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Pilot Judgments at the ECtHR

- Altered Prospects for Individual Justice?

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws programme

30 higher education credits

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Semester: VT13

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Summary

Primarily due to a massively overburdened docket, the European Court of Human Rights has been experiencing major challenges in the last decade. The crisis has prompted it to modify its procedures and one recent innovation at the Court is the pilot judgment procedure, which is a tool for dealing with systemic deficiencies in the Member States.

This thesis assesses what the effects of the pilot judgment procedure are on the Court's function as a provider of individual justice. An attempt is made to define the procedure and it is concluded that it is still in a development phase. The thesis also evaluates risks inherent in the procedure from the perspective of individuals who have been subjected to a systemic deficiency but whose cases the Court will not examine.

The thesis starts with an overview of the ECtHR in the respect of how it functions and what purpose it serves. It is concluded that the Court has a dual role: It is on one hand a last resort for victims of violations who have failed to attain recognition on the national level; it has on the other hand a constitutional function, to set standards and establish general principles for the protection of human rights under the ECHR.

Thereafter, the norms pertaining to the pilot judgment procedure is scrutinized and three constitutive elements of the pilot case are identified. Finally, a thorough examination of case law reveals that the procedure is still under development and has not yet matured into a formally defined concept.

Subsequently, the notion of individual justice is analyzed and it is concluded that for victims of human rights violations it is of essence that some form of redress is provided. For this purpose it is argued that the Court should take a more active role in relation to remedies. A comparison with the Inter-American Court of Human Rights substantiates this argument.

In the last chapter of the thesis some general principles are suggested for when the pilot judgment procedure should be applied. It is argued that the Court must be meticulous in the assessments of when to apply the procedure. The concern is that effectiveness gained for the institutional functioning of the Court, might result in harm for the very subjects that the Court is supposed to protect. It is argued that the Court, to the furthest extent possible, must strive to avoid such an outcome.

Sammanfattning

Europadomstolen för mänskliga rättigheter har stått inför svåra utmaningar under de senaste tio åren, framförallt på grund av sina enorma målbalanser. Detta har tvingat domstolen att ta fram nya processuella metoder för målhanteringen och ett förfarande den börjat använda sig av är det så kallade pilot-domsförfarandet; en procedur ämnad för mål som påvisar systematiska fel i medlemsstaterna.

Detta examensarbete analyserar pilot-målsförfarandets effekter på domstolens roll, och särskilt dess funktion som sista utväg för att uppnå individuell rättvisa. Ett försök görs att definiera pilot-målsförfarandet och det slås fast att förfarandet fortfarande är under utveckling. Även risker analyseras, särskilt från enskilda individers perspektiv, dvs. personer som fallit offer för systematiska fel men vars klagomål inte prövas av Europadomstolen.

Uppsatsen inleds med en översikt av hur domstolen fungerar och vilka syften den fyller; slutsatsen dras att Europadomstolen har en dubbel funktion. Den är både en sista utväg för individer vars rättigheter kränkts och som inte lyckats få gottgörelse på nationell nivå. Och den har också en mer konstitutionell roll, nämligen att fastställa normer och generella principer avseende skyddet av mänskliga rättigheter under Europakonventionen.

En analys av pilot-domsförfarandet ger därefter slutsatsen att ett mål som blir föremål för förfarandet (s.k. pilot-dom) innefattar tre processuella faser. Normerna för själva processen analyseras och en grundlig genomgång av praxis visar att pilot-domsförfarandet inte är moget för en formell definition.

Vidare diskuteras begreppet individuell rättvisa och slutsatsen dras att för individer vars rättigheter kränkts så är det viktigt att få upprättelse och få effekterna av kränkningen lindrade. Argumentet förs att domstolen borde ta en mer aktiv roll i detta avseende och en jämförelse med den Inter-Amerikanska domstolen för mänskliga rättigheter påvisar att en sådan omställning är genomförbar.

I en avslutande del ges några förslag på generella principer för när domstolen bör använda pilot-domsförfarandet. Det argumenteras för att det krävs noggrannhet i bedömningen, och vikten av att de klagandes intressen inte åsidosätts poängteras. Det bör i möjligaste mån undvikas att effektivitetsvinster för domstolen i stort går ut över enskilda, vilka i slutändan är de som domstolen ska skydda.

