

Ruling (In)directly through Individual Measures?

Effect and Legitimacy of the ECtHR's New Remedial Power

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Abstract

The Convention system is divided into a wide array of diverging standards as regards human rights protection, the preservation of the rule of law and democratic standards. The existence of systemic deficits and structural defects in several domestic systems has led to a workload that the European Court of Human Rights (ECtHR) is struggling to manage. Since 2004, the ECtHR has thus started to develop new remedial tools that are aimed at enhancing the Court's impact on the ground. The ordering of individual measures is one such tool which prescribes precisely how to implement the Court's judgment at the domestic level, eliminating the domestic executory discretion as foreseen by the Convention. This act of judicial self-empowerment may thus imply the Court's attempt to assume a supreme role in the Convention legal area, raising concerns of legality and legitimacy. It is suggested that these concerns can be redeemed, however, when considered within the wider context of the Court's relationship to the domestic authorities, particularly domestic courts.

I. Introduction

The European Court of Human Rights has developed new remedial powers and mechanisms that considerably change the architecture of the European Convention on Human Rights (ECHR) system regarding the implementation of the Court's judgments and opinions. While all eyes have focused on the introduction of general measures since *Broniowski v. Poland*,¹ and the attribution of quasi *erga omnes* effect to its judgments,² it has nearly gone unnoticed that the Court has started ordering specific individual measures that quite substantially reduce the discretion of the Convention states when implementing the judgments. In *Volkov v. Ukraine*, decided at the beginning of this year, the ECtHR for the first time in its history ordered the respondent state to reinstate a dismissed Supreme Court judge at the earliest possible date in the operative part of its judgment.³ This incre-

¹ ECtHR [GC], *Broniowski v. Poland*, Judgment of 22.6.2004, Application No. 31443/96.

² ECtHR [Plenary], *Ireland v. United Kingdom*, Judgment of 18.1.1978, Application No. 5310/71, Ser. A No. 25, § 154, "the Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Art. 19)".

³ ECtHR, *Volkov v. Ukraine*, of 9.1.2013, Application No. 21722/11, § 208, operative provision 9.

mental change in the original interpretation of Art. 46 ECHR⁴ (Part I.) is set against the backdrop of a Court that suffers from a serious backlog of cases, being seriously overloaded with repetitive cases and those where systemic and structural deficiencies in the domestic legal systems clog the path to domestic legal redress for human rights violations. This development reveals how the Court has become proactive, driven by the need to make the Convention system more effective and efficient in order to fulfil the Court's task (Art. 19) to "ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention and the Protocols thereto". Hence, the Court has created mechanisms which have enhanced its impact on the national plane. I would suggest that this development, rather than exemplifying how the Court is aggrandizing its autonomy to establish a hierarchical Convention system with the ECtHR as the paramount actor at the top (Part II.), must be considered within the wider context of the Court's endeavour to establish a complementary relationship with member states on the domestic level. This becomes apparent in the Court's efforts to reinforce the domestic systems as the primary remedial legal orders in order to allow for cooperation and only ultimately for compulsion in the interpretation and implementation of human rights (Part III. 1./2.). For this it uses the tool of interlocking the different levels of the Convention system, primarily by legal mechanisms. Within the evolving structure of *shared responsibility*, a form of checks and balances (Part III. 3. a)) as well as the delimitation of powers of the levels according to the structural principle of subsidiarity (Part III. 3. b)) can – for the time being – satisfy legitimacy concerns. However, due to questions regarding the Court's legal competence and concerns which arise with respect to the legal certainty and coherence of its judgments, the Court is required to exercise judicial self-restraint in order to preserve the acceptance and the resulting compliance it has so far widely enjoyed on the part of the Convention states (Part III. 3. c)). If the use of mandatory individual measures is to be expanded, it is hence recommended – *de lege ferenda* – that this power be provided with a clear legal basis so that the Court does not run the risk of losing its acceptance by the Convention states.

⁴ Articles referred to hereinafter are those of the ECHR unless cited otherwise.

II. Individual Measures – The ECtHR’s Incremental Amendment of Article 46 ECHR

1. Legal Development

a) Specific Measures as a Deviation from *Marckx v. Belgium*

Traditionally, since *Marckx v. Belgium*, the Court has seen its competence for finding a violation of the ECHR as being essentially declaratory in nature, hence leaving it to the delinquent State to choose the means for the performance of its implementation obligation under Art. 46.⁵ The accorded discretion is meant to “reflect the freedom of choice attached to the primary obligation of the Contracting States [...] under the Convention (Art. 1)”.⁶ Consequently, the Court used to point out that it was not empowered to annul or repeal legislative provisions⁷ or overrule court decisions⁸ or prescribe the instruments by which to remedy the violation.⁹ The latter was only exceptionally accepted in the form of a recommendation by way of *obiter dicta*.¹⁰

⁵ ECtHR [GC], *Marckx v. Belgium*, Judgment of 13.6.1979, Application No. 6833/74, Ser. A No. 31, § 58. Although the regular damage awards have already deviated from the structure of Art. 41, which foresees that the ECtHR only supplementarily awards damages, they have left thorough discretion concerning the execution of the judgments to the member states.

⁶ This recurring sentence was first expressed in *Papamichalopoulos and Others v. Greece* (Article 50), Judgment of 31.10.1995, Application No. 14556/89, Ser. A No. 330-B, § 34.

⁷ Mentioned for the first time in *Marckx* (note 5), § 58.

⁸ ECtHR, *Pakelli v. Germany*, Judgment of 25.4.1983, Application No. 8398/78, Ser. A No. 64, § 45; ECtHR [Plenary], *Belilos v. Switzerland*, Judgment of 29.4.1988, Application No. 10328/83, Ser. A No. 132, § 76.

⁹ ECtHR [GC], *Selmouni v. France*, Judgment of 28.7.1999, Application No. 25803/94, Reports of Judgments and Decisions 1999-V, § 126 (transfer to the Netherlands); ECtHR, *Vocaturo v. Italy*, Judgment of 24.5.1991, Application No. 11891/85, Ser. A No. 206-C, § 21 (publication of judgment in official gazette); ECtHR, *Castells v. Spain*, Judgment of 23.4.1992, Application No. 11798/85, Ser. A No. 236, § 54 (publication of summarized judgment in press).

¹⁰ ECtHR, *X. and Y. v. Netherlands*, Judgment of 26.3.1985, Application No. 8978/80, Ser. A No. 91, § 27; ECtHR, *Hentrich v. France*, Judgment of 22.9.1994, Application No. 13616/88, Ser. A no 296-A, § 71.

b) *Assanidze v. Georgia* – The Emergence of a New Exception

In *Assanidze v. Georgia*, the Court, for the first time, issued an unconditional specific order for restitution in the operative part of the judgment on the grounds that “by its very nature, the violation found in the instant case [did] not leave any real choice as to the measures required to remedy it”, ordering the release of an unlawfully detained prisoner at the earliest possible date.¹¹ About ten years earlier, the Court had already ordered restitution in the operative part of the judgment in *Papamichalopoulos v. Greece*,¹² stating that returning the land at issue would be the appropriate remedy, but leaving it to Greece to pay compensation if restitution was not feasible.¹³ This approach was later followed.¹⁴ In *Assanidze*, the Court decided that compensation could no longer be substituted for restitution. However notably, the highest Georgian court had previously issued a similar judgment which had not been implemented.

c) Specific Measures’ Expanding Scope and Amplifying Intensity

After *Assanidze* several cases have followed with the same rationale, expanding the scope as well as the intensity of this exceptional power. Only three months after *Assanidze*, the Court held in a Grand Chamber judgment in *Ilasçu and Others v. Moldova and Russia* that both Moldova and Russia “must take all necessary measures to put an end to the arbitrary detention of the [three] applicants still imprisoned and secure their *immediate release*”.¹⁵ Hence, it went further than in *Assanidze* by ordering the detainees “*immediate*” release. The judgment, moreover, opposed a final domestic court decision. Yet, this has to be seen against the backdrop of the ECtHR’s

¹¹ ECtHR, *Assanidze v. Georgia*, Judgment of 8.4.2004, Application No. 71503/01, Reports of Judgments and Decisions 2004-II, §§ 202-203, operative provision 14 (a); the acquittal judgment had not been executed in three years without the delay having occurred on a legal basis, which was in contravention of Arts. 6 para. 1 and 5 para. 1.

¹² *Papamichalopoulos and Others* (note 6), operative provision 2.

¹³ *Papamichalopoulos and Others* (note 6), § 39, operative provision 3. The “feasibility criterion”/“fall-back option” was aimed at leaving enough discretion to the states to preserve their good faith rules as well as to preventing the states from being obliged to rebuild. This criterion is mirrored in Art. 35 ILC Draft Articles.

¹⁴ See e.g. the expropriation case, ECtHR [GC], *Brumărescu v. Romania*, Judgment of 23.1.2001, Application No. 28342/95 (Article 41), Reports of Judgments and Decisions 2001-I, §§ 20-23, operative provisions 1, 2.

¹⁵ ECtHR [GC], *Ilasçu and Others v. Moldova and Russia*, Judgment of 8.7.2004, Application No. 48787/99, operative provision 22.

rejection of that court as a “tribunal” under Art. 6 as well as its finding of a “flagrant denial of justice”¹⁶ since the continued detention “necessarily entail[ed] a serious prolongation of the violation of Art. 5”.¹⁷ Release of prisoner cases have followed suit ever since.¹⁸

Apart from its application to cases involving Art. 5 and Art. 1, Protocol 1, this jurisprudence has also been extended to Art. 6 concerning the execution of ECtHR judgments, where the Court has ordered that the respondent state shall ensure the enforcement of the respective decision by appropriate means, usually within a period of three months from the date on which the judgment becomes final.¹⁹ Furthermore, while the ECtHR formerly abstained from ordering the reopening of proceedings, as this could conflict with internal legislation and the principle of *res judicata* if no review procedure was foreseen under domestic law in case of an adverse ECtHR judgment,²⁰ the Court began to recommend that the “most appropriate form of redress was the reopening of proceedings” and – backed by Recommendation Rec(2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights²¹ – only four months after *Ilaşcu*, inserted this in the operative provisions of a judgment for the first time in *Sejdovic v. Italy*.²² However, the time was apparently not yet ripe for such a progressive step, as the

¹⁶ *Ilaşcu and Others* (note 15), § 461.

¹⁷ *Ilaşcu and Others* (note 15), § 490, operative provision 22.

¹⁸ ECtHR, *Charabali v. Turkey*, Judgment of 13.4.2010, Application No. 46605/07, § 85, operative provision 7 (a); ECtHR, *Tebrani and Others v. Turkey*, Judgment of 13.4.2010, Applications nos. 32940/08, 41626/08, 43616/08, § 107, operative provision 10 (a); ECtHR, *Fatullayev v. Azerbaijan*, Judgment of 22.4.2010, Application No. 40984/07, § 174, operative provision 6.

¹⁹ ECtHR, *Ilić v. Serbia*, Judgment of 9.10.2007, Application No. 30132/04, § 112, operative provision 6 (a); ECtHR, *Poznakbirina v. Russia*, Judgment of 24.2.2005, Application No. 25964/02, § 33, operative provision 4 (a); ECtHR, *Plotnikov v. Russia*, Judgment of 24.2.2005, Application No. 43883/02, § 33, operative provision 4 (a); ECtHR, *Apostol v. Georgia*, Judgment of 28.11.2006, Application No. 40765/02, § 72, operative provision 3; ECtHR, *Kudrina v. Russia*, Judgment of 21.6.2007, Application No. 27790/03, § 36, operative provision 4 (a).

²⁰ Generally states are not obliged by the Convention to introduce procedures in their domestic legal systems, whereas judgments of their Supreme Courts constituting *res judicata* may be reviewed, see e.g. ECtHR, *Saidi v. France*, Judgment of 20.9.1993, Application No. 14647/89, Ser. A No. 261-C, § 47; *Lyons and Others v. United Kingdom*, Decision of 8.7.2003, Application No. 15227/03; *Dowsett v. United Kingdom (No. 2)*, Decision of 4.1.2011, Application No. 8559/08 with further references.

²¹ Recommendation II, adopted by the Committee of Ministers on 19.1.2000 at the 694th Meeting of the Ministers’ Deputies as Recommendation for the Convention States, available at <<https://wcd.coe.int>>.

