Responding to Legitimacy Challenges:
Opportunities and Choices for the European Court of Human Rights

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The developing remedial practice of the European Court of Human Rights and its implications for the legitimacy of the ECHR system

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1. Introduction

Since the mid-2000s, the European Court of Human Rights (ECtHR) has moved away from its traditional, strictly declaratory approach to remedies by sometimes being specific, or even prescriptive,[1] in the non-monetary individual measures and/or general measures indicated. The introduction of the pilot judgment procedure in 2004 was accompanied by an increased use of remedial indications under Article 46, out of concern to handle repetitive cases more efficiently and to aid states in discharging their obligations.[2] This paper discusses the implications of this still evolving practice for the legitimacy of the Court and the Convention system. It is based on empirical research involving (i) interviews and a seminar with ECtHR Judges,[3] Council of Europe officials and a range of domestic interlocutors;[4] and (ii) a statistical analysis of 170 'Article 46' and 29 pilot judgments issued from 2004-2016. It focuses on the Court's practice (the judgment phase) and the impact of that practice on implementation (the post-judgment phase) since both may affect legitimacy. The paper argues that the Court does not have a legitimacy deficit in this area; on the contrary, since both state and non-state actors largely vindicate its current, cautious practice—and there is enthusiasm for *more* specificity and prescriptiveness among those responsible for execution within the Committee of Ministers—the Court enjoys greater political space for the incremental development of a more proactive remedial approach than it might suppose.

2. What is the link between the Court's remedial practice and legitimacy?

We understand legitimacy in both its *social* dimension (subjective beliefs or perceptions about an institution) and its *normative* dimension (assessment of an institution's performance against certain independently-derived standards).[5] For a supranational human rights body, such normative standards include whether it has the legal authority it claims and whether its decisions accord with the principle of legality; for example,

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[1] By *specificity*, we refer to the degree of detail contained in the indication of 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* measure is required and possibly also *by when* it should be achieved. *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—of varying degrees of specificity—in the operative part. At the same time, we note the judicial disagreement about the legal effect of inserting measures in the operative part (see n 12).

[2] See, e.g., CM Resolution Res(2004)3 on judgments revealing an underlying systemic problem.

[3] Three judges were interviewed and a further five participated in a public seminar in Strasbourg in November 2017.

[4] Human Rights Law Implementation Project, funded by the Economic and Social Research Council (ES/M008819/1). In total, around 15 interviews were conducted in Strasbourg and a further 50 in Belgium, the Czech Republic and Georgia. Domestic interlocutors included government agents; MPs; judicial figures; litigators; and civil society actors.

[5] Cali, Koch and Bruch (2013) 'The Social Legitimacy of Human Rights Courts: A Grounded Interpretivist Theory of the Elite Accounts of the Legitimacy of the European Court of Human Rights', 35(4) *Human Rights Quarterly* 955.

whether it is deemed to have interpreted a treaty unduly creatively. Following Çalı, Koch and Bruch, we view the social and normative dimensions as being interconnected; thus, legitimacy is assessed by 'capturing what normative expectations actors have of an institution and how actors assess whether such expectations are met'.[6] This 'legitimacy-in-context'[7] approach recognises the multiple and sometimes contradictory accounts of legitimacy that may be espoused about the same institution. Thus, in a pluralist system such as the ECHR, legitimacy emerges 'in the interplay between international human rights institutions, the domestic institutions of states, and individuals and groups'.[8] This approach recognises, too, that the ECtHR, rooted as it is in the principle of subsidiarity, *influences* rather than *determines* what happens at the national level.

In respect of the Court's remedial practice, two questions arise: first, what expectations exist of what a legitimacy-enhancing remedial approach looks like, and secondly, is the Court deemed to have met them?

In the view of our interlocutors, the first question is best captured in terms of two sometimes conflicting imperatives: on the one hand, the need for *pragmatism*—permitting the Court to adopt a case-by-case approach to maximise the chances of successful implementation in the interests of actual and potential victims—and, on the other hand, the need to achieve a degree of *coherence, consistency* and *transparency* in its case law. Interviewees were also alert to the need to maintain the *institutional balance* created by Article 46 of the Convention between the Court and the Committee of Ministers (CM). Domestic interlocutors (principally, government agents) placed great value on dialogue with CM officials during the post-judgment phase as a means of designing remedies that are well-attuned to the domestic context, and were concerned that this process should not be undermined by an ill-conceived or unduly prescriptive approach by the Court.

