of detention applicable in an immigration context.<sup>52</sup>

Hence we can deduce that there is potentially an overlap between this reason for indicating general measures in order to try and prevent repetitive/clone complaints in the future overwhelming the Court and the first reason we identified, that of the Court addressing systematic defects in national legal and administrative systems, as both reasons are predicated on the Court encountering a major failing in the domestic respect for Convention rights.

In *Luli and Others v Albania*<sup>53</sup>, the Court was faced with a number of applicants complaining about the length of time their property claims had remained undetermined, for many years, by the domestic authorities in breach of Article 6(1) of the ECHR. The Chamber, unanimously, found a violation of that provision in several of the applications. The Chamber stated that its findings:

...demonstrate that excessive length is becoming "a serious deficiency in domestic legal proceedings". There are already dozens of similar applications before the Court. The growing number of applications is not only an aggravating factor as regards the State's responsibility under the Convention, but also represent a threat to the future effectiveness of the system put in place by the Convention, given that in the Court's view, the legal deficiency identified in the applicants' particular cases may subsequently give rise to other numerous well-founded applications.

...the Court's concern is to facilitate the rapid and effective suppression of a malfunction found in the national system of human-rights protection. In that connection and having regard to the systemic situation which it has identified... the Court considers that general measures at the national level are undoubtedly called for in the execution of the present judgment including, in particular, introducing a domestic remedy as regards undue length of proceedings.<sup>54</sup>

Key features of such a remedy, derived from previous case-law, were then elaborate by the Chamber. So in the different context of unreasonable delays in domestic judicial decision-making violating Article 6(1) of the Convention the Court indicated general remedies to try and reduce the large flow of complaints from Albania, amongst many other States<sup>55</sup>, on this problem.

The final example we shall examine of the Court citing concerns about future applications raising the same complaint as a reason for the Court to indicate general remedial measures involved the regime and conditions of life imprisonment existing in Bulgaria. The two convicted murderers in *Harakchiev and Tolumov v Bulgaria*<sup>56</sup>, complained, *inter alia*, that they were kept in constantly locked cells away from other prisoners. This led the Chamber, unanimously, to conclude that the applicants' conditions of detention infringed Article 3 of the Convention. Furthermore, that violation:

...discloses a systemic problem that has already given rise to similar applications ... and may give rise to more such applications. The nature of the breach suggests that to properly execute this judgment, the respondent State would be required to reform, preferably by means of legislation, the legal framework governing the prison regime applicable to persons sentenced to life imprisonment with or without parole. That reform, invariably recommended by the [Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment] since 1999... should entail (a) removing the automatic application of the highly restrictive prison

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<sup>52</sup> Ibid. at paras 121-123.

<sup>53</sup> Judgment of 1 April 2014.

<sup>54</sup> Ibid. at paras. 115 and 118.

<sup>55</sup> See, A. Mowbray *supra* n.2 at pp.431-434.

<sup>56</sup> Judgment of 8 July 2014.

regime currently applicable, as a rule, to all life prisoners for an initial period of at least five years, and (b) putting in place provisions envisaging that a special security regime can only be imposed – and maintained – on the basis of an individual risk assessment of each life prisoner, and applied for no longer than strictly necessary.<sup>57</sup>

So, interestingly, the Court was drawing upon the expert recommendations of its fellow Council of Europe body to provide the substance of its indicated general remedial measures that were necessary to prevent further breaches by Bulgaria.

The third reason we can identify in the contemporary jurisprudence for the Court indicating remedial measures is that used in the pioneering judgment of *Assanidze*, discussed above<sup>58</sup>, and it is the nature of the breach of the Convention found by the Court leaves no choice as to the remedial measure necessary to rectify the violation. A modern example of this reason being invoked by the Grand Chamber in an analogous scenario was *Del Rio Prada v Spain*<sup>59</sup>. The applicant was convicted of 23 murders and other serious crimes connected with domestic terrorism for which she received numerous lengthy prison sentences (totalling over 3000 years detention). However, the courts informed her that her individual sentences would be aggregated into one sentence of thirty years' imprisonment. When the prison authorities sought permission to release her after approximately twenty years' imprisonment, due to remission earned by her positive activities whilst serving her sentence, the courts applied a new precedent and denied her early release. She successfully complained to Strasbourg alleging breaches of Article 7 (retrospective imposition of a higher penalty) and Article 5(1) (unlawful detention after the passing of her remission release date) of the ECHR. Spain requested the Grand Chamber to rehear the case, under Article 43 of the Convention. An overwhelming majority, fifteen votes to two, upheld the Chamber's decision that there had been a breach of Article 7 and unanimously that the applicant's continued imprisonment since the expiry of her original remission release date violated Article 5(1). The Grand Chamber indicated that the applicant should be "released at the earliest possible date"<sup>60</sup>, because:

...In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see *Assanidze v. Georgia*...).