²² ECtHR, *Sejdovic v. Italy*, Judgment of 10.11.2004, Application No. 56581/00, operative provision 3 (Chamber judgment).

Chamber judgment was later watered down by the Grand Chamber, which decided only to recommend the remedy in its reasoning.²³

The Court, nevertheless, slowly paved the way towards ordering this specific measure mandatorily. Whereas in *Claes and Others v. Belgium* the Court proceeded in the “conditional fashion of restitution”, as in the deprivation of property cases,²⁴ it went all the way in *Lungoci c. Roumanie* in 2006 to order the reopening of the proceedings in the operative provisions without being overruled by the Grand Chamber.²⁵ This was obviously influenced by the fact that Romania had inserted a review procedure in its civil procedural code. Hence, the Court avoided having to tell a legislature to enact a review procedure in the operative part of its judgment. But in pushing for the reopening of the procedure, it managed to permeate the domestic legal order and thus intensified the legal effect of its decision by ordering this individual measure. This is also why the Court, individual judges and the Committee of Ministers (CM) have steadily encouraged states to enact review procedures, especially in criminal matters.²⁶ But the jurisprudence on this point remains ambiguous, in *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (No. 2) the Court again only indicated that the Convention-incompatible proceedings should be reopened. Importantly, it added that “the reopening of proceedings [...] is not an end in itself; it is simply

²³ ECtHR [GC], *Sejdovic v. Italy*, Judgment of 1.3.2006, Application No. 56581/00, indicating that a retrial is the only way to redress the violation, yet not wanting to indicate “how any new trial is to proceed and what form it is to take”, § 127, saying in operative provision 3 that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. This was followed in *Calmanovici c. Roumanie*, where the Court refused to make a specific order, along the lines of the Grand Chamber in *Sejdovic*, recommending that a reopening of the procedure would be the most appropriate form of redress, Requête de 1.7.2008, Requête No. 42250/02, § 163; *Salduz v. Turkey* [GC], Judgment of 27.11.2008, Application No. 36391/02, § 72. Some judges have, however, constantly favoured a mandatory order: Judges *Rozakis, Spielmann, Ziemele* and *Lazarova Trajkovka* in their concurring opinion in *Salduz* [GC] (note 23), § 2, on the principle of restitution in integrum, §§ 3-8, on the order to reopen a domestic procedure, §§ 9-13; similarly, Judges *Spielmann* and *Malinverni* in their concurring opinion in *Vladimir Romanov v. Russia*, Judgment of 24.7.2008, Application No. 41461/02 as well as Judge *Spielmann* in his concurring opinion in *Polufakin and Chernyshev v. Russia*, Judgment of 25.9.2008, Application No. 30997/02 (underlining that it amounted to the Court’s duty not only to note the existence of a review procedure, but also to urge the authorities to make use of it).

²⁴ ECtHR, *Claes et Autres c. Belgique*, Arrêt de 2.6.2005, Requête nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, operative provision 5 (a).

²⁵ ECtHR, *Lungoci c. Roumanie*, Arrêt de 26.1.2006, Requête No. 62710/00, § 56, operative provision 3 (a). This was followed in 2011 by ECtHR, *Ajdarić v. Croatia*, Judgment of 13.12.2011, Application No. 20883/09, § 58, operative provision 4 (a), on condition of the applicant’s request.

²⁶ (note 23) and (note 21).

a means – albeit a key means – that may be used for [...] the full and proper execution of the Court’s judgments”.²⁷

In 2009, in *Scoppola v. Italy* (No. 2), the Court increased the intensity of individual measures further. The case concerned the retrospective application of a legislative decree that extended a possible sentence from thirty years to life imprisonment to the applicant’s detriment in unfair proceedings. According to the domestic court’s decision, the applicant was meant to serve a life sentence, even though the maximum sentence at that time only extended to thirty years’ imprisonment. The decision was based on a legislative decree that had been issued after the relevant criminal acts took place. This amounted to a violation of Arts. 6 and 7 according to the ECtHR, which mandatorily prescribed that the applicant’s sentence of life imprisonment was to be replaced by a sentence not exceeding thirty years’ imprisonment. The ECtHR thus diminished executive discretion and quasi repealed the domestic court’s foregoing judgment.²⁸ However, even if the legislative decree might have been introduced at that time with the intention that it be applied in the proceedings, the Court’s judgment was perfectly compatible with the legal situation in Italy at that time.

Quite coincidentally with *Scoppola*, the Court expanded its specific measures jurisprudence to cases concerning detention conditions, where it had before reticently refrained from issuing orders.²⁹ It ordered that detained persons suffering from a mental disorder be transferred into a suitable psychiatric hospital or a detention facility with a specialized psychiatric ward at the earliest possible date in *Sławomir Musiał v. Poland*.³⁰ This inter-

²⁷ *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (No. 2), Judgment of 30.6.2009, Application No. 32772/02, para. 90; contested by strong joint dissenting opinion of Judges *Malinverni, Birsan, Myjer, Lefevre*, and a separate dissenting opinion of Judge *Sajó*; just after the judgment of *Lungoci*, the Court stopped short of making the order, only encouraging the states to use their procedural provisions allowing recent ECtHR case-law to be taken into account, e. g. *Yanakiev v. Bulgaria*, Judgment of 10.8.2006, Application No. 40476/98, § 90.

²⁸ ECtHR [GC], *Scoppola v. Italy* (No. 2), Judgment 17.9.2009, Application No. 10249/03, §§ 153-154, operative provision 6 (a).

²⁹ For an overview of the situation until 2008, see *I. Nifosi-Sutton*, The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health Perspective, *Harvard Human Rights Journal* 23 (2008), 51 et seq., at 62 et seq.

³⁰ ECtHR, *Sławomir Musiał v. Poland*, Judgment of 20.1.2009, Application No. 28300/06, §§ 96-97, §§ 107-108, operative provision 4 (a), backing the order with the Polish Constitutional Court decision that had already acknowledged the structural problem of overcrowding in Polish prisons; a new trend in the Court’s jurisprudence regarding this issue can be discerned since 2009, see also ECtHR, *Ghavitadze c. Georgie*, Arrêt de 3.3.2009, Requête No. 23204/07, § 106, operative provision 3 (a).

ferred with the state's policy decision. Yet, the Court could rely on a constitutional court decision which had quashed the legislation underlying the unlawful conduct of the state authorities. Still, as in *Assanidze*, legislation on this point had not yet been enacted, so that the Court forestalled this decision in an important respect.

d) *Volkov v. Ukraine* – Linking the *Assanidze* Logic to Cases of Systemic Deficiencies and Structural Defects

In *Volkov* the Court ordered the reinstatement of the former Supreme Court judge who had been dismissed in an unlawful manner, violating his rights under Arts. 6 and 8. The ECtHR explained that the systemic deficiencies of the judicial disciplinary system had provoked a situation of such nature that did not leave any real choice as to the individual measures available to remedy the violation, because it was not foreseeable that the respondent state would be able to institute fair disciplinary proceedings in the near future.³¹ Going beyond the *Assanidze* exception, the Court thus expanded its jurisprudence to cases where systemic deficiencies impede justice from being given effect within a proper timeframe and linked individual to general measures. This was in direct contradiction to domestic statutory law, as the latest legislative reforms set the maximum number of Supreme Court judges at 48,³² and a final national court's decision. In contrast to *Assanidze*, that court was recognized as a "tribunal" under Art. 6. Ultimately, *Volkov* also challenged the domestic legal order, as neither the Constitution nor any statutory law of the Ukraine provided for the legal possibility of reinstating a judge. The resulting expansion of the ECtHR's remedial power is further underlined by comparison to a case concerning the dismissal of a judge, *Maestri v. Italy*, which the Court had decided in 2004, where it only recommended the reopening of the proceedings against the applicant.³³

³¹ *Volkov* (note 3), §§ 207-208.

³² See Section 39 in "On the Judicial System and the Status of Judges" (2010) and Judge *Yudkivska's* concurring opinion where she underlines that the reinstatement will "become feasible only when one of the serving judges of the Supreme Court retires or leaves the Court for another reason or the relevant legislation changes", *Volkov* (note 3).

³³ ECtHR [GC], *Maestri v. Italy*, Judgment of 17.2.2004, Application No. 39748/98, § 47. Contrary to *Volkov*, the judge's unlawful dismissal was not traced back to systemic or structural defects of the judiciary's disciplinary law.

In summary, the ECtHR has incrementally developed the mandatory ordering of individual measures in a wide range of areas,³⁴ leaving little to no discretion to the respondent state for the implementation of its judgments.

2. Amended Implementation Structure

This development has changed the structure of implementation as foreseen in the Convention under Art. 46. According to this provision, implementation is laid in the hands of the Convention states and falls under the supervision of the Council of Ministers (CM) (Art. 46 paras. 1 and 2). The CM is empowered to refer a question of interpretation with consequences for the execution of the judgment back to the Court (Art. 46 para. 3). Under Art. 46 para. 4, the CM may, finally, refer the matter to the Court if a Convention state has failed to implement the Court's judgment. The Court may then find a violation, but has to refer the case back to the CM which ultimately decides which measures to take to enforce execution (Art. 46 para. 5). Consequently, the Convention originally foresaw a supplementary role for the Court in the implementation process, with its major function being to interpret the Convention. Yet the Court has meanwhile adopted the role of triggering and authoritatively indicating specific steps of implementation, thereby usurping the primary task in the implementation process and relegating the CM and the member states to supplementary positions.

In sum, it has been revealed that, as in the case of the creation of the pilot procedures,³⁵ the Court has proactively amended the implementation structure of the ECHR over the last ten years. While it has dauntingly expanded the scope and the intensity of its "new powers", it has gone about this in an incremental and sometimes very cautious and restrictive manner. Thus, the question arises what implications the changes have for the relationship of the different legal levels within the Convention system and the distribution

³⁴ For a good overview of the Court's case law, see *M. Breuer*, in: U. Karpenstein/F. C. Meyer, *Europäische Menschenrechtskonvention* (2011), Art. 46 paras. 10-19; *P. Leach*, *The European Court's Developing Approach to Remedies*, in: A. Follesdal/B. Peters/G. Ulfstein (eds.), *Constituting Europe*, 2013, at 149 et seq.; for an overview of the Court's increasing use of individual measures, see the country profiles on the Court's website, <<http://www.echr.coe.int>>, for the period till 2010, for more recent case law, see the newer country profiles, for the Ukraine e. g., <<http://www.echr.coe.int>>.

³⁵ *A. Szklanna*, *The Impact of the Pilot Judgment Procedure of the European Court of Human Rights on the Execution of Its Judgments*, *European Yearbook on Human Rights*, 2010, 223 et seq.; *D. Haider*, *The Pilot-Judgment Procedure of the European Court of Human Rights*, 2013.

of power among the ECtHR, the CM and the domestic authorities of the Convention states.

III. Moving Towards a Hierarchical Legal Order with the ECtHR as Supreme Actor at the Top?

When trying to classify the change which the interpretation and application of the Convention have undergone with respect to the ordering of individual measures one could read these as being part of a move towards a hierarchical legal order with the ECtHR as supreme actor at the top. Several aspects lead to this conclusion.

Firstly, one may discern a certain hierarchy as having evolved among the relevant legal actors. Essentially, the Court has self-authorized this development by according itself the final competence to interpret the Convention and by unilaterally changing its role within the Convention implementation structure, albeit without contestation by the Convention states or the political organs of the Council of Europe (CoE).

Secondly, while the Court started by often just reinforcing domestic decisions, e. g. court judgments that were not executed,³⁶ it has also increasingly instated itself as last arbiter of domestic decisions, e. g. in *Volkov*, where it quasi overturned the judgment of the Ukrainian High Administrative Court and also rejected the recently adopted act of parliament.

Thirdly, the ECtHR has imposed a hierarchy on the relevant legal orders by pronouncing specific remedies which leave the Convention state without the possibility to exercise discretion. While the Court started by leaving the Convention states discretion (e. g. through the feasibility criterion), it has incrementally reduced their margin of appreciation to zero, as demonstrated by *Volkov*. There is no room for selective incorporation or the balancing of the ECHR and domestic constitutional law.³⁷ Hence, the ECHR has thereby been given a quasi-direct effect. The resulting penetration of the domestic legal order has been enhanced by the specificity of the Court's orders especially when combined with domestic reopening clauses.³⁸ The specificity of the measures ordered and their binding nature facilitate the follow-up

³⁶ See *Assanidze* (note 11); *Sławomir Musiał* (note 30).