Yet the risk of the Court 'getting it wrong' was framed in hypothetical terms or seen as confined to isolated examples. Thus, in respect of the second question, our research suggests that domestic actors are broadly satisfied with the Court's current remedial practice. Certainly, there is no discernible *pattern* of pushback by states against directiveness on the Court's part,[9] and nor have discretion-reducing remedial indications featured in political discourse about its legitimacy. Strikingly, no high-level declaration, from Interlaken in 2010 onwards, refers 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. Further, the 2016 CDDH report on the longer-term future of the Convention system did not imply any criticism of the Court's remedial approach, whilst rejecting a proposal for more regular, formalised recourse to the indication of general measures.[10] For their part, non-state actors whom we interviewed, while generally welcoming specific or prescriptive indications as a means of exerting leverage, appear well aware of the constraints that the Court operates under vis-à-vis the principle of subsidiarity.

In sum, the Court's occasionally specific and/or prescriptive approach has simply not become a 'political' issue unlike, say, its dynamic interpretation of the Convention, which has frequently provoked accusations of judicial overreach among certain state actors. This may be partly because few domestic actors beyond government agents have specialised knowledge of the more nuanced or technical aspects of the Court's judgments.

[6] Ibid, 960.

[7] Beetham, *The Legitimation of Power*, 2nd edition (Palgrave Macmillan, 2013) 38.

[8] Schaffer, Føllesdal and Ulfstein, 'International Human Rights and the Challenge of Legitimacy' in Føllesdal, Schaffer and Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge University Press, 2013) 11.

[9] A finding echoed by Sicilianos (2014) 'The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments under Article 46 ECHR' 32(3) *Netherlands Quarterly of Human Rights* at 260.

[10] Steering Committee for Human Rights, *The longer-term future of the system of the European Convention on Human Rights*, June 2016, para 163.

3. What is the Court's remedial practice to date?

Our analysis of Article 46 and pilot judgments found, *inter alia*, that:

- judgments specifying remedial measures remain a **small fraction of the Court's case law** and their use, having grown steadily from 2004-2009, has—contrary to some perceptions—**not increased in recent years** but rather fluctuates annually (Annex, Charts 1a and 1b);
- the Court indicates **general measures far more often than individual measures** in both Article 46 and pilot judgments (Annex, Charts 2a and 2b);
- 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 in the main body of Article 46 judgments (Annex, Chart 3); and
- 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—or, conversely, has **disproportionately escaped** the use of such judgments; nor are there any **'rogue' Sections of the Court** that issue either a disproportionately high or low number of pilot or Article 46 judgments (Annex, Table 1).

The statistics evince a current remedial practice which is generally cautious, pragmatic and reasonably consistent in terms of how states are treated. These findings deserve to be highlighted, since they counter any concern that the Court's use of specific and/or prescriptive judgments has grown out of proportion, is incoherent, or operates on the basis of double standards, each of which could erode its legitimacy.

Yet, beneath the statistics, there are areas of disagreement or inconsistency. Indeed, there is open dissension as to the extent of the Court's remedial competence: while Judge Pinto de Albuquerque challenges the oft-repeated axiom that its judgments are 'essentially declaratory in nature',[11] other Judges argue that 'the Court is invested with *no* competence, *of any kind*, in the field of the execution'.[12] Such disagreement extends to the legal effect of indicating remedial measures in the operative part of a judgment.[13] There are also inconsistencies as regards the invocation of Article 46, there being a blurred line between judgments containing indications under that provision and purely 'diagnostic' judgments, which elucidate the root cause of a violation without going so far as to indicate a remedy. Further, 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.[14]

The case of *Oleksandr Volkov v Ukraine* is striking for the way it has been differently evaluated by various actors. One Judge ventured that the Court 'went too far'[15] in its use of the operative part to order Mr Volkov's reinstatement to the Supreme Court, while an Execution Department official described it as 'a success story' from the perspective of implementation.[16] These contrasting assessments illustrate how the Court's still evolving nature remedial practice, driven by the imperative to aid execution, is open to interpretation based as much upon its (perceived) efficacy as its conformity with a normative desire for consistency.

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[11] *Moreira Ferreira v Portugal (No. 2)*, Application No 19867/12, 11 July 2017 (Grand Chamber), Dissenting Opinion of Judge Pinto de Albuquerque joined by six others, para 3.

[12] Ibid, Joint Dissenting Opinion of Judge Raimondi and six others, para 4 (emphasis added).