139. The Grand Chamber agrees with the Chamber's finding and considers that the present case belongs to this last-mentioned category.<sup>61</sup>

This judgment confirms that the Court may decide that the flagrant continued unlawful detention of an applicant in breach of Article 5(1) justifies the indication of the individual remedial measure of immediate release of the successful applicant.

The contemporary Court has also cited the nature of the respondent State's breach as the reason for indicating individual measures in the different context of a violation of Article 3 in *Amirov v Russia*<sup>62</sup>. The applicant who suffered from many serious health problems, including spinal paralysis, complained about the lack of specialist medical care he was receiving during his pre-trial detention. The unanimous Chamber determined that the prolonged inadequate medical care given to the applicant constituted inhuman and degrading treatment.

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<sup>57</sup> Ibid. at para. 280.

<sup>58</sup> Supra n.13.

<sup>59</sup> Judgment of 21 October 2013.

<sup>60</sup> Ibid. at para. 139.

<sup>61</sup> Ibid. at paras. 138 and 139.

<sup>62</sup> Judgment of 27 November 2014.

117. In the instant case the Court considers that it is necessary, in view of its finding of a violation of Article 3 of the Convention, to indicate individual measures for the execution of this judgment. It has found a violation of that Article on account of the failure of the Russian authorities to provide the applicant, a seriously ill-person whose life is at risk, with the requisite level of medical care.

118. The Court considers that in order to redress the effects of the breach of the applicant's rights, the authorities should admit him to a specialised medical facility where he would remain under constant medical supervision and would be provided with adequate medical services corresponding to his needs. Nothing in this judgment should be seen as an obstacle to his placement in a specialised prison medical facility if it is established that the facility can guarantee the requisite level of medical supervision and care.<sup>63</sup>

So here, again, the nature of the serious breach was such that the Court considered specific individual measures were required to remedy that violation.

A much rarer example of the contemporary jurisprudence revealing the Court using the nature of the violation reason to justify the indication of general measures occurred in *Benzer and Others v Turkey*<sup>64</sup>. In that case 41 individuals complained that the bombing of their villages by Turkish military aircraft, as part of a long-running campaign against the PKK (Kurdistan Workers Party), caused the deaths of 34 of the applicants' close relatives and the injuring of some of the applicants. The Chamber, unanimously, found, *inter alia*, unlawful killings of some of the applicants' relatives in breach of Article 2 and a procedural failure of that Article as the authorities had not conducted an effective investigation into those deaths. Alongside ordering the payment of non-pecuniary damages to specified applicants (amounting to six-figure sums for some), the Chamber repeated its commonly used phraseology about the nature of the violation leaving no choice of remedial measure.<sup>65</sup> The Chamber then stated:

Having regard to the fact that the investigation file is still open at the national level, and having further regard to the documents in its possession, the Court considers it inevitable that new investigatory steps should be taken under the supervision of the Committee of Ministers. In particular, the steps to be taken by the national authorities in order to prevent impunity should include the carrying out of an effective criminal investigation, with the help of the flight log [a photocopy of the flight log of identified Turkish Air Force fighter jets operations on the day of the bombings supplied to the Court by the applicants], with a view to identifying and punishing those responsible for the bombing of the applicants' two villages.<sup>66</sup>

The Committee of Ministers characterised this as an indication of general measures by the Court<sup>67</sup>, presumably this was because of the scale of the investigation obligations required of Turkey given the number of successful applicants in the proceedings.

The fourth reason we can identify in the contemporary case-law for the Court indicating remedial measures is the Court's belief that to do so will assist the respondent State in complying with its obligations under Article 46. We can see the Grand Chamber deploying this reason in the tragic case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*<sup>68</sup>. The applicant non-governmental organisation brought the case on behalf of the deceased applicant who had died in a neuropsychiatric hospital

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<sup>63</sup> Ibid.

<sup>64</sup> Judgment of 12 November 2013.

<sup>65</sup> Ibid. at para. 217.

<sup>66</sup> Ibid. at para. 219.

<sup>67</sup> *Supra* n.33 at p.93.