³⁷ A method that has been called the "Berücksichtigungspflicht" by the German Federal Constitutional Court (FCC) in FCC, *Görgülü*, Decision of 10.6.2005 – 1 BvR 2790/04, § 46, this is a method of according international law mediate effect.

³⁸ For pertinent case law see (note 25).

procedure for the CM,³⁹ making its assessment of compliance easier and quicker. Moreover, the Court's mandatory order fortifies the authority of the CM, thus increasing the pressure on the respondent Convention states. This leads to a more immediate effect in terms of time, but also in terms of substance, because domestic implementation of a specific order in a reopened procedure will naturally take the exact form envisaged by the Court. Furthermore, the specificity of the Court's orders also facilitates the possibility that other political actors and the media will hold a violating government accountable concerning compliance. This consequently increases external pressure to effect implementation adequately and quickly. Finally, the specificity of the Court's orders may more quickly trigger Art. 46 paras. 4 and 5, according to which, in case of disobedience, the member state may be required to pay damages.

At present, the ECtHR still legally differs from an organ which is integrated into a member state's domestic legal system and whose decisions take direct legal effect or an organ that has modifying powers, allowing it to call legislation null and void, overrule final judgments and annul executive acts. Yet, if the Ukraine adhered to the *Volkov* judgment, the factual difference would only be that Mr. *Volkov* would be reinstated three months later as opposed to the situation after a directly effective judgment. Of course it is still formally possible for member states to disobey the Court's orders. Practically however, it is not feasible for a Convention state to regularly refuse implementation. This would either lead to its expulsion, according to Art. 8 CoE Statute, or to the procedure under Art. 46 paras. 4 and 5 under which it could incur high fines and expose itself to massive political pressure.

Summing up, elements can be discerned in the jurisprudence on individual measures which support the view that there has been a development in the Convention system towards a more hierarchical relationship with the Court taking the predominant position. This can be considered as a parallel development to the reduction of member states' discretion on substantive grounds, i. e. when the Court reduces the margin of appreciation due to a European consensus, which has also been invoked as an example of the Court's increasingly powerful position with reference to its interpretative function.⁴⁰

³⁹ As pointed out by Judge *Costa* in his concurring opinion in *Assanidze* (note 11), the political difficulties §§ 6-7.

⁴⁰ Heavily criticizing these developments, *Lord Hoffmann*, *The Universality of Human Rights*, *Law Quarterly Review* 125 (2009), 416 et seq., at 422, 429 et seq., but see also the response, *E. Bates*, *British Sovereignty and the European Court of Human Rights*, *Law Quarterly Review* 128 (2012), 382 et seq., at 389.

IV. Avoiding Onesidedness – The Emergence of *Shared Responsibility* within a Complementary Relationship

The creation of and recent developments with respect to individual measures are the result of the Court's endeavour to enhance its impact "on the ground" so as to diminish its suffocating backlog. Yet, instead of seeking to establish a predominant position within a hierarchical multi-level order, the Court appears to have intended to create a powerful complementary role. In the wake of the Interlaken conference, Court President *Costa* invoked the concept of *shared responsibility*.⁴¹ While it was not further developed by him, it implies that only together can both levels render full human rights protection to the individual. This in turn connotes, on the one hand, coordination and cooperation through dialogue to apply and develop European rights' protection jointly and to avoid collisions between the levels; on the other hand, the concept also implies that one level can compensate for the other's failure. Concurrently, these forms of interaction substantially enhance the Court's impact on the domestic plane,⁴² because they enable the legal levels to truly interlock.⁴³ For this to happen, however, they have to be mutually open and legally permeable, i. e. each has to accept the limited exclusivity of its legal order and be open to the influence and receptive to the

⁴¹ *Costa* presents this idea in the Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference, 3.7.2009, available at <<http://www.echr.coe.int>>, at 4; this notion was echoed in other official documents: in the Interlaken Declaration, 19.2.2010, 3rd reiteration, 2; <<http://www.coe.int>>; reiterated in the Izmir Declaration, 27.4.2011, point 6, 1, available at <<http://www.echr.coe.int>>; in the Brighton Declaration, point 3 & 4, lit. B 12 c), connecting this concept to the idea of dialogue, point 3, 1, lit. B 11, & 12 a), 3, available at <<http://www.echr.coe.int>> and Court President *Bratza* in his opening speech, available at <<http://www.echr.coe.int>>, at 3, 5.

⁴² Describing how vertical dialogue enhances the effectiveness of supranational tribunals, *A.-M. Slaughter*, A Typology of Transjudicial Communication, U. Rich. L. Rev. 29 (1994-1995), 99 et seq., at 114 et seq.; *L. R. Helfer/A.-M. Slaughter*, Toward a Theory of Effective Supranational Adjudication, Yale L. J. 107 (1997-1998), 273 et seq., at 323 et seq.; *H. Keller/A. Stone Sweet* (eds.), A Europe of Rights, 2008, for a country overview with all the significant structural and procedural innovations to coordinate domestic and evolving ECHR law; the Report of the Group of Wise Persons to the CM, 979bis Meeting, 15.11.2006, CM(2006)203, Proposed Measures, II. lit. B, point 3, para 70, stresses the possible enhancement of the authority of the Court's case law through cooperation with national courts, available at <<https://wcd.coe.int>>.

⁴³ *A. Peters*, Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse, ZÖR 65 (2010), 3 et seq., *Peters* gives an overview of the views taken on the relationship of national and international law by current academia (as opposed to the traditional models of monism and dualism), herself classifying it as a meshwork of legal orders (at 49).

ideas of the other legal order.⁴⁴ Consequently, none of the actors may establish absolute authority over the other.⁴⁵ Another important factor allowing for effective vertical multi-level cooperation is the actors' capacity to interact. Hence, the Court has taken pains to strengthen and improve the independence, integrity and functionality of core national institutions, such as the courts.⁴⁶ As a last resort, a complementary relationship may also permit compulsory supplementation⁴⁷ for the purpose of preservation of the European minimum standard of human rights' protection enshrined in the Convention,⁴⁸ if one level fails to react properly, be it in a single instance or due to systemic deficiencies or structural defects.⁴⁹ In the long run, an institution that was backstopped or compelled may be reinforced by the supplementing measure.⁵⁰ Drawing clear limits for the domestic authorities' power

⁴⁴ See *H. Keller/A. Stone Sweet* (note 42), for the practical reception processes that have provoked deep changes at domestic and ECHR level; *N. Krisch* underlines the openness to learning, adaptability, transformative capacity, room for contestation and the acceptance of the legal orders' non-exclusivity as virtues of coordinating different multi-level legal systems, "The Case for Pluralism in Postnational Law", LSE Law, Society and Economy Working Papers 12/2009, available at <<http://ssrn.com>>, at 20 et seq.

⁴⁵ Referring to the rejection of national actors (Italy and France), primarily constitutional courts, to accept the ECHR as a superior constitutional level, *S. Henmette-Vauchez* takes an exclusively pluralistic view of the ECHR system, in: *Constitutional v. International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law*, in: J. Christofferson/M. R. Madsen (eds.), *The European Court of Human Rights between Law and Politics*, 2011, 144 et seq.; see also *J. Christofferson*, *Individual and Constitutional Justice. Can the Power Balance of Adjudication be Reversed?*, in: J. Christofferson/M. R. Madsen (note 45), 181 et seq.

⁴⁶ This e. g. was the main point in *Volkov* (note 3). *A.-M. Slaughter* and *W. Burke-White* have identified the strengthening of the national institutions as one of the three functions of international law in "The Future of International Law is Domestic (or, the European Way of Law)", *Harv. Int'l L. J.* 47 (2006), 327 et seq., at 334 et seq.; showing that the position of the domestic courts *vis-a-vis* the other branches of government is strengthened when they invoke Strasbourg case law, *A. Stone Sweet*, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, *Global Constitutionalism* 1 (2012), 53 et seq., at 68.

⁴⁷ *A. M. Slaughter/W. Burke-White* call this "backstopping and compelling," strategies which have led to international law's most effective implementation, (note 46), at 333, 339 et seq.

⁴⁸ Protecting the "European public order", used for the first time in ECtHR (Preliminary Objections), *Loizidou v. Turkey*, Judgment of 23.3.1995, Application No. 15318/89, Ser. A. No. 310, § 75, and frequently since. *A. Stone Sweet* (note 46), finds that "the protection of fundamental rights is a core value of pan-European constitutionalism", at 83.

⁴⁹ Regarding individual measures in single cases, *L. R. Helfer*, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, *EJIL* 19 (2008), 125 et seq., at 149; concerning systemic deficiencies/structural defects.

⁵⁰ See *A. Stone Sweet* (note 46), although compelling individual measures seeking to reinforce national courts and the voluntary use of international precedents by the latter differ in

is also important for the ECtHR's authority. Domestic courts may rely on non-compliance, where there has been an intrusion on fundamental constitutional values, as a tool to limit the ECtHR's impact. The resulting coequality of the ECtHR and the national courts will allow for a functioning cooperation, as this requires an equilibrium of power, i. e. authoritative and autonomous actors on both sides.⁵¹ While cooperation works in several ways, for the ECtHR as a legal actor the most important, albeit not the only one, is the legalized form, owing to the courts' shared expertise, methodology and language. Moreover, legal structures contain the arbitrariness and ineffectiveness of political processes, thus enhancing the Court's impact by increasing its effectiveness. Bearing this in mind, rather than pointing towards a hierarchical order, the newest developments appear to be much better explained along the lines of a complementary structure that promotes cooperation and allows for compulsion only as a last resort.

1. Individual Measures Re-read

Individual measures have been formulated by the Court as an exception. Thus, the Court continues as a general rule, merely to declare violations or make non-binding indications. The member states and the CM remain the primary actors in ensuring implementation. Moreover, the Court has introduced strict criteria for this exception to kick in, under a "reduction to zero" test requiring a showing that no other reaction would constitute a Convention-compatible answer and systemic defects which make it impossible for the state to employ a different measure. If not wanting to go all the way, the Court only indicates the measures to be taken (see Part II.). This reveals that individual measures are not meant to be the standard response by the Court to human rights violations but only an instrument of last resort. Moreover, while the Court has expanded individual measures to a breadth of different subject-matters, it has predominantly applied the exception to Convention rights that are unqualified, which the Court has classified "core" or "fundamental" Convention rights⁵² and limited the scope of ap-

nature, the effect of reinforcing domestic actors through authoritative international human rights law, forcing transformation, is comparable, at 68 et seq.

⁵¹ *A.-M. Slaughter* (note 42), at 123 et seq.

⁵² These include the right not to be tortured and the right to liberty, see ECtHR [GC], *A and Others v. the United Kingdom*, Judgment of 19.2.2009, Application No. 3455/05, §§ 126, 162, 164, 184 (fundamental); ECtHR [GC], *Jalloh v. Germany*, Judgment of 11.7.2006, Application No. 54810/00, §§ 104, 107 (core), § 99 (fundamental).

plication to cases of significant human rights violations.⁵³ The same is true for the group of cases where systemic deficiencies harm the observation of human rights obligations to such an extent, that only *ad hoc* remedial action can effectively remedy the human rights violation at issue. As has been shown, the Court has hardly ever gone against a final domestic court decision nor has it ever specifically prescribed how domestic organs should amend a certain piece of legislation. Hence, it reveals restraint towards the constitutionally high-ranking authorities and their legal acts.⁵⁴ Similarly, in contrast to the Inter-American Court of Human Rights (IACtHR), the ECtHR has refrained from specifying a “plan” setting out all facets of the measures to be taken. Rather, the Court restricts itself to ordering the desired result. The determination of the process itself and the actors to be involved is left to the Convention states’ discretion. Consequently, the Court has not primarily sought to instate a general trend of hierarchisation and assume paramount authority but uses the individual measures only as a means of last resort. It has rather shown that it seeks to establish a balanced position between the levels which is the prerequisite for cooperation to work. That the individual measure in *Volkov* required the reinstatement of the Supreme Court judge, indicates an intention to reinforce the independence and authority of the highest court in the Ukraine against corrupt and deficient political structures. This, in turn, will allow for a proper discharging of the *shared responsibility* of the Convention’s legal actors.⁵⁵

Also the manner, in which the Court developed the new mechanism of individual measures shows its attempt to allow for cooperation in this process. The Court *incrementally* enhanced the individual measures’ scope and intensity. Additionally, the ECtHR’s judges were not always in harmony on this point. In fact, the exception started with a few judges advocating it in several separate opinions and others expressing their criticism, making the

⁵³ Rec. II, (note 21), sets out the cases, in which the re-examination of a case should be possible, as exceptional: a continuing suffering of very serious consequences must exist, II. (i); in case of procedural faults, they must be of “such gravity that a serious doubt is cast on the outcome of the proceedings”, II. (ii); point 13 of the Explanatory Memorandum stresses the confinement to grave human rights violations; this is also to allow only for a narrow exception of the rule of *res judicata*, point 10.