[13] For Judge Spano, recommendations have only 'the status of *obiter dicta*, in the form of guidance for the execution process'; see Presentation by Judge Robert Spano, Seminar on the Evolving Remedial Practice of the ECtHR, Strasbourg, 8 November 2017, 2. Conversely, for Judge Pinto de Albuquerque, 'obligations imposed in the operative part and those included only in the reasoning ... have the same legal force'; supra n 10, para 17.

[14] Compare, e.g., *Del Río Prada v Spain*, Application No 42750/09, 21 October 2013 (Grand Chamber) and *Mammadov v Azerbaijan,* Application No 15172/13, 22 May 2014.

[15] Interview, 23 May 2017.

[16] Interview, 28 June 2017.

4. Why has the Court's remedial practice developed as it has?

Our interlocutors characterised the Court's remedial approach as being in flux, or, as a Registry official opined, 'a learning process for everybody—states, Court and Committee of Ministers'.[17] One Judge ventured that its remedial practice was 'haphazard', adding that 'we are, on a case-by-case basis, looking into the possibilities of saying something more than simply declaring a violation'.[18] This has sometimes involved considerable creativity as to the nature of the remedies indicated.[19] What judicial considerations underpin this evolving practice?

What we have coined 'judicial pragmatism' manifests itself in an acute awareness on the part of the Judges and Registry officials that the effectiveness—and hence legitimacy—of the Convention system depends on states acquiescing to the Court's authority to indicate remedial measures. Judges are mindful of the negative repercussions of non-implementation of a pilot or Article 46 judgment, given that the heightened scrutiny attached to them risks rendering any failure—or outright refusal—to implement more visible. Recognising that it is futile to order remedies which will foreseeably not be executed, the Court will thus assess the likelihood of good faith engagement by the state and vary its use of the pilot judgment procedure and Article 46 accordingly. While such pragmatism creates a risk of appeasement, our interlocutors ventured that it had not, in fact, led the Court to be unduly accommodating of uncooperative states; rather, the Court weighs up, case by case, the likely outcome of indicating remedial indications, or refraining from (or deferring) doing so.

Judges and Registry officials with were also conscious that by specifying remedies, especially general measures, the Court is straying into policy-based analysis requiring a contextualised understanding of the legal and political environment in the respondent state. This potential limitation is compounded by their distance, both temporally and geographically, from the facts at the origin of an application, especially in the absence of any reference to remedial measures in the pleadings. Any resulting legitimacy deficit, however, is offset by the presence of national Judges, whose inside view was deemed by our interlocutors to be essential to help the Court gauge the feasibility of proposed remedial measures.

A further consideration which informs Judges' strategic thinking is a concern to respect the institutional balance between the Court and the CM—an intricate balance, as the case of *Burmych*[20] demonstrates. This concern cuts in two directions: the Court is anxious to protect judicial independence by avoiding any 'backdoor discussions' with the CM on specific cases during the judgment phase, 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.

Yet these caution-inducing factors are offset by Judges' developing sense of responsibility to address problems of non-implementation and uphold the interests of victims by way of specificity and/or prescriptiveness, fostered by encouragement from the Execution Department.

Judges are aware that by heightening scrutiny—especially in conjunction with the enhanced supervision procedure—specificity and prescriptiveness may prevent states from engaging in obfuscation or proposing unduly narrow or minimalistic remedies. Such an approach, in turn, permits other states to apply pressure during DH meetings. Further, specificity and prescriptiveness are seen by Strasbourg actors as providing constructive solutions to problems that are common to several states.[21] To these benefits should be added

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[17] Interview, 19 April 2017.

[18] Interview, 13 June 2017.

[19] Judges' readiness to innovate is evident in the stipulation that Lithuania, which had hosted CIA detention sites, should 'make further representations' to the United States—a non-Council of Europe state—to remove or limit the effects of multiple violations on the applicant; see *Abu Zubaydah v Lithuania* Application No 46454/11, 31 May 2018, para 681.

[20] *Burmych and Others v Ukraine* Application Nos 46852/13 et al., Strike Out, 12 October 2017 (Grand Chamber).

[21] For example, a former Execution Department official had witnessed in 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*

opportunities for pro-implementation actors (both state and non-state) to use greater specificity or prescriptiveness to exert more pressure for implementation domestically. Indeed, the Court's increased sensitivity to execution matters extends to an explicit awareness of the need—even as early as the judgment phase— to identify 'allies' in the respondent state and enhance their domestic negotiating power.