<sup>68</sup> Judgment of 17 July 2014.

at the age of nineteen. He had been diagnosed as HIV positive at the age of five and he also suffered from a very low IQ. In addition Valentin had been brought-up in an orphanage. At eighteen the local Child Protection Panel determined that given his age he should be discharged from local authority care and transferred to a neuropsychiatric hospital (contrary to the recommendations of his social worker). Valentin's physical and mental health deteriorated over the ensuing months and he died a few months later. The Grand Chamber, unanimously, concluded that Romania had violated both the substantive and procedural aspects of Article 2 of the ECHR in its treatment of Valentin. After noting that:

...with a view to assisting the respondent State to fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist...

...the Court recommends that the respondent State envisage the necessary general measures to ensure that mentally disabled persons in a situation comparable to that of Mr Câmpeanu, are afforded independent representation, enabling them to have Convention complaints relating to their health and treatment examined before a court or other independent body...<sup>69</sup>

So the Grand Chamber was indicating the types of general remedial measures that were necessary for Romania to take in order to comply with its Article 46 duty to abide by final judgments to which it was a party.

A united Chamber used this reason to indicate specific legislative reform that was necessary in *Aitman v Turkey*<sup>70</sup>. The applicant was travelling down a hill in a lorry when gendarmes ordered the vehicle to be stopped, as they suspected it was being used in the smuggling of fuel. The applicant claimed he shouted to the gendarmes that the brakes had failed and the lorry could not be halted. However, after firing warning shots in the air the gendarmes shot the applicant in the hip. Section 39 of the Regulation on the Duties and Powers of the Gendarmerie provided that those officers could use their firearms when smugglers disobeyed an order to stop and ignored a warning shot being fired in the air. The Chamber upheld the applicant's claims that he had suffered a breach of both the substantive and procedural limbs of Article 2 of the ECHR due to the actions of the gendarmes and a lack of independence in the investigation into the shooting. After using similar language as in *Valentin*, above, to explain why it was indicating remedial measures the Chamber stated that:

...in order to execute the present judgment, in accordance with its obligations under Article 46 of the Convention, the respondent State will have to make the relevant legislative amendments to prevent similar violations in the future. To that end, the Court considers that section 39 of the Regulation on the Powers and Duties of the Gendarmerie should be amended to ensure that the relevant provisions are in compliance with Article 22 of Law no. 5607 on the Prevention of Smuggling [this provides that officers may only use firearms in self-defence when a suspect uses firearms].<sup>71</sup>

Hence in this case the Court was being much more precise in detailing what general remedial measures needed to be enacted.

It is also worth noting that in some cases where the Court indicates remedial measures parties to the proceedings have made express pleas for the Court to adopt such a course of action. For example in *McCaughey*<sup>72</sup>, the Committee on the Administration of Justice (a non-governmental Northern Irish human rights organization), which had been given permission to submit third-party comments,

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<sup>69</sup> Ibid. at paras. 159 and 161.

<sup>70</sup> Judgment of 23 September 2014.

<sup>71</sup> Ibid. at para. 47.

<sup>72</sup> *Supra* n. 48.

“proposed” that the Court make an Article 46 ruling.<sup>73</sup> As we have already discussed above, the Court went on to provide such an indication in the operative part of its judgment.

#### 4. Operative part indications

The next issue for us to consider is the reasons we can discern for the Court deciding that it is going to indicate remedial measures in the operative part of its judgment. We can identify two sets of reasons for operative part indications in the contemporary jurisprudence. Firstly, in several cases, the Court refers to a combination of the nature of the Convention violation leaving no real choice regarding the individual remedial measures necessary to remedy the breach and the urgent need to end the breach. For example in *Grande Stevens and Others v Italy*<sup>74</sup>, the applicants successfully complained, *inter alia*, that their ongoing prosecutions in respect of allegedly disseminating false information regarding the financing of shareholdings in the FIAT automotive company, after they had been fined, millions of euros, by the National Companies and Stock Exchange Commission (CNSOB) for market manipulation concerning the same activities violated Article 4 of Protocol No 7 (right not to be tried or punished twice) to the ECHR. The Chamber, unanimously, determined that:

...as regards individual measures, the Court considers that in the present case the nature of the violation found is such as to leave no real choice as to the measures required to remedy it.

237. In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 4 of Protocol No. 7, the Court considers that the respondent State must ensure that the new set of criminal proceedings brought against the applicants in violation of that provision and which, according to the most recent information received, are still pending, are closed as rapidly as possible and without adverse consequences for the applicants...<sup>75</sup>

The Chamber subsequently included the latter instruction in its operative provisions.<sup>76</sup> A differently composed Chamber had used similar language in the earlier case of *Oleksandr Volkov*<sup>77</sup>. The united Chamber ordered that “Ukraine shall secure the applicant’s reinstatement to the post of judge of the Supreme Court at the earliest possible date.”<sup>78</sup>

The combination of the nature of the violation and the urgency of ending the breach were cited by the Grand Chamber as the basis for its operative part indication in *Del Rio Prada*<sup>79</sup>. A fascinating aspect of that ruling was Judge Mahoney’s dissent against the operative part indication.<sup>80</sup> He did not believe that the breach of Article 5 in the

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<sup>73</sup> *Ibid.* at para. 143.