⁵⁴ A pertinent example is the case of ECtHR [GC], *Kurić and Others v. Slovenia*, Judgment of 26.6.2012, Application No. 26828/06, § 411, where the Court refrains from examining the legislative reforms and the executive acts and prematurely ordering a specific result and limits itself to prescribing Slovenia to set up a domestic compensation scheme, § 415, operative provision 9.

⁵⁵ This also corresponds to the view taken by Judge *Spielmann* in his concurring opinion in *Polufakin and Chernyshev v. Russia*, that the prescription of individual measures amounts to a *duty* of the Court (note 23).

benefits and drawbacks transparent in their “discussions”.⁵⁶ This indicates that the Court left room for the member states to criticize or show their acceptance of this development. In fact, submissions voicing a contrary reading of Art. 46 have never been made.

2. Recent Remedial Developments and Structures Pointing towards a Complementary and Cooperative Relationship between the ECtHR and Domestic Actors

The Court’s attempt to enhance its impact “on the ground” by fostering a complementary relationship as described above (Part II. 1.) is also advanced by other recent amendments to the Convention’s wider implementation structure. The – through the ECtHR proactively supported⁵⁷ – introduction of an advisory procedure in Protocol 16 serves as a good example. As opposed to classical inter-state advisory procedures (or Art. 47 of the Convention), the envisaged procedure is rather reminiscent of the EU preliminary reference procedure. The Convention states’ highest courts are enabled to ask for the Court’s opinion on specific legal questions that have come before them. Salient facts are that this procedure will, in contrast to the EU procedure, not be obligatory and that the opinions will be non-binding. Nevertheless, the ECtHR will be included in a quasi-integrated reference structure of courts across the levels of the domestic legal orders and the Convention. While the changes of Art. 46 pertain to the ECHR’s repressive mechanisms, this addresses the need for implementation pre-emptively. For, if a domestic court decides along the lines of the advisory opinion, the Convention law, as interpreted by the Court, will have immediate effect through the normal domestic implementation mechanism of national court decisions.

Here again, one could underline the elements that amplify the ECtHR’s authority and ask if the Court issues the initial opinion on a case whether this will not determine the discourse which follows. It may be difficult for national courts to deviate from the opinion of the ECtHR once having asked for it. Even if the procedure is not obligatory, will a national court not be factually bound by peer pressure and media attention to consult the

⁵⁶ (note 23).

⁵⁷ Having sent a Reflection Paper to all member states and other interested parties for comment, it eventually submitted a final opinion to the CM which was fed into the final draft Protocol, see Opinion of the Court on Draft Protocol No. 16 to the Convention, adopted 6.5.2013, <<http://www.echr.coe.int>>.

ECtHR before taking its decision wherever ECHR law is obviously concerned? Furthermore, the institutionalized interchange between the courts again by-passes any political process that might be interposed between the final domestic court decision and a decision of the ECtHR. Finally, the importance of the ECtHR's role may be enhanced even further by its more frequent involvement in the finding of a legal answer to controversies arising under the Convention.⁵⁸

Seen through the lens I have previously used however, this may be assessed differently. The changes mentioned would appear to reinforce dialogue and cooperation. Even if the ECtHR issues the individual reasoning, it is still up to the domestic court to decide on the need for a referral. Additionally, since it is not binding, the domestic court may deviate from the ECtHR's opinion, if it has good reasons. This possibility might augment the quality of the domestic court's reasoning. Pressure by the media or the public will be ineffective if that reasoning is convincing. An advisory opinion by the ECtHR might in fact fortify the position as well as the concrete decision of the domestic court. Through this form of cooperation the domestic courts may become stronger actors who can, in turn, effectively translate such cooperation into concrete human rights protection. In addition, the new procedure itself seems to have been borne out of a cooperative process which has occurred across the Convention's different legal levels.⁵⁹ Finally, in the Court's explanation of the intention behind this new procedure, we find clear words supporting the institutionalizing of a judicial *dialogue* between itself and the highest domestic courts.⁶⁰ The "constitutional role" that has been envisaged in this process for the latter does not contradict this view. Former Court President *Wildhaber*, who triggered the debate, as well as the Court itself have a Court in mind that may "develop the underlying principles of law in a manner that will speak to the legal systems of all the

⁵⁸ As envisaged by the Group of Wise Persons, (note 42), lit. B. 14.

⁵⁹ See the Opinion of the Court on Draft Protocol No. 16 (note 57), point 3.

⁶⁰ Opinion of the Court, (note 57), para 4; Report of the Group of Wise Persons, (note 42), at 21.

Contracting Parties”.⁶¹ Aiming at communication, the complementary and cooperative relationship is inherent in this formulation.⁶²

Furthermore, the development of the pilot procedure constitutes an expansion of the Court’s remedial powers that may, at first sight, constitute a development that illegitimately intrudes domestic internal affairs, but at second glance also demonstrates its ambition to cooperate with the national sphere, more precisely, with the domestic legislatures.⁶³

Similarly to the individual measures, the Court has also developed a parallel jurisprudence of so-called Art. 46 judgments (semi-pilot procedures),⁶⁴ where the Court refers to the legal obligation of the state under Art. 46 to introduce general measures in the domestic legal system, but without issuing binding obligations in the operative provisions. The Art. 46 judgments’ recent expansion in scale and breadth of their subject-matters⁶⁵ also highlights the trend of the Court to use the obligatory judgments only cautiously, while in all other cases it prefers a softer approach that emphasizes the dialogue and cooperation between the levels. Another development which should be mentioned here is the Court’s eagerness to foster “soft” or informal judicial dialogue as well as the dialogue which takes place through judgments.⁶⁶ Moreover, the Court has focused increasingly on further elaborating its jurisprudence on Art. 13 to reinforce the local level.⁶⁷ Last but

⁶¹ “Reflection paper on the proposal to extend the Court’s advisory jurisdiction”, ref. No. 3853038, available at <<http://www.coe.int>>, proposed measures, II. lit. B 4, point 81; this takes recourse to the formulation of this role in the Report of the Group of Wise Persons, (note 42), at I. point 24 – constitutional “mission”, II. lit. B 4, point 81, III. lit. B. 4, point 135; for *L. Wildhaber’s* approach, see his latest publication on this topic, *ibid*, Rethinking the European Court of Rights, in: J. Christofferson/M. R. Madsen (note 45), 204 et seq.

⁶² See *S. Greer/L. Wildhaber*, Revisiting the Debate about “constitutionalising” the European Court of Human Rights, HRLR 12 (2012), 655 et seq.; *A. Stone Sweet* (note 46), at 76 et seq.

⁶³ For an account of the procedure’s development, the criticism and the placement into a cooperative framework, see *M. Fynys*, Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights, GLJ (2011), 1231 et seq.

⁶⁴ See for these notions *P. Leach* (note 34), at 166 et seq.

⁶⁵ For an account of Art. 46 judgments and their expansion see *P. Leach* (note 34), at 166 et seq.

⁶⁶ *M. Villiger*, The Dialogue of Judges, in: C. Hohmann-Dennhardt/P. Masuch/M. Villiger, Grundrechte und Solidarität, Festschrift R. Jaeger, 2010, 195 et seq., particularly at 202 et seq.

⁶⁷ ECtHR [GC], *Ramirez Sanchez v. France*, Judgment of 4.7.2006, Application No. 59450/00, §§ 159, 166 (finding a violation of Art. 13 without a corresponding violation of substantive rights); *Čonka v. Belgium*, Judgment of 5.2.2002, Application No. 51564/99, § 83 (establishing Art. 13 as one of the fundamental principles of a democratic society), *Anguelova v. Bulgaria*, Judgment of 13.6.2002, Application No. 38361/97, § 161 (duty to tailor domestic remedies with respect to a successful complaint). This has also been backed by CM docu-

not least, Protocol 14 encouraged the application of friendly settlements by placing the Court to the parties' disposal at any stage of the proceedings. This procedure has since been resorted to more frequently.⁶⁸ Here, the Court provides a forum for the settlement of human rights disputes. Instead of playing an adjudicative role, the Court acts as mediator. Again, this constitutes a soft, non-hierarchical form of influence on the domestic level.

In sum, all the new developments share the aim of enhancing the Court's impact "on the ground" by strengthening the national sphere, interlocking the Convention's different legal levels and, thus, reinforcing vertical dialogue and cooperation.⁶⁹ Individual measures fit into this overall conception when seen as a supplementary mechanism of last resort which *authoritatively* reinforces the Convention as a "constitutional instrument of European public order".⁷⁰ Accordingly, they allow both levels to share their complementary responsibilities in a balanced manner.

3. Addressing Legitimacy Concerns

a) Integrating the Idea of Checks and Balances

The Court's incremental legalization of its supervision of implementation, whereby it has taken over salient functions of the CM, raises the question of its compliance with the principle of checks and balances. Against any reproach in this connection, the following arguments can be adduced. It could be adduced that the Convention states as well as the CM have freely conceded their further political involvement in the implementation process, implying that the Court did not intrude on their political powers but rather only assumed the conceded competences. Firstly, Art. 46 was already amended by the Convention states in Protocol 14, which gave the Court a role to play in the implementation process for the first time. Hence, the ini-

ments, see CM Recommendation Rec(2004)6 to member states on the improvement of domestic remedies, available at <<https://wcd.coe.int>>.

⁶⁸ For the recent practice, *H. Keller/M. Forowicz/L. Engi*, Friendly Settlements before the European Court of Human Rights, Theory and Practice, 2010.

⁶⁹ Cooperation may narrow the distance that is perceived to exist between the domestic and the ECHR legal systems, in Russia the latter has been described as "chuzhoy"/"foreign", *A. Nußberger*, The Reception Process in Russia and Ukraine, in: *H. Keller/A. Stone Sweet* (note 42), at 667; domestifying ECHR law and thereby creating an identity of a Europe of Rights is seen as a tool to enhance human rights' impact at domestic level, at 677 et seq.; *L. R. Helfer* invokes the notion of "embedding" the Convention within the Convention states' legal and political systems, (note 49).

⁷⁰ (note 48).

tial steps in legalizing the process were consciously taken by the member states themselves. The idea behind this was to enhance the “political” pressure, driven by the need for an alternative to the CM’s authority to suspend a contracting state’s membership according to Art. 8 CoE Statute.⁷¹ The Court merely developed the mechanism further. Secondly, the political organs of the CoE pushed for the amendment of Art. 46 in Protocol 14.⁷² With respect to the making of specific orders, it was the CM itself that urged the Court to give clearer guidance in its judgments so as to facilitate the implementation process and make it more effective.⁷³ In its annual report of 2012 the CM positively remarked that the Court had engaged in assisting the execution process by giving clear indications since *Assanidze*.⁷⁴ Moreover, the CM recommended that the Convention states adopt provisions for the reopening of procedures in case of an adverse judgment by the ECtHR, a position that led to the legalization of cross-level cooperation, particularly regarding the courts.⁷⁵

Furthermore, the complementary structure of *shared responsibility* implies a vertical system of accountability and checks and balances.⁷⁶ Of course this system is not to be equated with the classical domestic form of horizontal checks and balances, but the latter is neither practical nor worth

⁷¹ Explanatory Report to Protocol 14, amending Art. 16, points 99-100, available at <<http://conventions.coe.int>>.

⁷² Parliamentary Assembly of the Council of Europe (PACE) had urged that Art. 46 be amended in order to alleviate the perceived weaknesses of the CM in safeguarding the execution of judgments by the Court, see *W. Vandenhole*, Execution of Judgments, in: P. Lemmens /W. Vandenhole (eds.), Protocol No. 14 and the Reform of the European Court of Human Rights, 2005, 105 et seq., at 111 et seq. Some judges, including the Court’s president, were skeptical, pointing out the danger of shifting the competences between the Court and the CM, *E. Lambert-Abdelgarwad*, The Execution of Judgments of the European Court of Human Rights, Human Rights Files, No. 19, 2008, at 54, with reference to Court President *Wildhaber*’s opinion cited in CDL-AD (2002) 34, 18.12.2002, Opinion No. 209/2002, § 6. The envisaged amendment of Art. 46 paras. 4, 5 was thus narrowed down (no fine as proposed by PACE, as on EU Level, Art. 258 AEUV), a 2/3 threshold was inserted to trigger the procedure.