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. This interaction takes various forms including: increasing staff mobility between the Registry and the Execution Department; the training of Registry officials about how the drafting of a judgment may affect its implementation; meetings between senior officials on the CM side and Registrars and Sections of the Court; and an intensified flow of information on execution matters, particularly by means of the HUDOC-EXEC database. These developments appear to signal a new phase in the relationship between the Court and the CM—one in which those responsible for execution are sending signals as to the perceived effectiveness of well-designed remedial indications. These signals have clearly penetrated the walls of the Human Rights Building; as one Judge put it, 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'.[22]

5. Looking forward: implications for Strasbourg and domestic actors

To reiterate, there is no evidence that the Court's remedial practice has engendered a legitimacy problem. Indeed, becoming *less* specific and prescriptive arguably poses just as much risk of eroding the Court's legitimacy as becoming *more* so. At the same time, legitimacy is not an issue for the Court alone; rather, appraising its remedial practice entails an assessment of how effectively all relevant actors discharge their shared responsibilities for implementation. What, then, are the implications of this discussion for Strasbourg as well as state- and non-state actors?

From the perspective of the **Court**, we strongly discourage a return to the practice of issuing purely declaratory judgments, as some Judges have mooted.[23] Such a step would be to the detriment of actual and potential victims, given the benefits of well-judged remedial indications to the execution process identified above. Moreover, such a regressive development would be out of step with expectations both from the CM and from many state and non-state actors—and may indeed be misinterpreted as an admission that the Court's occasionally specific and prescriptive approach has failed, a conclusion that is not supported by the evidence.

The question then arises as to how problematic a degree of instability is in the Court's still developing remedial practice. Our research suggests that actors in Strasbourg, and notably at the ECtHR, appear to be *more* concerned about (actual or hypothetical) inconsistency than many domestic actors are. Yet government agents *were* said to be aware of contradictions, creating a risk that recalcitrant actors might, say, use the absence of remedial indications, or vagaries in terminology, to frustrate implementation. We concur, therefore, with a Judge who ventured that the Court's 'already rich' case law on remedies would benefit from consolidation.[24] This requires Judges to find common ground on contentious areas. In addition, we submit that Court should strive for transparency by clarifying wherever possible *why* it is taking a specific remedial approach, especially where it is departing from the practice in an earlier, similar case.

There is a concomitant risk, however, that consolidation of this kind may constrain Judges' ability to act strategically, leading our interlocutors, both in Strasbourg and at state level, to be extremely wary about any attempt to codify the Court's remedial practice. In particular, they eschewed the idea of reforming the

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v Hungary (Applications Nos 14097/12 et al., 10 March 2015), which referred to the detailed remedial indications in the pilot judgment in *Torreggiani and Others v Italy*, Applications Nos 43517/09 et al., 8 January 2013.

[22] Interview, 13 June 2017.

[23] Supra n 11.

[24] Interview, 29 June 2017.

Convention itself, since to do so would open a Pandora's box. Moreover, such reform was viewed as unnecessary, since the Court's authority in this area has not been challenged.

There was reluctance, too, to reform the Rules of Court, save for one proposal—endorsed by the Judges we interviewed—to institutionalise a process whereby the parties to a case would be systematically invited to make submissions on the matter of remedies, in order to better inform the Court's discussions under Article 46.[25] The benefits of such a practice may go further still if it were to encourage **states** to think more proactively about implementation even while a case is pending. Likewise, **litigators** could engage with the implementation process more actively than many presently do, both domestically and in Strasbourg. 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 **NGOs and National Human Rights Institutions** to consider this dimension not only in their briefings to DH meetings,[26] and any submissions to the CM under Rule 9.2, but also in third party interventions before the Court.

This proposal aside, we detected great caution about tying the Court's hands in any way given Judges' desire to maximise their leverage case-by-case and assist the CM in its execution function. Nor, we recall, is there clamour for reform of the Court's practice from the **CM or the Execution Department**; on the contrary, one CM official argued that it would be 'premature to expect the Court to take a definitive stand' on its remedial approach, which might *create* tensions with the CM where none exist.[27] What *is* clear is 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. Such interaction may be especially useful to identify lessons in respect of intractable, systemic problems such as discriminatory laws or practices, in order that the Court may make more frequent reference to Convention-compliant remedial approaches that have been developed in other states.[28]