<sup>74</sup> Judgment of 4 March 2014.

<sup>75</sup> *Ibid.* at paras 236 and 237.

<sup>76</sup> *Ibid.* at point 6.

<sup>77</sup> *Supra* n. 44.

<sup>78</sup> At point 9. The Ukrainian Parliament (Verkhovna Rada) took nearly two years to vote on Judge Volkov’s reinstatement. He resumed sitting in the Supreme Court during February 2015. For his account of the background to his dismissal and resort to Strasbourg see: O. Volkov, “Judicial reform in Ukraine”, *European Human Rights Advocacy Centre Bulletin* No.23/Summer 2015 at p. 3 (Middlesex University, London).

<sup>79</sup> *Supra* n. 59.

<sup>80</sup> *Ibid.* Partly Dissenting Opinion of Judge Mahoney.



applicant's case was sufficiently serious to justify the Court making such an order. For him the breach of her right to liberty, due to the lack of foreseeability of Spanish law governing the calculation of prisoner release dates, was not of the same magnitude as in the earlier classic operative part release indications ordered in *Assanidze*<sup>81</sup> and *Illascu and Others*<sup>82</sup>. This unusual dissent on an operative part indication highlights the gravity of the breach of the Convention is a key component in the Court's decision to give such an indication. The fact that the Spanish government secured the applicant's release from prison the day after the Grand Chamber delivered its judgment is a practical demonstration of the authority accorded to operative part indications.<sup>83</sup>

The second reason we can identify in the contemporary case-law for the Court specifying remedial measures in the operative part of its judgments is that the case discloses a systemic problem that needs to be resolved. For example in *Zorica Jovanovic v Serbia*<sup>84</sup>, the applicant complained that in 1983 her healthy newborn baby had been taken from her in a hospital and subsequently the authorities had informed her that the baby had died. The authorities failed to provide an adequate explanation of the fate of her baby and the body of the baby was never returned to the applicant and her family. From the early years of this century the Serbian media began to report on numerous similar experiences of other families. Many of these families believed that their babies had not in fact died, but had been passed on to other persons. In 2005 hundreds of parents who claimed that their babies had gone missing from Serbian hospitals during the last three decades of the twentieth century petitioned the Serbian Parliament for redress. During 2006 the Parliament published a report which, *inter alia*, concluded that there had been serious defects in the legislation and practices of the authorities in those years, these failing justified the parents' concerns about the fate of their babies and changes to legislation together with action by public authorities was necessary to provide the parents with redress. Four years later the Serbian Ombudsman issued a report finding, *inter alia*, that in previous times medical opinion was that parents should be relieved from the mental anguish of having to deal with the burial of their newborn babies, autopsy reports on such death were frequently inconclusive and of dubious accuracy and that the government's response since 2006 had been inadequate. Before the Court the applicant contended that the authorities continuing failure to provide her with information about the real fate of her son amounted to a breach of her right respect for her family life, guaranteed by Article 8 of the ECHR. The Chamber, unanimously, found a violation of that right due to the authorities' persistent failure to provide her with credible information as to what had happened to her baby. She was awarded 10,000 euros compensation for her non-pecuniary damage. Noting that the applicant had requested that Serbia be ordered to amend its legislation, the Court ruled that:

In view of the above, as well as the significant number of potential applicants, the respondent State must, within one year from the date on which the present judgment becomes final in accordance with Article 44 § 2 of the Convention, take all appropriate measures, preferably by means of a *lex specialis* ... to secure the establishment of a mechanism aimed at providing individual redress to all parents in a situation such as, or sufficiently similar to, the applicant's... This mechanism should be supervised by an independent body, with adequate powers, which would be capable of providing credible answers regarding the fate of each child and awarding adequate compensation as appropriate.<sup>85</sup>

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<sup>81</sup> Supra n.13.

<sup>82</sup> Supra n.17.

<sup>83</sup> "Spain releases Eta convict after European Court ruling", BBC News, 22 Oct. 2013.

<sup>84</sup> Judgment of 26 March 2013.

<sup>85</sup> *Ibid.* at para. 92.