Preface

Writing a thesis about the (somewhat overlooked) subject of procedural human rights law has been a very interesting process. Focusing on the European Court of Human Rights while doing and internship at the Department for Human Rights at the Swedish Foreign Ministry has made it all the more stimulating, since I have been able to follow some of the issues I dealt with in the thesis up front (so to speak).

I would initially like to thank my supervisor Mr. Alejandro Fuentes for valuable comments on my text. I would moreover like to thank my colleagues in the litigation group at the Foreign Ministry for giving me time to work on the thesis, despite the busy situation at the office. Last but not least I would like to thank my girlfriend Kendra Bannister for her help with editing and grammar control. And of course Kendra, and also my family, deserve gratitude for always being supportive and inspiring me in my activities.

Abbreviations etc.

ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
IACHR	Inter-American Convention of Human Rights
IACtHR	Inter-American Court of Human Rights
OAS	Organization of American States

Definitions

Brighton Conference	A high level Conference on the future of the Court was organized by the United Kingdom in Brighton on 18-20 April 2012
Brighton Declaration	A joint declaration adopted at the close of the Brighton Conference
Interlaken Conference	Ministerial Conference on the future of the European Court of Human Rights, organized by Switzerland in Interlaken on 18-19 February 2010
Interlaken Declaration	A joint declaration adopted at the close of the Interlaken Conference

1 Introduction

1.1 Background

The regional system established by the European Convention of Human Rights[1] (hereinafter, ECHR or 'the Convention') is commonly regarded as the world's most successful system for human rights protection. The European Court of Human Rights (hereinafter, ECtHR or 'the Court') is undoubtedly the world's most highly developed human rights court.[2] The system is in dire straits however; some have even stated that its future effectiveness is in serious danger. Its predicament has been labeled a docket crisis, the biggest challenge being the sheer number of applications that the Court receives. The average number of incoming applications to the Court has been over 50 000 per year in the last five years and regardless of increases in its output,[3] its backlog has risen to over 100 000 cases.[4] A troubling aspect of this inflow of applications is that many of them regard systemic deficiencies in the Member States, *i.e.* problems giving rise to numerous and repetitive well-founded cases.[5] Such cases have been estimated to make up around 60% of the Court's judgments.[6]

Since the establishment of the Court's compulsory jurisdiction, in 1998,[7] a continuous reform effort has taken place within the Council of Europe, mainly aiming to tackle the ever-increasing docket crisis. The principal goal of the reform has been to increase the Court's output and make its procedures more swift and efficient. With the pilot judgment procedure the Court takes a somewhat new approach, however, and focuses on improving the human rights-protection on the national level. The main goal is

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[1] 'Convention for the Protection of Human Rights and Fundamental Freedoms', (ETS No. 5), adopted in Rome on the 4th of May 1950.

[2] Antonio Bultrini, 'The Future of the European Convention on Human Rights after the Brighton Conference' (2012) IAI Working Paper, p. 1, available at http://www.iai.it/pdf/DocIAI/iaiwp1223.pdf [Last accessed 2013-05-23].

[3] The number of judgments per year was at 1 500 in 2011 and an even bigger increase in the number of inadmissibility decision has occurred (33 000 in 2009 and 88 000 in 2012).

[4] See, ECHR website: 'Statistics', available at http://www.echr.coe.int/Pages/home.aspx?p=reports&c=#n1347956867932_pointer [Last accessed 2013-05-23].

[5] Luzius Wildhaber, 'Rethinking the European Court of Human Rights', in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics*, (Oxford University Press, 2011) 205, p. 213.

[6] Costas Paraskeva, 'Reforming the European Court of Human Rights: An Ongoing Challenge', (2007), 76(2) *Nordic Journal of International Law* 185, p. 213; There are a multitude of reasons for the high number of repetitive cases and

[7] Before Protocol No. 11 came into force in 1998 the Court had been a part-time body with jurisdiction only over cases referred to it by the European Commission of Human Rights, or the states. For more about Protocol No. 11, see Chapter 3.1.

to free the Court of repetitive cases by inducing the Member States to solve systemic problems and redress violations through their own legal systems.