We conclude by suggesting that, while the Court presently has no legitimacy deficit in respect of its remedial practice, one could conceivably develop through deliberate mischaracterisations of the notion of subsidiarity as implying, *inter alia*, the primacy of national law over the ECHR—as was deplorably evident in the Draft Copenhagen Declaration. This creates an imperative for Council of Europe actors, as well as conscientious state and non-state actors, including academics, to concertedly reiterate the basic premise of this foundational principle. We submit, following Jahn,[29] that subsidiarity—properly understood as placing the primary responsibility for upholding Convention rights on states, always subject to Strasbourg's supervision—can accommodate a remedial practice involving more intrusive indications. As Jahn argues, within a 'less rigidly state-centric application of subsidiarity', even the most discretion-reducing individual measures may be viewed as reinforcing national institutions and hence the functioning of domestic democratic processes,[30] *Volkov* being an outstanding example. Here, the guiding normative consideration is not states' sensitivity to the perceived cost of having their discretion constrained but 'how individuals' interests are best fostered'.[31]

We submit that the interests of actual and potential victims are best served by the Court charting a middle course, neither foreclosing the evolution of this aspect of its case law, nor rapidly accelerating the pace of change. Encouragement from the Execution Department and the absence of any sustained challenge by states suggest that, as Judges navigate these tensions, they enjoy a wider political latitude than they imagine: the door is firmly open to evolution, if not revolution, in the Court's remedial practice.

[25] Applicants can, of course, do so now; see, e.g., *Aslakhanova v Russia* Application Nos 2944/06 et al, 18 December 2012, paras 222-38, which appear to have been substantially informed by the applicants' pleadings.
[26] See the work of the European Implementation Network at: www.einnetwork.org.
[27] Interview (a), 2 May 2017.
[28] Supra n 20.
[29] Jahn (2014) 'Ruling (In)directly through Individual Measures?: Effect and Legitimacy of the ECtHR's New Remedial Power' 74 *Heidelberg Journal of International Law* 1.
[30] Ibid, 24.
[31] Ibid, 29.