⁷³ Resolution Res(2004)3 of the CM, on judgments revealing an underlying systemic problem, adopted 12.5.2004, albeit with respect to general measures. Also PACE and the Venice Commission have induced the Court to give clearer indications for the execution of its judgments, Venice Commission Opinion CDL-AD (2002) 34, 18.12.2002, Opinion No. 209/2002, §§ 56 ff.

⁷⁴ See e. g. “Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights”, 6th Annual Report of the CM 2012, at 28, §§ 37-39, available at <<http://www.coe.int>>.

⁷⁵ Rec. II (note 21); see also the CM’s Resolution of 12.5.2004, Res(2004)3.

⁷⁶ Emphasizing the role played by pluralism in the EU, *M. P. Maduro*, Three Claims of Constitutional Pluralism, in: M. Avbelj/J. Komárek (eds.), Constitutional Pluralism in the European Union and Beyond, 2012, 67 et seq., at 77.

striving for, since the Convention system is not intended to become a quasi-domestic supranational political order.⁷⁷ The vertical idea of courts checking on the ECtHR as well as a wider compound of legal experts⁷⁸ may serve as a good mechanism for ensuring accountability regarding issues of legal competence, coherence and consistency. The Court's incremental approach leaves room for critique, capable of informing its next step. Nevertheless, the "checking power," which would hold the Court accountable for burdening democratic processes with overly extensive measures, should also be vested with political organs. Ideally, the Court should also be limited by means of horizontal checks and balances exercised by the CM and the Parliamentary Assembly (PACE). In the present context, however, the different actors have tended to encourage the Court or to acquiesce. Whether the Court is seen as having acquired "conceded" competences or as having intruded on the powers of other legal actors, the disquieting feeling remains that the Court acts in a quasi-vacuum concerning checks by political bodies. The same goes for the Convention states, as it seems that they have not yet critically scrutinized this development. One sign of this is that respondent states have generally neither made submissions offering a contrary interpretation and application of Art. 46 nor have they openly abstained from compliance or expressly criticized this development. In the case of the Ukraine, however, the government has not yet complied with the individual measure, and it has pointed out its legal difficulties in doing so. Picking up on what was noted in Parts III. 1./2., it should be emphasized that within the processes of developing the Convention, the Court has interacted with political actors on both levels, i. e. with national governments, PACE, CM and its expert bodies.

b) Structuring the Complementary Role of *Shared Responsibility* According to the Principle of Subsidiarity

Which principles structure the complementary relationship between the legal levels of the Convention system so as to provide the right "power balance"? Parallel to the developments of "interpretative cooperation", the concepts of subsidiarity, deference, effectiveness and proportionality could

⁷⁷ *A. Stone Sweet* notes that traditional domestic notions are "no longer up to the task" and "that such notions [may be] in the process of being adapted to cosmopolitan precepts and realities", (note 46), at 84.

⁷⁸ Also emphasizing the legitimating potential of "accountability" within this coordinative structure, *A. Peters* (note 43), at 54 et seq., exemplary for the EU context, *A. Voßkuhle*, *Verfassungsgerichtsbarkeit und Europäische Integration*, NVwZ-Beilage (2013), 27 et seq.

be used to structure “enforcement cooperation”. The structural principle of subsidiarity runs through the whole Convention allocating the institutional competences across the levels.⁷⁹ It is decisive for the admissibility of an application; it is inherent in the margin of appreciation doctrine that determines the material scope of review and it applies to the implementation process. The Brighton conference recently underlined the importance of this principle for the adequate allocation of powers between the different legal levels of the Convention system, which has led to its inclusion in the Preamble (Protocol 15). As described above (Part I. 1.), the Court originally interpreted Art. 46 as recognizing the states’ discretion to adopt – in cooperation with the CM – the appropriate measures by which to execute the Court’s judgments.⁸⁰ Although the general measures ordered by the ECtHR were already of discretion-reducing effect, in terms of prescribing specific processes and results to be adopted and achieved, they never prescribed the exact means, thus leaving domestic actors substantial discretion for the execution of the Court’s orders. Individual measures, however, hardly leave room for such discretion. In principle, they appear to contravene the subsidiarity principle, as traditionally applied by the Court, causing doubts as to the preservation of the concept’s underlying values.⁸¹ This raises concerns as to the ECtHR’s democratic legitimacy to make such orders⁸² and about

⁷⁹ For subsidiarity as a structural principle in international human rights law, see *P. G. Carozza*, *Subsidiarity as a Structural Principle of International Human Rights Law*, *AJIL* 97 (2003), 38 et seq.

⁸⁰ This expresses the idea of subsidiarity, see e. g. Judge *Costa* in *Assanidze* (note 11), concurring opinion § 4.

⁸¹ *D. Shelton* lists as underlying values efficiency, liberty and justice, considering subsidiarity the ultimate expression of self-determination, *Subsidiarity and Human Rights Law*, *HRLJ* 27 (2006), 4 et seq., at 5 et seq.; see also *P. G. Carozza*, (note 79).

⁸² The Court has generally discussed its democratic deficit and stated that this demands deference, ECtHR [GC], *Animal Defenders International v. the United Kingdom*, Judgment of 22.4.2013, Application no. 48876/08, para. 111 with further references; emphasizing, that its “task in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities” *Animal Defenders* (note 82), para. 105 and *VgT Verein gegen Tierfabriken v. Switzerland*, Judgment of 28.9.2001, Application no. 24699/94, para. 68. The democratic deficit of constitutional courts reviewing parliamentary acts has been broadly discussed under the term of countermajoritarian difficulty at the domestic level. Particularly the ideas of *J. Waldron*, *R. Dworkin* and *J. H. Ely* have informed academic debate about the democratic legitimacy of ECtHR review, see *S. Wheatley*, *Minorities under the ECHR and the Construction of a Democratic Society*, 2007, PL 770, at 783, who stresses that these concerns are “exacerbated by the absence of possibility of legislative override, or treaty amendment without the consent of all other states parties”, while *A. Follesdal*, *The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights*, *Journal of Social Philosophy*, 40 (2009), 595 et seq., argues with a liberal contractualist approach in favour of the democratic legitimacy, presupposing the exercise of a weak judicial review, however, which is slightly altered by the ordering of specific measures; for a defence of strong judicial

the preservation of diversity.⁸³ Moreover the Court's lacking expertise, efficiency and the lacking opportunities of procedural participation before it may be seen insufficient to afford adequate procedural justice to the individual.⁸⁴ Nevertheless, the Court has considered individual measures necessary to increase the effectiveness of the implementation process. In fact, the use of individual measures has facilitated the CM's observation of implementation.⁸⁵ Hence, the question is whether the values underlying the concept of subsidiarity forbid the Court to use this new remedial tool or whether a less rigidly state-centric application of subsidiarity is legitimate. Following *Assanidze*, the Court employed a "no other alternative" interpretation to allow for individual measures and in *Volkov* it connected this criterion to the existence of systemic defects in the Ukrainian judicial disciplinary law which were of such a nature that, according to the Court, a reopening of the disciplinary procedure would not have effected legal redress in an adequate amount of time. Even if one doubts whether there was no alternative, one may be inclined to agree that no other legal response would have afforded an equally appropriate individual redress considering the gravity of the human rights violations involved. Thus, the argument that the values underlying subsidiarity could have demanded an alternative legal response would seem misplaced.⁸⁶ Recalling the analysed case law, stricter measures were ordered not in opposition to but due to democratic legitimacy concerns. Specific individual measures have been used to strengthen and reinforce national institutions, especially courts, which may then better serve the functioning of domestic democratic processes.⁸⁷ This is connected

review, see G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 2007, at 119; A. Legg, *The Margin of Appreciation in International Human Rights Law*, 2012, analyses democratic legitimacy as external factor for the ECtHR to acknowledge a margin of appreciation, at 75 et seq., supporting the ECtHR's democratic legitimacy for review in these cases. Rejecting these concerns, when construed along the lines of the traditional domestic notions, see A. Stone Sweet (note 46).

⁸³ In the ECHR context this has been discussed with respect to the margin of appreciation, "ethical decentralization" and cultural relativity being the antagonistic concepts in the debate, see e. g. J. A. Sweeney, *Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post Cold-War Era*, ICLQ 54 (2005), 459 et seq., at 472 et seq., with recourse to M. Walzer's concept of thick and thin concepts of human rights, *Thick and Thin: Moral Argument and Home and Abroad*, 1994, at 459. For the lack of complex ethical issues in the cases of individual measures being ordered, this is not relevant here.

⁸⁴ Explanatory Report to Protocol 14 (note 71), point 15; expertise is also a factor for the margin of appreciation in the ECtHR's jurisprudence, see A. Legg (note 82), at 145 et seq.

⁸⁵ Consult the CoE website on information about the state of execution of ECtHR's judgments, <<http://www.coe.int>>, for the case of *Volkov*.

⁸⁶ For a similar account, see L. R. Helfer (note 49), at 149.

⁸⁷ The Court may draw its democratic legitimacy from the fulfillment of its function to secure the legislator's legitimacy claim by accounting for it by virtue of its constitutional judi-

to the Court's endeavour to protect fundamental requirements of the rule of law – which form the basis of a functioning democracy – where they were undermined by the democratic process.⁸⁸ By ordering specific measures, the ECtHR protected minorities and vulnerable groups against a democratic government which did not adequately represent their interests,⁸⁹ it applied the new tool where provisions were so broad that the legal quality was held missing.⁹⁰ Furthermore, by their authoritative force, individual measures may empower the domestic democratic process by shielding it from external pressures.⁹¹ By requiring specific steps to be taken within a certain timeframe, the possibility to delay implementation without incurring accountability is reduced. Due to the orders' specificity political actors as well as the media will be in a position to control governmental actions more closely. This may foster the political discourse on necessary legal reforms and, thus, further a general democratic politicization at the national level. Hence, individual measures can also be seen as a means to reinforce democratic legitimacy, albeit within narrow confines.

The other underlying value of subsidiarity which may appear compromised by the ordering of individual measures is the provision of procedural justice to the individual. According to its logic, the interests of the individual can generally best be served by the smallest jurisdictional unit due to local

cial review, see for this idea C. Möllers, *Gewaltengliederung*, 2005, at 138; C. Möllers, *Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts*, in: C. Schönberger/M. Jestaedt/O. Lepsius/C. Möllers (eds.), *Das entgrenzte Gericht*, 2011, 281 et seq., at 334, which may be transferred to the present context. This reveals another parallel between the two remedial powers actively developed by the Court, as the reinforcement of and the cooperation with the domestic parliaments have been invoked to justify the democratic legitimacy of general measures, see e.g. *M. Fyrnys*, (note 63).

⁸⁸ See *A. Legg* (note 82), at 100, in *Volkov* (note 3), the law on Supreme Court judges' dismissal was considered systemically deficient with respect to fundamental requirements of the rule of law, including the requirements of a fair trial, judicial independence etc., which led to the Court's finding that it had no other alternative than to order the reinstatement of Mr. *Volkov*.

⁸⁹ *J. H. Ely's* "representation-reinforcement" theory may be adduced here, *J. H. Ely*, *Democracy and Distrust. A Theory of Judicial Review*, 1980, at 73 et seq. The USA based theory has been transferred to the ECHR level by *A. Legg* (note 82), at 93 et seq., with respect to the concept of deference in relation to the concept of margin of appreciation. I submit that this idea can also be transferred to the implementation phase.

⁹⁰ See also the parallel to the Court's heightened scrutiny with respect to the substantive question of the violation of a right, *A. Legg* (note 82), at 98 et seq. This was the case in *Volkov* (note 3), where the "breach of oath" definition was deemed so opaque that *Volkov's* dismissal could not be considered as relying on "law" in the terms of the Convention.