1.2 Purpose and Research Question

This thesis analyzes the pilot judgment procedure and assesses it in light of the notion of individual justice. The question underlying the discussion is: what, if any, are the effects of the pilot judgment procedure on the Court's function as a provider of individual justice?

To answer this question, three sub-questions are investigated: when does the Court apply the pilot judgment procedure? What are the constitutive elements of the procedure? And what are the possible effects on the potential for achieving individual justice for victims?

The pilot judgment procedure has been used with increased frequency over the last few years but it has not yet been formally defined in the literature. This thesis aims to fill this gap and define the procedure and its constitutive elements. It also aims to critically evaluate the procedure, to find flaws and pitfalls and suggest general principles for improved application. It is argued that for pilot judgments to be effective, and not lead to diminished trust in the system, the Court must balance the interest of institutional effectiveness with the interest of individual justice.

1.3 Theory and Methodology

The thesis takes a realistic approach to human rights and focuses on procedural rather than substantive law. This essentially means that neither an idealistic nor an overly critical attitude to the subject will be applied and instead the aim is to find viable ways of achieving the Convention's inherent aims. It also means that real world complications such as politics and cultural diversity will be taken into account in the analysis.[8]

The subject of analysis is in certain aspects rather abstract and requires investigations of underlying theoretical questions (such as what the notion of individual justice entails and what purposes remedies serve). In this regard, scholarly writings on mainly the theory of remedies are used. Otherwise the

[8] Realism in this sense can be defined as an attitude where human rights are considered to offer the clearest and most coherent vision of a good society, and therefore should be implemented at the center of all legitimate legal and political systems. Human rights are inherently abstract and imprecise, however, and when institutionalized they will give rise to difficult conflicts of interests (between rights *inter se*, and between rights and public interests). The primary benefit of a legal system for the protection of human rights is that 'the moral primacy of the individual is given formal institutional recognition and protection', see Steven Greer, 'Being "Realistic" about Human Rights', (2009), 60 *Northern Ireland Legal Quarterly* 147, p. 154-55 and 161.

method entails a review of standard sources of international law, such as treaties and other inter-governmental agreements (for example declarations). A large part of the analysis will focus on the reform of the ECtHR and therefore official documents from the reform process within the Council of Europe are scrutinized. Also scholarly writings on the specific topic of reforming the ECtHR are used in the analysis. Primarily, however, a thorough study of the case law of the ECtHR is undertaken, and in addition some cases from the Inter-American Court of Human Rights.

1.4 Outline

Chapter 2 investigates the underlying purpose of the ECtHR and tries to determine its essential function. It analyzes how the fundamental principles of subsidiarity and effectiveness frame the Court's adjudication in the realm of human rights protection in Europe. It also investigates what the functional aims of the Court's supervision are. It is concluded finally that the Court has a dual function.

Chapter 3 analyses the evolution of the pilot judgment procedure and moreover, an attempt is made to define the procedure. An analysis of when the Court has used the procedure is undertaken and a number of unresolved questions are identified. Lastly, it is found that the increased use of pilot judgments represents a move away from the Court's function as a last resort for individuals, and towards a more constitutional role.[9]

Chapter 4 substantiates the notion of individual justice by analyzing remedies. The Court's traditional approach to remedial orders is thereafter analyzed and, in addition, general comparisons with its counterpart in the Americas, the Inter-American Court of Human Rights (hereinafter IACtHR) are provided. The chapter concludes by evaluating if a development of the Court's remedial approach is viable.

The final chapter analyses how the Court can reconcile its individual justice function when it decides to apply the pilot judgment procedure. The questions it tries to answer are: When should the pilot judgment procedure be applied? And how should the Court approach the different elements of the procedure?

The thesis concludes by reviewing the Court's role as a guardian of human rights and the effects on this of the pilot judgment procedure.

[9] See Chapter 2.2 below, regarding what the Court's constitutional role is.