The Chamber repeated this obligation in the operative part of its judgment<sup>86</sup> together with a decision that similar applications pending before the Court should be adjourned during the one year timeframe<sup>87</sup>. These operative part determinations by the Chamber reveal *Zorica Jovanovic* to be a paradigm example of what we have previously discussed have been referred to as “quasi-pilot judgments”<sup>88</sup>. This is because the Court identified a systemic problem in the respondent State, instructed that State to take specific general remedial measures and, within a defined period of time, the Court adjourned similar pending applications. The only differences from a formal pilot judgment were that the Court did not expressly invoke the pilot judgment procedure<sup>89</sup> nor formally so designate its judgment.

Other contemporary cases disclose that the Court may include general remedial directions in the operative part of its judgments when systemic defects have been found, but without the Court deciding to suspend the consideration of similar pending applications. An example was *Vlad and Others v Romania*<sup>90</sup>, in which the three applicants complained about excessive delays in their criminal and civil trials violating their right to reasonable speed in the determination of criminal charges and civil rights provided by Article 6(1) of the ECHR. The united Chamber upheld those complaints and after positively acknowledging legislative reforms enacted by the respondent State decided that:

However, in view of the extent of the recurrent problem at issue, and in the light of the identified weaknesses and shortcomings of the legal remedies indicated by the respondent State... consistent and long-term efforts, such as the adoption of further measures, must continue in order to achieve complete compliance with Articles 6, 13 and 46 of the Convention.<sup>91</sup>

In the operative part of its judgment the Chamber held that the violations were caused by the “malfunctioning” of Romanian legislation and practice<sup>92</sup> and directed the creation of a domestic compensatory remedy for those who had suffered from unreasonably lengthy judicial proceedings.<sup>93</sup> We may speculate that the Court did not adjourn other similar pending cases so as to maintain the pressure of future Strasbourg litigation on Romania to deal with its systemic judicial delay problems.<sup>94</sup>

In recent times the Court has also included individual remedial directions in the operative part of a judgment which dealt with a continuing systemic problem that had been subject to an earlier judgment containing both Article 46 and operative part indications. The underlying problem in *Duric and Others v Bosnia and Herzegovina*<sup>95</sup>, was

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<sup>86</sup> *Ibid.* at point 6.

<sup>87</sup> *Ibid.* at point 7.

<sup>88</sup> *Supra* n.26.

<sup>89</sup> As detailed in *supra* n.4.

<sup>90</sup> Judgment of 26 November 2013.

<sup>91</sup> *Ibid.* at para. 163.

<sup>92</sup> *Ibid.* at point 5.

<sup>93</sup> *Ibid.* at point 6.

<sup>94</sup> The Committee of Ministers characterised the judgment in *Vlad* as “support” for the Committee’s continuing role in supervising the execution of previous Romanian excessive delay cases: *supra* n.33 at p.90.

<sup>95</sup> Judgment of 20 January 2015.

the large number, over 10,000, of unenforced war damage judgments delivered by the domestic courts against the Republika Srpska (one of the two constituent entities of Bosnia and Herzegovina). The damages awarded in those judgments totalled about 75 million euros. In 2009 the Court had found breaches of Article 6(1) and Article 1 of Protocol No. 1 of the Convention in respect of fifteen applicants whose war damage judgments had not been enforced.<sup>96</sup> Having noted the scale of the problem, there were over 100 similar complaints pending before the Court, the Chamber invoked Article 46 to express the view that the respondent State should grant adequate redress to all those persons. Furthermore, the Chamber required, in the operative part of its judgment<sup>97</sup> the State to secure enforcement of the applicants' domestic war damages. Subsequently the domestic settlement plan for Republika Srpska war damage judgments had its time-frame extended from thirteen to twenty years. In *Duric*, where some of the applicants' domestic judgments had not been enforced for thirteen years, the Court applied Article 46 to express the view that the settlement plan should be amended to include "a more appropriate"<sup>98</sup> (*i.e.* shorter) time for payment. Additionally the operative part of the judgment ordered the respondent State to secure the enforcement of the applicant's domestic damages within three months.<sup>99</sup> So we may deduce that a State's repeated failure to resolve a wide-scale problem resulting in repetitive applications to the Court was the catalyst for the operative part indication of individual remedial measures involving the swift enforcement of long-overdue domestic judgments.