⁹¹ *E. Benvenisti* argues that "referring to foreign and international law has become an effective instrument for empowering the domestic democratic processes by shielding them from external economic, political, and legal pressures", in: *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, *AJIL* 102 (2008), 241.

expertise and the fact that the local remedy is most accessible, quick and inexpensive. In multi-polar legal relationships of the ECHR, the local level can best consider all interests as certain individuals who are affected but not parties to the proceedings on the regional level will not be represented before the ECtHR and thus their concerns might otherwise be left unconsidered. This issue once led to a significant confrontation between the ECtHR and the German Federal Constitutional Court (FCC).⁹² Notably, the Court has refrained from ordering individual measures in multi-polar relationships. Generally, interest groups might even have a better opportunity for access to justice at the international level via *amicus curiae* participation than in some national proceedings. The efficiency of settling a legal dispute is enhanced when the Court gives clear directions as to the implementation of its decision. Due to lacking local expertise, the ECtHR depends on national authorities' independent and well-substantiated appreciation of human rights issues. Strengthening these authorities by ordering individual measures, as done in *Volkov*, thus enriches the international proceedings with expert information.⁹³ Considering that the Court asks for "no other practical alternative" to make a specific order, the decisive effect of local expertise is reduced.

In sum, the Court's use of individual measures does not squarely compromise the underlying values of subsidiarity, instead it may even help reinforce (democratic) self-determination.

Having thus examined and redeemed the main arguments against reading the concept of subsidiarity in a rigidly deferential, state-centric sense, we can proceed to envisage an adjusted dynamic interpretation of the subsidiarity principle which accommodates the new remedial tool.⁹⁴

One wider reading of the concept holds that the higher level can intervene if the lower level is not able or willing to afford effective human rights protection.⁹⁵ This would encompass all individual measure cases. Such a concept leaves no room for a more complementary interlocking cross level

⁹² Decision of the FCC, 2 BvR 1481/04 of 14.10.2004, available at <<http://www.bverfg.de>>, point 3(c), marginal number 59; commenting on the courts' "struggle", *M. Hartwig*, Much Ado About Human Rights: The FCC Confronts the European Court of Human Rights, GLJ (2005), 869 et seq.

⁹³ For the dependence on national independence, see *J. Christofferson* (note 45), at 192 et seq., 200 et seq.

⁹⁴ For a variety of relevant concepts, see *A. Follesdal*, The Principle of Subsidiarity as a Constitutional Principle in International Law, in: *Global Constitutionalism 2* (2013), 37 et seq., at 41 et seq.

⁹⁵ This is also called a complementarity principle in Art. 17 Rome Statute; some prefer this over subsidiarity, see *S. Hentrei*, Generalising the Principle of Complementarity: Framing International Judicial Authority, *Transnational Legal Theory 4* (2013), 419 et seq.

structure, but is rather strict in separating the levels and their scope of action. Defining when a certain member state is “not willing” or “not able” will be difficult and, owing to its opacity, will generally allow for decision-making on the international level. Importantly, this approach also poses the problem that the principle of subsidiarity may be turned on its head in cases of countries suffering from systemic deficiencies or structural defects, as they may be held to be generally unable to afford adequate protection. These countries will thus generally be excluded from having the primary remedial role.

This is also the problem with another interpretation of subsidiarity which attributes the primary role to the local level only if it features democratic structures and adheres to the rule of law.⁹⁶ According to this normative view, a principle of “suspended subsidiarity” would apply with respect to “bad states”. The resulting “Council of two speeds” would represent a threat to the equality of states, something which is fundamental to the functioning and the legitimacy of the Convention system.

Yet, it is submitted that a normative concept of subsidiarity,⁹⁷ that is embedded in the complementary relationship of the vertical levels, constitutes the basis for the adequate allocation of institutional competences.⁹⁸ Deference would function as the legal principle which “translates” the values associated with governance at the lower level, especially those of democratic and individual self-determination for the legal discourse, requiring, in principle, a legal presumption for a certain decision to be taken at the domestic level,⁹⁹ unless *countervailing concerns of a sufficient weight* would demand to shift the decision-making power to a higher level in order to effectively

⁹⁶ H. Keller/A. Fischer/D. Kühne, Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals, EJIL 21 (2010), 1025 et seq., at 1031 et seq. with reference to L. R. Helfer (note 49), at 149.

⁹⁷ For a reconstruction of the subsidiarity principle along the notion of cosmopolitan normative individualism, so as to avoid pure, unsubstantiated state-centrism, see A. Follesdal, (note 94), at 55 et seq.; see also A. v Staden, The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review, Jean Monnet Working Paper 10/11, available at <<http://www.jeanmonnetprogram.org>>; I. Feichtner, Subsidiarity, in: MPEPIL, para 3.

⁹⁸ In contrast to the foregoing concept, this does not mean that the Court would have to first assess whether a respondent state meets basic democratic standards, as this general assessment is left to the CM to decide according to Chapter II Arts. 8 and 3 and Chapter I Art. 1 of the CoE Statute, which prescribes the suspension of a member state, in case it does not adhere to the fundamental principles which “form the basis of all genuine democracy”.

⁹⁹ For the implied preference for the lower level, see I. Feichtner (note 97); for subsidiarity as a presumptive theory, see A. Legg (note 82), 61.

protect individual rights.¹⁰⁰ The effectiveness of human rights protection would constitute a “counterweight”¹⁰¹ to this reading of subsidiarity.¹⁰² The balancing of the two “pillars” – of subsidiarity and effectiveness – should be guided by the principle of proportionality. Proportionality is the principle which allows for cross-level “dialogue”, interlocking the levels and preventing their collision. The concept constitutes a reasonable methodological tool to delimit questions best left to political discretion from those that fall within the legal sphere. This is what principally guided the Court in *Volkov*, as underlined by Judge *Yudkivska*’s concurring opinion and the majority’s construction of the individual measure as representing an *exceptional* case. It did so, notably, after having balanced the need for *deference* and *effectiveness* along a *proportionality* scale, according to its “hidden balancing structure”, as the wording of the argument (reduction to zero) – parallel to the reduction of the margin of appreciation – revealed.¹⁰³

This approach tackles the shortcomings of the traditional concept of subsidiarity with regard to effectiveness. By allowing a “scale of interventionism”, it also responds to the criticism of a too rigid “either-or” subsidiarity concept. It squares it with the idea of a complementary relationship that is structured by the principle of subsidiarity, according to which both levels of the Convention system exercise a shared and interlinked responsibility, bal-

¹⁰⁰ *M. Kumm*, The Legitimacy of International Law in Question, EJIL 15 (2004), 907 et seq., at 921, also employs a presumption for the EU context in order to demarcate the levels with the subsidiarity principle.

¹⁰¹ Compare the proposal by the Jurisconsult in the wake of Interlaken, who came up with the concept of *complementary subsidiarity* which starts with subsidiarity and construes the effectiveness principle as the second “pillar” of the Strasbourg system, serving as a “counterweight” to subsidiarity. This accommodates that the Court always conceived of the concepts as antipodes, Note by the Jurisconsult, Interlaken Follow-Up, 8.7.2010, I. A. 3 and I. C. 14, available at <<http://echr.coe.int>>. It formulates the principle as follows: “Where a failure by the Court to act would result in a denial of justice on its part, rendering the fundamental rights guarantees under the Convention inoperative, the Court can and must intervene in the role attributed to it by Art. 19.”

¹⁰² The principle of effective human rights protection is anchored in the ECHR as objective and task of the Court (Art. 19) and expressed in the Court’s motif that Convention rights must not be merely “*theoretical and illusory but practical and effective*,” which goes back to the “*Belgian Linguistic*” case, ECtHR [Plenary], Case “*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium*”, Judgment of 23.7.1968, Application Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Ser. A No. 6, paras. 3-4 and inherent in the living instrument doctrine, as developed in *Tyrer v. United Kingdom*, Judgment of 25.4.1978, Application No. 5856/72, Ser. A-26, § 31.

¹⁰³ Also acknowledging the need to use the proportionality test for arriving at “clear” delimitations of the levels, *M. Kumm* (note 100). The assessment of proportionality has served as catch, where the Court has often used the concept of margin of appreciation to defer to the domestic level, see *A. Legg* (note 82), 192 et seq. The Court may develop a mirror-image jurisprudence for the implementation stage.

anced between the poles of restraint and activism. Within this form of *complementary subsidiarity* the use of individual measures may be deemed legitimate. In short, this approach departs from a too formal, state-centric interpretation of subsidiarity by taking normative considerations focused on how individuals' interests are best fostered as guidance. At present, the balance struck in individual measure cases, appears reasonable where the measure is seen to constitute an exception that is quite clear-cut and only kicks in if certain criteria are fulfilled.

Taking a comparative view, it becomes obvious, that not paying due regard to the values underlying the concept of subsidiarity and taking a too expansive approach to ordering individual measures – including indications as to which legislative measures to take or policy measures to adopt – may lead to legitimacy and compliance problems which can be observed with respect to the IACtHR.¹⁰⁴ Analogously, a study on the ECtHR shows that legitimacy as an engine of enforcement may subside when the number of specific remedies stipulated by the Court increases in connection with the new institutional role assumed by the Court in non-compliance procedures under Art. 46 para. 4.¹⁰⁵

4. Answering Concerns of Acceptance Arising under the Notions of Legal Competence, Certainty and Coherence

If a new development is considered to be within the bounds of a treaty (*lex specialis*), *de lege lata*, or at least to be in compliance with general public

¹⁰⁴ After *Loayza Tamayo v. Peru*, Judgment of 17.9.1997, Ser. C No. 33, the first case where restitution was afforded, Panama challenged the Court's competence to supervise the implementation of remedies, as the decision had led to serious implementation problems, see IACtHR, *Baena-Ricardo and Others (270 workers) v. Panama*, Judgment of 2.2.2001, Ser. C No. 72, 88, §§ 202, 203. For the problem of legitimacy, see *E. Malarino*, Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights, *International Criminal Law Review* 12 (2012) 665 et seq., at 684 et seq.; for compliance problems, see *F. Basch*, The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions, *Sur Journal - International Journal on Human Rights* 7 (2010), at 19, indicating that 50 % of the respondent states do not comply with remedies ordered at all, but amongst those who comply, 58 % are in compliance with monetary remedies, but only 36 % comply with restitution reparations.

¹⁰⁵ *B. Çalı/A. Koch/N. Bruch*, University College London (UCL) Study on the Legitimacy of the ECtHR: The View from the Ground, Department of Political Science 2 (2011). The study was conducted with a total of 107 active politicians, lawyers and judges from the UK, Ireland, Germany, Turkey, and Bulgaria, particularly at 35, 36, available at <<http://ecthrproject.files.wordpress.com>>.

international law (*lex generalis*), it tends to be accepted as being the result of a domestically, often democratically legitimized, act.¹⁰⁶ Hence, Judge *Yudkivska* endeavoured in her concurring opinion in *Volkov* to show that individual measures have a proper legal basis in the Convention and are in line with other regional human rights bodies' practice and general public international law. The reference to the practice of other human rights bodies is indeed valid in so far as all regional human rights courts have ordered *restitutio in integrum* and the reinstatement of state employees.¹⁰⁷ In contrast to the ECHR, however, the American Convention on Human Rights (ACHR) provides a legal basis for this competence (Art. 63 ACHR) and the indications of the Human Rights Committee and the African Commission are not binding. Moreover, the relevant cases were characterized by serious and systemic human rights violations. Last but not least, the human rights regimes at issue display notable differences concerning their institutional and political frameworks.¹⁰⁸ Consequently, while the comparative argument has supportive value, the exact demarcation of powers has to be informed by the specific context of the European Convention system.

Individual measures have also been seen as being in conformity with general public international law.¹⁰⁹ In fact, the Court first had recourse to the principle of primacy of *restitutio in integrum* as formulated in the *Factory at Chorzów* case¹¹⁰ when it mandatorily ordered restitution in the case of *Papamichalopoulos*. However, this reference does not tell us whether the ECtHR should have the competence to *order* such a remedy. The PCIJ and

¹⁰⁶ For a clear distinction between legality and legitimacy, see *J. Habermas*, Faktizität und Geltung, 1992, 565 and *C. Möllers* (note 87), 329 et seq., whose concerns about inferring the latter from the former are exacerbated at the international level, hence the term of acceptance is used in this context as a sociological category, compare *N. Luhmann*, Legitimation durch Verfahren, 1969, i. a. 28, 34, and *J. Habermas* (note 106), at 192. Albeit the idea of court acceptance through procedure may not be sweepingly transferred to all types of courts, see e. g. *C. Möllers* (note 87), at 303 et seq. for the national realm.