Annex

Chart 1a

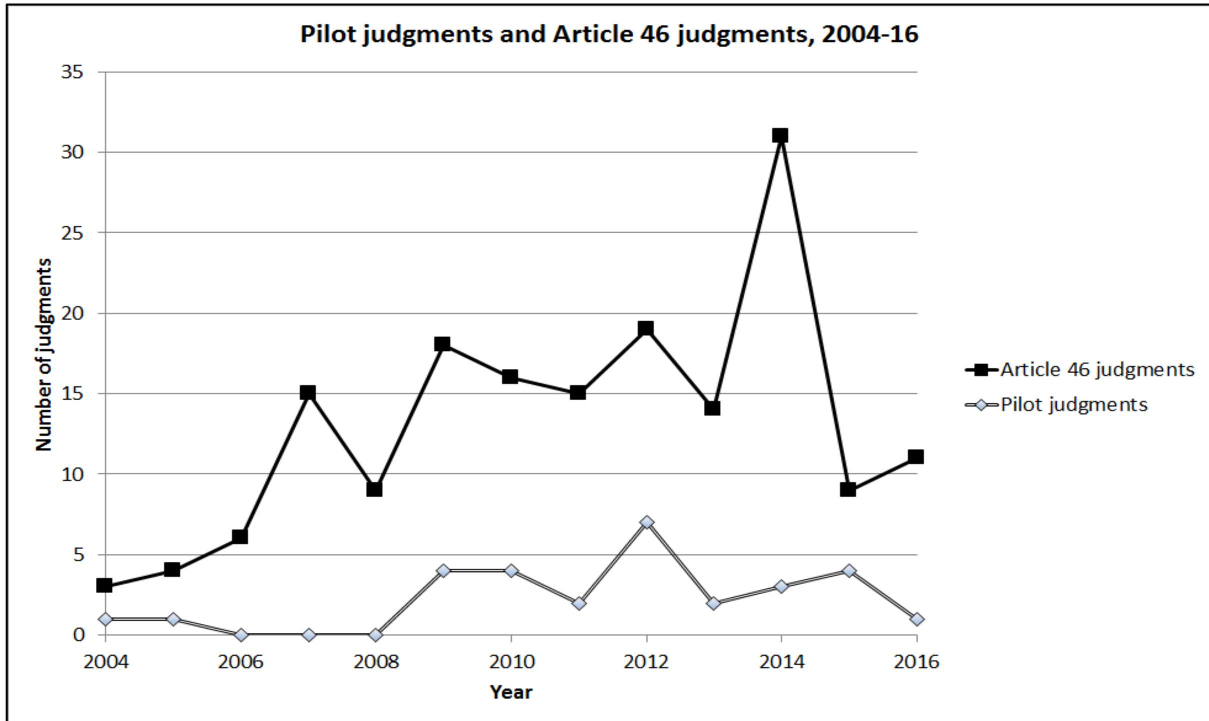

Chart 1b

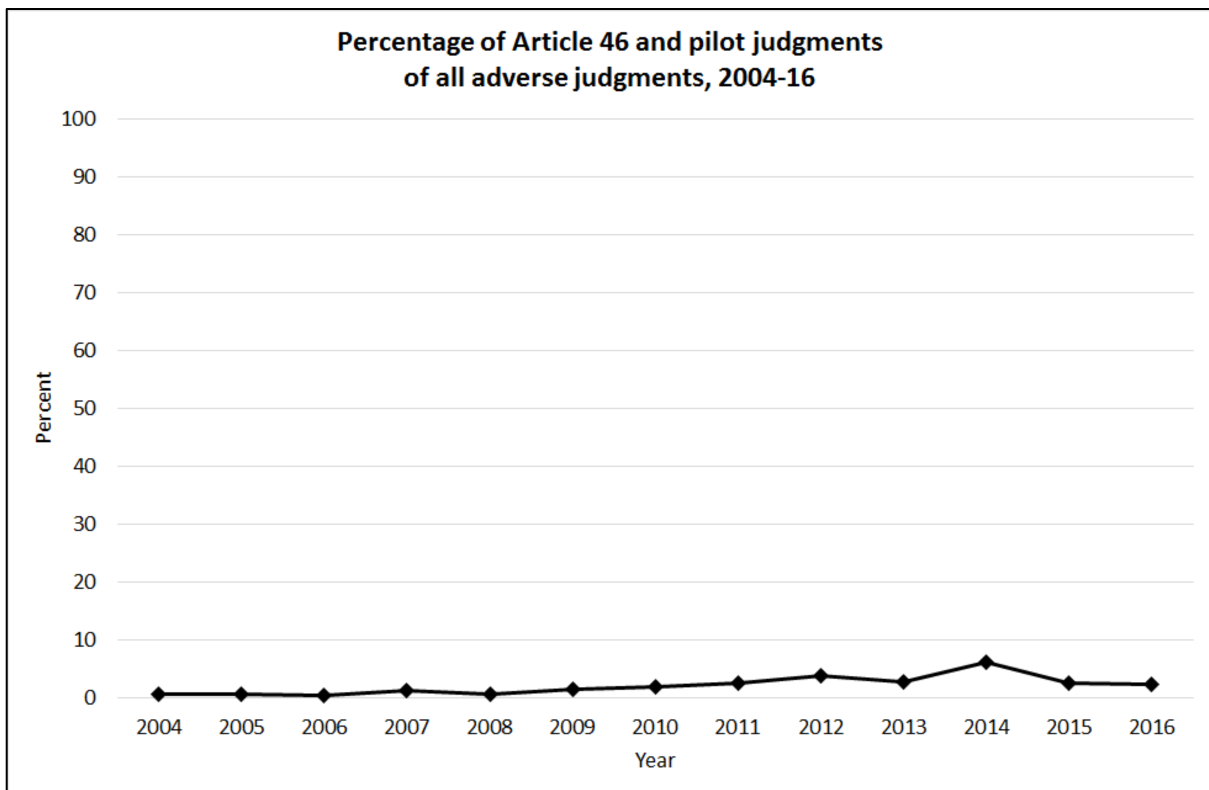

Chart 2a