### **5. The legal foundations of indicated remedial measures**

The primary legal foundation of the Court indicating non-financial remedial measures is Article 46 of the ECHR. This is reflected in the Court's frequent inclusion of a sub-heading in relevant judgments entitled "Application of Article 46 of the Convention" after which the Court expresses its remedial indications. Furthermore, as we have discussed above, the Committee of Ministers has categorised these cases as "Article 46 judgments".<sup>100</sup> Judge Sicilianos has also identified other legal bases including Article 32 of the ECHR<sup>101</sup>. In his opinion, "it is important to highlight that Article 32 of the Convention constitutes a clear basis for the Court to decide whether or not to be involved in the execution of its own judgments and that the Court itself has repeatedly relied upon this provision in order to do so."<sup>102</sup> Looking beyond the text of the Convention he considers the "subsequent practice" in the application of the ECHR as another legal basis for the Court's remedial indications. Citing Article 31 of the Vienna Convention on the Law of Treaties he notes that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" is a factor which can be used to construe treaties. As, "it seems that no State Party to the Convention has ever supported the view- either before the Court or

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<sup>96</sup> *Colic and Others v Bosnia and Herzegovina*, Judgment of 10 November 2009.

<sup>97</sup> *Ibid.* at point 5.

<sup>98</sup> *Supra* n.95 at para.47.

<sup>99</sup> *Ibid.* at point 5.

<sup>100</sup> *Supra* n.26.

<sup>101</sup> This provides: "(1) The Jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47. (2) In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."

<sup>102</sup> *Supra* n.27 at p.257.

elsewhere- that the Court lacks jurisdiction to indicate execution measures in general. Taking into consideration the number of the relevant judgments of the Court, the general attitude of the contracting parties denotes their acquiescence in this respect."<sup>103</sup> Therefore he concludes that there is a "solid legal basis"<sup>104</sup> for the Court to indicate remedial measures but he cautions that this power is complementary to the primary responsibility of the Committee of Ministers regarding the supervision of the execution of Court judgments.

## **6. Implications of the Court indicating remedial measures**

The consequences of the Court indicating non-financial remedial measures on the Committee of Ministers' supervision of the execution of such judgments and the reactions of respondent States are topics worthy of a separate study. Nevertheless some provisional conclusions can be derived from this piece of research. It appears highly likely that when the Court issues an Article 46 judgment the Committee of Ministers will subsequently decide to subject that judgment to the more intense "enhanced procedure" of supervision.<sup>105</sup> This exceptional procedure is reserved for cases involving one or more of the following criteria: "-judgments requiring urgent individual measures;- pilot judgments;- judgments disclosing *major* structural and/or complex problems as identified by the Court and/or the Committee of Ministers;- interstate cases." [italics/bold as in original text]<sup>106</sup> The Committee of Ministers decided to subject all but one of the seventeen Article 46 judgments that became final in 2013 to the enhanced procedure.<sup>107</sup> Similarly all thirteen of the Article 46 judgments that became final in 2015 were placed under enhanced supervision by the Committee of Ministers.<sup>108</sup> Inexplicably the Committee of Ministers had only placed ten (out of twenty-three) Article 46 judgments that became final in 2014 on the enhanced procedure by the time of the publication of the Committee's annual supervisory report.<sup>109</sup> However, overall during our survey period the vast majority of Article 46 judgments were accorded enhanced supervision by the Committee of Ministers.

Where the Court indicates a non-financial remedy in the operative part of its judgment our study reveals that the Committee of Ministers and/or the respondent State may be able to secure/provide a satisfactory remedy more swiftly than where the Article 46 indication is contained in the text of the judgment. The most dramatic example of that process in action was in *Del Rio Prada* where, as we have already noted, the Government obtained the release of the applicant from prison the day after the Grand Chamber delivered its judgment.<sup>110</sup> The Committee of Ministers gained Hungarian police

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<sup>103</sup> Ibid. at p.260.

<sup>104</sup> Ibid.

<sup>105</sup> For an explanation of the background and requirements of this procedure see Mowbray supra n.2 at pp.58-61.

<sup>106</sup> Ministers' Deputies Information Documents, *Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan*, CM/Inf/DH (2010) 45 Final, para. 10, Strasbourg, 7 December 2010.

<sup>107</sup> Supra n.28 at p.68.

<sup>108</sup> Supra n.34 at pp.116-120.

<sup>109</sup> Supra n.33 at pp.86-93.

<sup>110</sup> Supra n.83.

protection for the vulnerable applicants in *R.R. and Others v Hungary*<sup>111</sup>, within about eighteen months of the Court so indicating (in the operative part of its judgment) that adequate protection should be provided to the mother and her children. However, the Committee of Ministers' Deputies had found it necessary to express its "concern", at a supervisory meeting in September 2014, that such protection had not been provided more than a year after the judgment became final.<sup>112</sup> After two years and four meetings of the Ministers' Deputies<sup>113</sup>, during which the Deputies had noted the "unconditional obligation" on Ukraine to reinstate Judge Oleksandr Volkov to his position on the Ukrainian Supreme Court and the Deputies had issued an Interim Resolution calling for his reinstatement<sup>114</sup>, he was restored to his judicial office (a few weeks after the publication of the Interim Resolution).<sup>115</sup> The other three judgments containing operative part indications that became final during 2013 were still pending before the Minister's Deputies in November 2016.<sup>116</sup>