¹⁰⁷ See e. g. *Baena-Ricardo and Others* (note 104) where the reinstatement of 270 employees was ordered, if this was impossible, it was held that they should be provided with employment alternatives with similar conditions, salaries and remunerations; for the HRC, see *Busyo and Others (on behalf of 68 Judges) v. Democratic Republic of Congo*, Communication No 933/2000, UN Doc CCPR/C/78/D/933/2000, at 6.2., 6.3.; for the African Commission, see *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97 and 210/98 (2000), 4th recommendation to the government.

¹⁰⁸ *J. L. Cavallaro/S. E. Brewer*, Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court, *AJIL* 102 (2008), 768 et seq., at 784.

¹⁰⁹ Judge *Yudkivska* made this argument in her concurring opinion in *Volkov* (note 3).

¹¹⁰ PCIJ, *Factory at Chorzów (Germany v. Poland)*, Merits, Judgment of 13.9.1928, Ser. A No. 17, at 47.

the ICJ have indeed ordered material¹¹¹ and legal¹¹² restitution, attributing to themselves the inherent power to order restitution based on their functions.¹¹³ This approach has also been followed by human rights institutions in the UN system,¹¹⁴ and by the African Commission.¹¹⁵ The power of the Court to issue individual measures might also be inferred by reference to Art. 31 para. 3 lit. b Vienna Convention on the Law of Treaties (VCLT), which allows for interpreting the Convention in light of the subsequent practice of the parties in the application of the treaty.¹¹⁶ All of these arguments, however, presuppose that the *lex generalis* can be applied, since the *lex specialis* does not completely regulate the Court's powers.

The Court did long not decide on which provision to rest the power and which legal qualification applies.¹¹⁷ An explanation for this is that the Convention does not expressly provide the power to order individual measures. Art. 41 only allows for according just satisfaction, which comprises a decla-

¹¹¹ For examples, see Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Art. 35, fn. 497-500.

¹¹² For references, see (note 111), fn. 501-505.

¹¹³ Most prominently, in the *Factory at Chorzów* case, the PCIJ inferred from the complementarity of a breach and the obligation to provide reparation the competence for a Court to accord reparation notwithstanding a treaty's silence on that point, *Chorzów Factory*, Jurisdiction, Judgment of 26.7.1927, Ser. A No. 9, p. 22, and reaffirmed e. g. in *La Grand (Germany v. United States of America)*, Merits, Judgment of 27.6.2001, § 48; International tribunals have ever since also inferred the implied power to indicate reparations, see *D. Shelton*, Remedies in International Human Rights Law (2006), at 103, 280 et seq. Regarding the competence to order specific measures, the ICJ simply acted upon it, see e. g. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, operative provisions 3 a), b), c) and the *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, operative provision 12.

¹¹⁴ Referring to Art. 2 para. 3, in conjunction with Art. 40 para. 4 ICCPR, see Report of the Human Rights Committee, GAOR, 55th Session, Supp. No. 40, A/55/40, Vol. I, para. 593; *D. Shelton* (note 113), at 178 et seq.

¹¹⁵ See *G. J. Naldi*, Reparations in the Practice of the African Commission on Human and Peoples' Rights, LJIL 14 (2001), 681 et seq., at 690.

¹¹⁶ *E. Klein*, The Human Rights Committee and the European Court of Human Rights – Comparative Remarks, in: J. Bröhmer (ed.), The Protection of Human Rights at the Beginning of the 21st Century, 63, at 74; *G. Ress*, Supranationaler Menschenrechtsschutz und der Wandel der Staatlichkeit, ZaöRV 64 (2004), 621 et seq., at 633.

¹¹⁷ The Court oscillated between Arts. 41 and 46 as legal basis; compare *Assanidze* (note 11), *Slawomir Musiał v. Poland* (note 30) and *Volkov* (note 3). Concerning the legal qualification, academia has oscillated between *restitution* and the competence to *end* violations of public international law as an inherent power flowing from the power to ensure the observance of primary obligations; as to the *Assanidze* logic, see e. g. *J. A. Frowein*, Europäische Menschenrechtskonvention, 2009, Art. 46, paras. 9-11; *M. Breuer* (note 34), paras. 6-8.

ration or the payment of damages;¹¹⁸ neither the wording of Art. 46 nor of Art. 19 of the Convention empower the Court to take concrete measures. The *travaux préparatoires* of Art. 41, furthermore, reveal that the Convention's founders did not want the Court to become an authority that could annul, repeal or quash legislative, executive or judicial decisions.¹¹⁹ Hence, a power that would lean too far into this direction might be difficult to reconcile with the present legal structure.

A systematic interpretation¹²⁰ could provide a legal basis for ordering individual measures, since Art. 46 was amended by the member states, formalizing the enforcement process and integrating the ECtHR into the procedure¹²¹ in order to increase the political pressure on the parties to adhere to the Court's decisions.¹²² Yet, the Court was only attributed a repressive, supplementary and interpretative role (see also Art. 46 para. 3) rather than an active, preventive and enforcing one. Hence, this interpretation rather suggests that the parties have implicitly decided not to give the Court the latter power.

On the other hand, the silence of the Convention can also be said to argue against making a negative assumption. Owing to the ambiguity of the law, we are left with the teleological interpretation, allowing us to consider whether the legal basis for individual measures can be found in an implied or inherent power under Art. 46 (in conjunction with Arts. 19, 1 and the Preamble).¹²³ Since the Court had previously interpreted its power to be merely declaratory and the founders did not want to see too powerful a court emerge, the argument supporting such measures should demonstrate

¹¹⁸ In *Assanidze* the Court based the order on Art. 41; this was doctrinally criticized by *M. Breuer* (note 34), para. 8; the term just satisfaction has generally not been read as encompassing the ordering of restitution; suggesting to read it differently, however, see *D. Shelton* (note 113), at 50, 56, 58.

¹¹⁹ *P.-H. Teitgen*, the so often called "father of the Convention", pushed for the Court to be vested with powers to annul, call void or repeal national legal acts, but this undertaking was stopped by the governments of the Convention states, *Collected Edition of the Travaux Préparatoires*, 1975, Vol. I, at 45. Today's Art. 41 is reminiscent of Art. 10 of the German-Swiss Treaty on Arbitration and Conciliation (1921) and Art. 32 of the Geneva General Act for the Pacific Settlement of International Disputes of 1928, implying that the Court was meant to be given the typical power of an international court, *M. Breuer*, *Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR*, *EuGRZ* (2004), 257 et seq., at 260.

¹²⁰ This is a method of interpreting the provisions within their systematic context.

¹²¹ *A. Peters/T. Altwicker*, *Europäische Menschenrechtskonvention*, 2012, § 37, fn. 151; *A. Peters/T. Altwicker*, in: *S. Leible/J. P. Terhechte* (eds.), *Europäisches Rechtsschutz- und Verfahrensrecht*, Vol. III, *Encyclopedia European Law* (forthcoming), § 13 para 50.

¹²² (note 71).

¹²³ See e. g. *M. Breuer* (note 34), para. 8; *A. Peters/T. Altwicker*, *Encyclopedia* (note 121), infer an implied power from the synopsis of Arts. 46, 41 and 19.

why new circumstances require them and why they are still in accordance with the purpose and within the realm of the Convention.

Pursuant to the living instrument doctrine, the huge backlog of cases before the ECtHR may serve as a justificatory argument. With a view to confronting a case overload generated by several member states that suffer from serious systemic and structural defects in their legal systems, effective measures are a necessity. This is also in conformity with the ECtHR's case law in which the Court has emphasized that the Convention rights must be "practical and effective" in a material as well as a procedural dimension.¹²⁴ Art. 19 provides that the Court shall "ensure" the protection of human rights and if the Conventions system encompasses supervision of the implementation process according to Art. 46, the Court in fact has the responsibility to give clear indications. Otherwise Art. 19 could also read "observe". Consequently, if *restitutio in integrum* is the primary legal remedy by which the member states fulfil their international human rights obligations on the national plane, the Court should also have the inherent power to order it.¹²⁵ Envisaged by several separate opinions before,¹²⁶ the Court has now explicitly based its authority to order individual measures on Art. 46, as interpreted in light of Art. 1 in the case of *Savridin Dzburayev v. Russia*.¹²⁷ However compelling this interpretation may sound, it is not imperative and it seems to bend the Convention's black letter law. Classifying the interpretation as part of a law-applying or law-making discourse, the Court seems to have engaged in the latter.¹²⁸ Whether the interpretation is still an admissible act of judicial law-making is questionable. Considering the definition of the FCC concerning the limits of admissible judicial "law-making" e. g., they are seen to be set by the scope of the treaty. This means that admissible judicial law making stops where the following begins: an amendment of fundamental treaty provisions that derive from elementary political decision or an interpretation that fundamentally changes the allocation of power and influence between the domestic and the international lev-

¹²⁴ (note 102); *A. Peters/T. Altwicker*, Encyclopedia (note 121), also transfer this "concept of effective human rights protection" to the implementation process and its possible means.

¹²⁵ This argument is also made by *A. Peters/T. Altwicker*, (note 121); *M. Breuer* (note 34), para 8.

¹²⁶ Already argued by Judge *Yudkivska* in *Volkov* (note 3) and by Judges *Rozakis, Spielmann, Ziemele* and *Lazarova Trajskovka* in their concurring opinion in *Sejdovic* (note 23); Judges *Rozakis* and *Spielmann* in *Salduz* (note 23), §§ 12-13; and Judge *Bonello* in his concurring opinion in *Assanidze*, (note 11).

¹²⁷ ECtHR, Application No. 71386/10, Judgment of 25.4.2013, §§ 247-248.

¹²⁸ *J. Habermas* (note 106), 286 et seq. differentiates between "Normanwendungs- and Normbegründungsdiskursen" to demarcate the adequate power balance between legislature and judiciary.

el.¹²⁹ As individual measures have been applied *as an exception* to declaratory judgments which may only be ordered if *strict criteria* are fulfilled, the new development appears to be sustainable. Additionally, since the Convention states have so far acquiesced to the development and complied with the Court's orders, individual measures can be seen as validated by international law terms of tacit consent or of dialogic interpretation.¹³⁰

Still, the going against *res judicata* and legislative decisions may lead to orders that have a discriminatory effect and cause implementation problems at the domestic level.¹³¹

Additionally, a few caveats remain, with respect to the narrowness, legal certainty and coherence of individual measures. The *exceptional power* to order such measures is triggered by the already elaborated "no other legal alternative" ("reduction to zero") rule. While this rule is, indeed, quite narrow and clear, the addressee of the Court's order may nevertheless question which other forms of redress were considered. In *Volkov*, the Court, applying a welcome transparent line of reasoning, specifies that the alternative could be to order the reopening of proceedings. It remains unclear, however, what sort of causal link is required for determining that systemic deficiencies or a specific violation should lead to the reduction to zero of domestic discretion. In cases reflecting the classic *Assanidze* exception, one could deduce from the provisions in relation to which the exception was developed (Arts. 3 and 5) and the serious impact on the lives of the individuals concerned that the violation has to be of substantial severity. From *Volkov* it could be inferred that the idea that "justice is only timely justice"¹³² presumes the legal impossibility of adapting the legal system in time

¹²⁹ Generally FCC, 2 BvR 687/85, *Kloppenburger-Beschluss*, 2nd Senate, Judgment of 8.4.1987, §§ 54-60, concretizing this in FCC, 2 BvR 2661/06, *Honeywell*, 2nd Senate, Judgment of 6.7.2010, § 64.

¹³⁰ H.-J. Cremer, in: R. Grote/T. Marauhn (eds.), EMRK/GG Konkordanzkommentar, Art. 46, para. 118 brings up this concept that goes back to former ECtHR Judge R. Bernhardt's thesis, R. Bernhardt, *Entscheidungen des EGMR im deutschen Rechtsraum*, at 154. It starts from the assumption that if Convention states do not contest the ECtHR's case law, they tacitly consent to the practice of the Convention; the concept then adds the criterion of good faith a. o. to confine the scope of admissible judicial law-development; these thoughts have also been echoed by G. Ress, (note 116), 632 et seq.

¹³¹ This is also the assessment of Judge Costa in his concurring opinion in *Assanidze* (note 11), §§ 6-8. By contrast to general measures, individual measures benefit only the applicant, even though several people are likely to be affected by the general systemic defects. The domestic legal system is thus left with the task to implement the individual measures in a fair and non-discriminatory fashion.