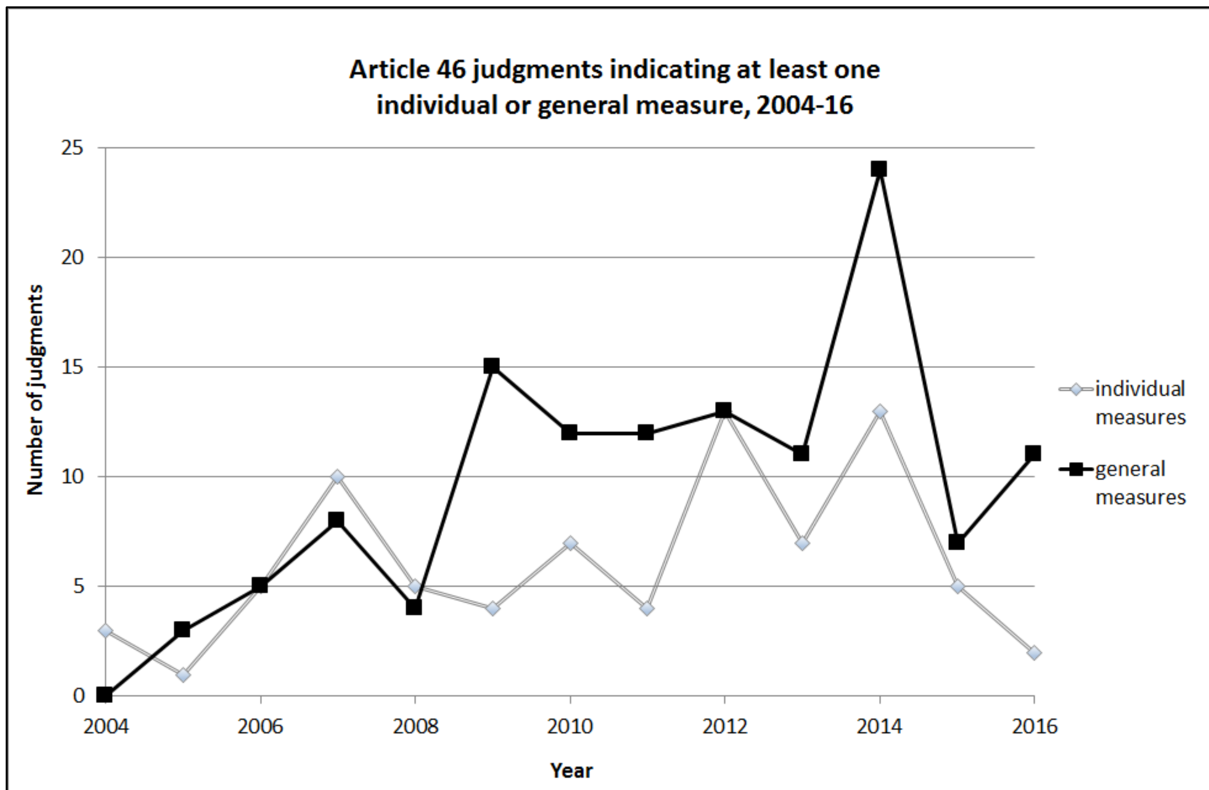

Chart 2b

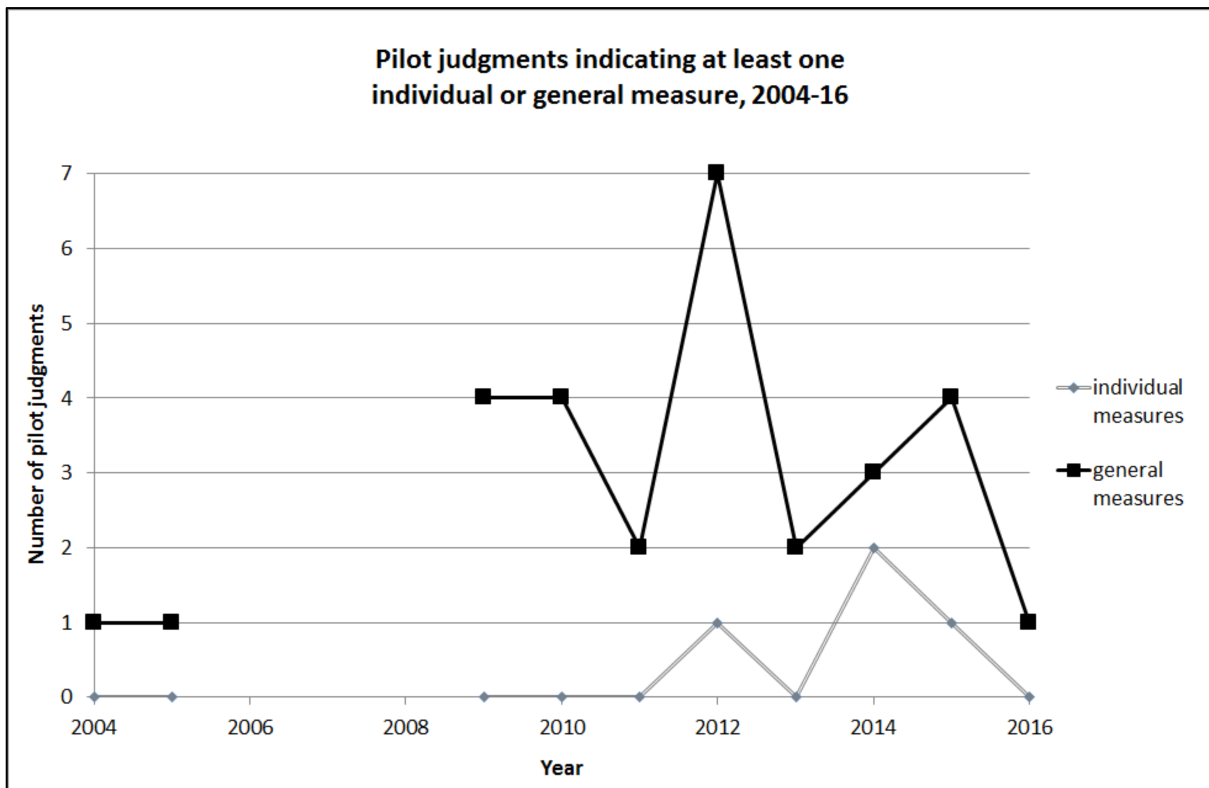

Chart 3

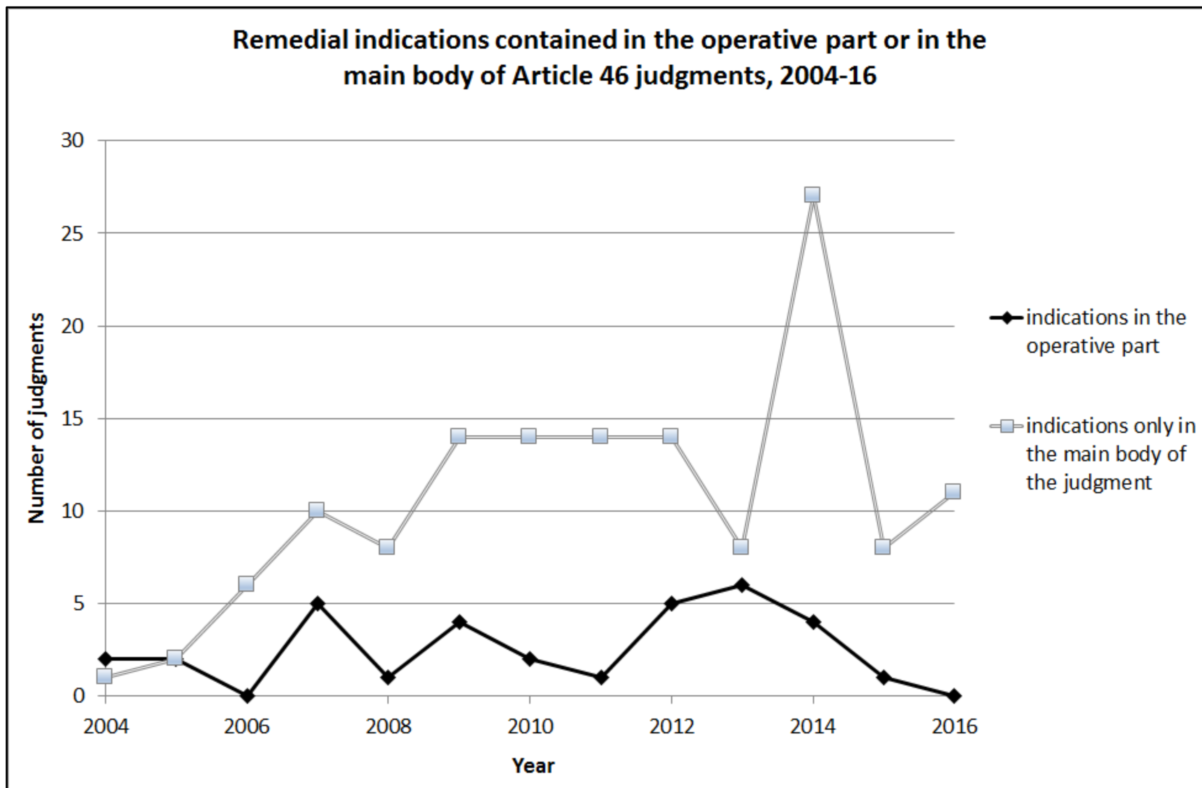

Table 1[32]

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

[32] Note that the composition of the Sections changed during the period under review.