By way of comparison if we examine the progress in achieving remedies where the Court indicated non-financial remedies in the text of judgments becoming final during 2013 we discover that only one<sup>117</sup> (out of eleven) case had been closed by the Committee of Ministers (as the latter were satisfied that all individual and general remedial measures had been undertaken by the respondent State) by the end of September 2016.<sup>118</sup> The ten remaining cases were still pending before the Committee of Ministers, but one<sup>119</sup> had been transferred from enhanced to standard supervision due to progress in the provision of general measures by the respondent State.

## 7. Conclusions

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<sup>111</sup> Judgment of 4 December 2012.

<sup>112</sup> Department for the Execution of Judgments of the European Court of Human Rights, *Decisions Adopted Compilation 2014-2016*, p. 157, Strasbourg, November 2016.

<sup>113</sup> *Ibid.* at pp.313-316.

<sup>114</sup> Interim Resolution CM/ResDH (2014)275, "Recalling also the urgency of adopting individual measures and that the Court held in its judgment that Ukraine should secure the applicant's reinstatement in the post of judge of the Supreme Court at the earliest possible date; Expressing grave concern that despite the efforts deployed by the Ukrainian authorities to ensure, by way of a parliamentary resolution, the applicant's reinstatement as required by the Convention, such a resolution has still not been adopted;... CALLS UPON the Ukrainian authorities to take without any further delay all necessary measures to secure the applicant's reinstatement as a judge of the Supreme Court.", Strasbourg, 4 December 2014.

<sup>115</sup> *Supra* n.78.

<sup>116</sup> *Zorica Jovanovic supra* n.84, *McCaughey supra* n. 48 and *Youth Initiative for Human Rights v Serbia* Judgment of 25 June 2013; according to a search of the Department for the Execution of Judgments' "pending cases" database on 8<sup>th</sup> November 2016.

<sup>117</sup> *Suso Musa supra* n. 51.

<sup>118</sup> *Supra* n.112 at pp. 182-3.

<sup>119</sup> *Gulay Cetin v Turkey*, Judgment of 5 March 2013, by decision of the Ministers' Deputies in March 2016 as certain legislative changes had been enacted regarding the release of prisoners on medical grounds: *Supra* n.112 at p. 288.

We have discovered how in recent times the Court has indicated non-financial remedies in nearly six times more “Article 46 judgment” cases than in formal pilot judgment cases (there were 53 final Article 46 judgments delivered in the three years 2013-2015 compared with 9 final pilot judgments). Surprisingly we have also ascertained that during this time the Court has been indicating general remedial measures far more frequently than individual measures (general measures were indicated in 33 final judgments between 2013-2015 compared with 10 final judgments indicating individual measures). This may be seen as a reflection of Professor Leach’s description of Article 46 judgments as decisions which “highlight systemic or structural problems which have been the source of repeated Convention violations.”<sup>120</sup> Indeed, as our analysis has shown, the leading reasons underlying the Court’s willingness to indicate non-financial remedial measures are that the case discloses a systemic problem and/or the violation(s) found by the Court may generate significant numbers of similar complaints in the future. These systemic defects encompassed a range of Convention Articles, including Article 2<sup>121</sup>, Article 3<sup>122</sup>, Article 5<sup>123</sup>, Article 6<sup>124</sup> and Article 1 of Protocol No.1<sup>125</sup> Consequently we may postulate that the issuing of Article 46 judgments has been one of the strategies adopted by the Court to respond to the persistent problem of repetitive/clone complaints which account for about half of the backlog of pending cases before the Court.<sup>126</sup>

Other reasons justifying the Court indicating remedial measures we discovered in the case law were the nature of the breach of ECHR rights, for example domestic authorities failing to effectively investigate civilian deaths (allegedly caused by military bombing) violating the implied procedural limb of Article 2<sup>127</sup>, and to help respondent States comply with their remedial obligations under Article 46 of the Convention, such as securing independent representation to safeguard the well-being of mentally disabled persons<sup>128</sup>. Again these judgments often dealt with violations that were of a wide-scale and needed general remedial measures to redress the breaches of the Convention found by the Court. Though our research has also revealed that the Court has been willing to indicate general remedial measures in cases falling within the lower importance categories of judgments (24 judgments classified as of Levels 2 and 3 compared to 9 judgments in Case Reports and Level 1).