¹³² "Article 13 [...] guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time", see ECtHR [GC], *Kudla v. Poland*, Judgment of 26.10.2000, Application No. 30210/96, § 156.

if this would incur a significant amount of time. But what if parliamentary procedural laws are defunct, at what point will the Court tell the legislature which legal provisions to adopt? Ultimately, the question remains, which criteria constitute systemic deficiencies or structural defects.¹³³ Even if the case law has so far been quite clear and narrow in scope, the use of clearer legal criteria would make the Court's context-specific case-by-case assessment more certain, transparent and accountable.¹³⁴ Ultimately, the interplay of individual measures (Art. 46) and just satisfaction awards (Art. 41) will have to be rationalized.

Summing up, it may be said that the problematic legal basis for individual measures should restrict the Court from expanding its power too far in this regard. If the Court were to proceed further in expanding its authority to order specific measures, eventually even unsettling the present rule-exception configuration, it is recommended that – *de lege ferenda* – it should seek to have this power be put on a secure legal footing. While the pilot judgment procedure has neither been developed nor been put on a solid legal footing in the Convention, the Court has, meanwhile, adopted Rule 61 of the Rules of Court. It sets out in detail the Court's powers and duties under the pilot procedure and the relevant procedural requirements and thereby enhances the legal certainty at least.¹³⁵

V. Conclusion and Outlook

To conclude, the Court has managed to enhance its impact at the national level by expanding its powers under Art. 46. Instead of seeking to employ a hierarchical legal structure for this purpose, the Court has endeavoured to complement the national legal sphere by a complementary system of cooperation and supplementation.

¹³³ See, however, the attempt at defining these terms by PACE's Committee on Legal Affairs and Human Rights, States with major structural/systemic problems before the European Court of Human Rights: statistics, AS/Jur/Inf (2011) 05 rev 2, 18.4.2011, para. 8: "a systemic/structural problem may be considered to be a 'dysfunction' in the national legal system when it leads to numerous applications before the Court".

¹³⁴ For an analysis of the principles governing the application of specific remedies, see *P. Leach, Beyond the Bug River – A New Dawn for Redress before the European Court of Human Rights?*, EHRLR 2 (2005), 148 et seq., at 163.

¹³⁵ Provisions concerning the power to order individual measures should, thus, at least be inserted into Chapter V Rules of Court, so that the parties will know how to submit their claim properly for an individual measure, and maybe Chapter VIII, to specify which exact measures can be ordered by the Court.

Individual measures embody the Court's exercise of its responsibility to enforce the "constitutional instrument of the European public order"¹³⁶ as a last resort. In general, the Court has managed to penetrate the domestic legal orders with its jurisprudence,¹³⁷ Convention states having largely accepted the new remedial powers, and thereby contained the arbitrariness and ineffectiveness of domestic political processes. The emerging European public (legal) order may be seen as being developed by a decentralized community of actors, located at the regional and the domestic level, particularly by a transnational community of courts.¹³⁸ This underlines that the legal relationship between international and national law is not static and that the individual has become a focus in the development of international law and gained an increasingly strengthened position against the state.¹³⁹ This development will be successful only as long as the fundamental principles of democratic and individual self-determination, diversity, a balanced consideration of all interests concerned, checks and balances and legality are preserved. A simple reliance on principle, logic and a moral imperative¹⁴⁰ will not allow the Court to expand its powers further in this respect. To do so, therefore, it will have to tread carefully and seek to rest its power on a secure legal basis. While this is important for the expansion of the Court's powers to order redress in terms of their scope, it may also become crucial for extending their legal depth, i. e. by having individual measures accord direct effect. Concerning this point, it should not be left unnoticed that the EU will accede to the ECHR. If the ECtHR is found to acquire a powerful "constitutional" position in this regard, being *pari passu* with the ECJ, this might serve as a trigger for the recognition of the ECtHR's orders as having direct effect. Yet, the attitude towards recognizing a direct legal effect of international tribunals' decisions in the domestic sphere has been rather adverse.¹⁴¹ While the direct effect of certain decisions of the IACtHR has been

¹³⁶ (note 48).

¹³⁷ *A. Stone Sweet* (note 46), at 67.

¹³⁸ Compare *A. Stone Sweet* (note 46), at 62 and *L. R. Helfer* (note 49), urging for the increasing involvement of political actors as well, at the national and regional level, at 130, 139.

¹³⁹ For an account of the individual's strengthened position in international and national law by virtue of the ECHR and of the change of statehood and the concept of sovereignty, see *G. Ress* (note 116) as well as *A. Stone Sweet* (note 46), who construes the Convention system as a cosmopolitan legal order, framed with reference to *Kantian* ideas, at 62, 83.

¹⁴⁰ See for this the concurring opinion of Judge *Bonello* in *Assanidze* (note 11).

¹⁴¹ See e. g. the judgment of the ICJ in *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31.3.2004, 2004 ICJ Reports 12, and the subsequent reaction of the President, in effect implementing the judgment by ordering its application, Memorandum by the President for the US Attorney-General, 28.2.2005, (2005) 44 ILM 964, and particularly the subsequent decision of the US Supreme Court, deciding that the ICJ

accepted, it has to be noted, that the doctrine is confined to grave breaches of human rights such as amnesty laws¹⁴² in decisions arising in a very specific historical and political context.¹⁴³ Similarly, the ECJ has had a very unique role within the development of the EU.¹⁴⁴ Undoubtedly, the EU represents a special political constellation, in which the political and legal integration of the member states into a common legal and political community has led to the establishment of an autonomous legal order that has its very own specific workings encompassing the doctrines of supremacy and direct effect of EU law and EU court decisions.¹⁴⁵ Prerequisite criteria for assuming the direct effect of international treaties are the provision's suitability to be applied directly by domestic courts and the parties' intention to that end. A provision's suitability to be applied directly is assessed with reference to the criteria of the narrowness and unconditionality of a provision.¹⁴⁶ While these criteria are unproblematic concerning certain individual

judgment was not directly enforceable without implementing legislation, *Medellin v. Texas*, 552 US (2008), Judgment of 25.3.2008; in the same direction, see *Görgülü* (note 37) and BVerfGK 9, 174 (2 BvR 2115/01, 2 BvR 2132/01, 2 BvR 348/03), Decision of 19.9.2006, para. 54 and, by contrast, see BVerfGK 9, 174, para. 59, where an intrusive impact of international provisions on the domestic legal system is assessed if they are of a subjective character ("individualschützende Norm"), however, their prevailing over a final domestic decision is rejected and their impact is held to be assessed according to domestic law; interestingly, the European Court of First Instance also decided not to accord a WTO DSB decision direct effect, CFI, T-174/00, *Biret International SA v. Council*, Slg. 2002 II-17, § 67; for more detail see *A. Peters, Jenseits der Menschenrechte* (forthcoming), § 16, at 454 et seq.

¹⁴² *Barrios Altos case (Chumbipuma et al. v. Peru)*, Judgment of March 2001, Ser. C No. 75, confirmed in *La Cantuta v. Peru*, Judgment of 29.11.2006, Ser. C No. 162 and *Almonacid Arellano y otros v. Chile*, Judgment of 26.9.2006, Ser. C No. 154.

¹⁴³ *C. Binder, Auf dem Weg zum lateinamerikanischen Verfassungsgericht?*, ZaöRV 71 (2011), 1 et seq., at 7 et seq., 27.

¹⁴⁴ On the ECJ's judicial activism in its specific political context, see *M. Dawson* (ed.), *Judicial Activism at the European Court of Justice*, 2013; *J. H. H. Weiler*, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, *J. Common Mkt. Stud.* 31 (1993), 417.

¹⁴⁵ ECJ, Rs 6/64, *Costa v. ENEL*, Slg 1964, 1251, 1270 (autonomous legal system); ECJ, Rs. 26/62 *Van Gend en Loos v. Nederlandse Finanzverwaltung*, Slg.1963, 7, 24 et seq., 28 (direct effect). Arguably, the ECHR has evolved into a partly autonomous legal order, see, among other signs, the creation of the notions of the ECHR as a "constitutional instrument of the European public order", (note 48). Yet, it also strives to be seen as part of the public international law system, becoming apparent in cases where the ECtHR tries to reconcile ECHR and public international law through harmonious interpretation, see e. g. ECtHR [GC], *Nada v. Switzerland*, Judgment of 12.9.2012, Application No. 10593/08, §§ 186 et seq.

¹⁴⁶ See for the criteria of direct effect of international law generally, *A. Peters* (note 141), § 16, at 449 et seq. and *R. Geiger, Grundgesetz und Völkerrecht*, 2013, at 151. Some courts have further considered the overall objective of a treaty and asked for a provision to pursue the aim of individual rights' protection in order to be suitable for direct application by the courts, this is rejected by *R. Geiger* (note 146), at 152.

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measures, such as the release of prisoners in *Assanidze*, the Convention states appear to have intended to reject a direct effect, as displayed in the *travaux préparatoires* (see Part III. 3.). The Court was not meant to have the competence to annul, void or repeal national legal acts. This would, nevertheless, be the result in certain cases if the individual measures were to take direct legal effect. Notably, legitimacy concerns are much more pressing for the direct effect of international court decisions than with respect to the direct effect of treaty provisions.¹⁴⁷ However, according to the living instrument doctrine, the Convention has to be interpreted in the light of today and if Convention states accepted the decisions and applied them directly, this would automatically indicate a change of intention. Hence, it will be important to scrutinize how these states react to the ECtHR's ordering of individual measures.¹⁴⁸

In its *Görgülü* decision, the FCC opposed direct effect, in a situation where domestic courts would have to be able to take new facts into account when executing the ECtHR's decision.¹⁴⁹ In *Volkov*, the measure ordered has not yet been implemented due to the absence of enabling legal mechanisms and an apparent unwillingness to accept the individual measure ordered, let alone its direct effect.¹⁵⁰ This may, however, not be the last word. It remains to be seen how other Convention states will react¹⁵¹ and how active and legally integrating a role the ECtHR will assume to enhance the effectiveness of individual rights' protection and thus the European rule of law.¹⁵² Recalling the Court's cooperative approach, particularly with domes-

¹⁴⁷ Concerns about the adequate allocation of power between international courts, on the one hand, and democratic law makers and executives, on the other hand, and the general concern about the lacking democratic legitimacy of international law are exacerbated.

¹⁴⁸ For an account of the mixed national/international quality of the legal institute of direct effect, see *A. Nollkaemper, National Courts and the International Rule of Law*, 2011, 127 et seq.

¹⁴⁹ (note 37), §§ 38-63, esp. §§ 52-62; NJW 2005, 2685 et seq., at 2688.

¹⁵⁰ The Head of the High Council of Justice, Mr. *Lavrynovych*, stated in an interview on 8.10.2013 that, according to Ukrainian legislation, Mr. *Volkov* can only be newly appointed to the post but not reinstated. The subsequent problem would then be that the Law on the "Judiciary and Status of Judges" (available in English translation at <<http://cis-legislation.com>>) limits the number of judges to 48 which has not been amended since the judgment became effective, even though a different amendment to the law was adopted in July 2013 (compare note 85).

¹⁵¹ *M. Kamminga* sees no general objection of states to these individual measures, especially due to the trend, particularly in Eastern Europe, to accord human rights treaty provisions direct effect in domestic law, *M. Kamminga*, in: *M. Kamminga/M. Scheinin* (eds.), *The Impact of Human Rights Law on General International Law*, 2009, at 14.

¹⁵² Seeing an underlying assumption of international human rights tribunals, that their judgments may have direct legal effect in the domestic legal systems, particularly with re-

tic courts, that seeks to balance judicial activism and restraint, it seems realistic that the Court will generally rely on domestic review procedures and will refrain from trying to directly annul or repeal legislative, judicial or high executive acts. However, regarding serious violations of human rights that can be remedied by ordering measures of a simple administrative nature without any room for discretion (e. g. the order to release a prisoner as in *Assanidze*, where the highest court decision had just not been executed), a different attitude might surface in the future. In conclusion, albeit proactive and authoritative, the Court cannot be described as indirectly or directly *ruling* the Convention system, being still confined by and dependent on the domestic level.

course to the orders measures that leave no discretion to the local level, *M. Kamminga* (note 151), at 14.

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