Turning to the most powerful non-financial remedial judgments where the Court delivered its instructions in the operative part of the judgment we have seen that individual measures have been prescribed far more often than general measures (6

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<sup>120</sup> P. Leach, “No longer offering fine mantras to a parched child? The European Court’s developing approach to remedies” in A. Follesdal, B. Peters & G. Ulfstein eds., *Constituting Europe* (2013) at p.166.

<sup>121</sup> *McCaughey and Others*, supra n.48.

<sup>122</sup> *Harakchiev and Tolumov*, supra n.56.

<sup>123</sup> *Suso Musa* supra n.51.

<sup>124</sup> *Barta and Drajko*, supra n.46.

<sup>125</sup> *Statileo*, supra n.42.

<sup>126</sup> President Raimondi identified the problem of clone cases (amounting to approximately 30,500 pending cases) as one of the challenges facing the current Court: Forward to the Court’s Annual Report 2015, January 2016, Strasbourg.

<sup>127</sup> *Benzer and Others*, supra n.64.

<sup>128</sup> *Valentin Campeanu*, supra n. 68.

judgments specified individual measures and two judgments elaborated general measures). Also operative part remedial indications were primarily found in high importance level cases (six operative part judgments were classified as Case Reports or Level 1 cases, while three operative part judgments were Level 2 cases). Given the severity of the breaches and the significance of the matters raised in many of these cases, including the unfair and biased dismissal of a Supreme Court judge<sup>129</sup>, the failure of public authorities over many years to provide a mother with credible information regarding the fate of her baby<sup>130</sup> and the launching of duplicate criminal proceedings against a defendant<sup>131</sup>, it is clear why they have been accorded high importance. A striking feature is that recent years have witnessed a marked decline in the numbers of these rare judgments (from 6 in 2013 to one in 2015).

In 2016 the Committee of Ministers' expert Steering Committee for Human Rights expressed a frosty attitude towards the Court providing indications of individual and general remedial measures in non-pilot judgment cases. "The CDDH does not support a regular recourse to this practice, beyond these exceptional cases, where the nature of the violation found may be such as to leave no real choice as to the measure(s), in particular individual ones, required to remedy it."<sup>132</sup> This view is at odds with the positive comments previously expressed by the Committee of Ministers regarding Article 46 judgments in its annual supervisory report.<sup>133</sup> One wonders whether the 2016 expert's report marks the beginning of a new less supportive attitude by State authorities at Strasbourg towards the Court providing these types of remedial indications?

Whilst it is indisputable that Article 46 judgments are a tiny proportion of the Court's judgments, as the table below demonstrates, they are very significant as the Court believes the circumstances of the particular case require the judicial indication of non-financial remedial measures.

Proportion of Article 46 judgments

Year	Total number of judgments delivered (a) <sup>134</sup>	Number of Article 46 judgments (b)	(b) as a percentage of (a)
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<sup>129</sup> *Oleksandr Volkov*, supra n.44.

<sup>130</sup> *Zorica Jovanovic*, supra n.84.

<sup>131</sup> *Grande Stevens and Others*, supra n.74.

<sup>132</sup> Steering Committee for Human Rights (CDDH), *Report on the longer-term future of the system of the ECHR*, CM(2015)176-add1final, Strasbourg, 3 February 2016, at para.145.

<sup>133</sup> Supra n.32.

<sup>134</sup> Note, not all of the judgments delivered each calendar year became final in that year.

2013	916 <sup>135</sup>	17	1.85%
2014	896 <sup>136</sup>	23	2.56%
2015	823 <sup>137</sup>	13	1.57%

The Court should be supported in exercising this limited remedial jurisdiction under the Convention, regarding the indication of individual and/or general measures, where any of the grounds identified in the jurisprudence above necessitate such indications for the benefit of the applicant (or other persons in a similar situation) and/or the respondent State. We have seen that the Court has been extremely cautious in using this power and the primary responsibility of the Committee of Ministers to supervise the execution of Court judgments has not been usurped by excessive judicial remedial activism. Nevertheless it would enhance transparency, for the benefit of all the stakeholders involved in litigation at Strasbourg, if the Court provided greater clarity in explaining why it was using Article 46 to deliver a quasi-pilot judgment (when a systemic defect was identified in national law/domestic procedures, general remedial measures were indicated and the determination of similar applications suspended) rather than invoking the formal pilot judgment procedure in all such cases.

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<sup>135</sup> *ECtHR Annual Report 2013*, January 2014, Strasbourg, p.203.

<sup>136</sup> *ECtHR Annual Report 2014*, January 2015, Strasbourg, p.175.

<sup>137</sup> *ECtHR Annual Report 2015*, January 2016, Strasbourg, p.199.