2 Defining the Court's Function

This chapter provides a general background to the Convention-system and the fundamental principles that underpin it. The first section analyses the principles of subsidiarity and effectiveness and their implications on the Court's adjudication. The second section analyzes the Court's functional aims and identifies the concepts of individual and constitutional justice. It is argued that the Court has a dual role: to be a last resort for individuals, whose rights allegedly have been breached; and to set standards and elucidate the meaning of the ECHR. The third section analyzes the limitations to effectiveness inherent in the system, mainly due to the Court's jurisdiction.

2.1 Subsidiarity and Effectiveness: Two sides of the Same Coin

This section analyses the subsidiary nature of the Court and what role the principle of effectiveness plays for its adjudication. It is suggested that the Court can be considered to balance these two fundamental underlying values.

2.1.1 The Principle of Subsidiarity

The ECHR was drafted after the Second World War as part of a peace project mainly aiming to ensure that the Member States of the Council of Europe did not backslide into totalitarianism.[10] It was the basis of a human rights protection system built on the concept of 'collective enforcement'.[11] This meant that the Member States of the Organization would share the responsibility to uphold the Convention's guarantees.[12] Article 1 of the ECHR stipulates that the Member States are bound to secure the rights in the Convention to 'everyone within their jurisdiction'. Article 19 moreover, sets up the Court and gives it the task to 'ensure the observance of the engagements undertaken by the [Member States]'. This is the basis of the principle of subsidiarity, which the Court has defined in the following way:

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[10] See e.g. Laurence Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', (2008), 19(2) *The European Journal of International Law* 125, p. 129.

[11] See ECHR, preamble, in which it is stated that the signatories are 'resolved, as the governments of European countries […], to take the first steps for the *collective enforcement* of certain of the rights stated in the Universal Declaration' [Italics added by the author].

[12] See 'Speech given by sir Nicolas Bratza, President of the European Court of Human Rights, on the Occasion of the Opening of the Judicial year, 27 January 2012', *Annual Report 2012*, p. 35, available at http://echr.coe.int/Documents/Annual_report_2012_ENG.pdf [last accessed 2013-05-23].

'the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights'[13]

The principle of subsidiarity is not explicitly stated in the Convention but is rather implied in certain provisions. For example in Article 13, which obligates the Member States to provide effective national remedies, and Article 35, which requires that applicants exhaust such remedies.[14] It is also implicit in some of the Courts methods of adjudication such as 'the margin of appreciation' and the 'fourth instance-doctrine'.[15] These legal doctrines imply that the Court 'cannot assume the role of the competent national authorities', who are 'in continuous contact with the vital forces of their countries' and 'better placed to assess questions of fact and national law'.[16] As a result, the Court in general concerns itself more with procedural justice,[17] and leaves to national authorities to determine substantive issues such as the assessment of evidence.[18] The Court is moreover careful not to interfere on issues where profound differences in view exist among the Member States,[19] and it thus takes a somewhat pluralist approach to human rights.[20] It is in these respects that the principle of subsidiarity delimits the Court's supervisory powers.

Helfer has argued that the principle of subsidiarity is justified not only by normative but also by practical considerations.[21] Normatively, some deference to national actors legitimizes the Court as it gives space for democratic decision-making on issues where there are multiple Convention-compatible options. From the practical perspective, subsidiarity is warranted because it is impossible for an international court to have a more extensive

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[13] *Scordino v. Italy (no. 1) ([GC]*, App. no. 36813/97, Judgment of 26 March 2006, para 140.
[14] ECHR, Art 13 and 35.
[15] See 'Principle Of Subsidiarity' (Interlaken Follow-Up), *Note by the Jurisconsult*, published on the 8 July 2010 (hereinafter: 'Subsidiarity – *Note by the Jurisconsult*'), p. 12-17. available at http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf [last accessed 2013-05-23].
[16] See e.g. *Borodin v. Russia*, App. No. 41867/04, judgment of 6 November 2012, para 158; *Centro Europa 7 S.R.L. And Di Stefano V. Italy*, App. No. 38433/09, judgment of 7 June 2012, para 197; *Varnava and Others v. Turkey* [GC], App. nos. 16064/90 et al., Judgment of 18 September 2009, para 164.
[17] A somewhat fluent term related to the administration of justice: the fairness and the transparency of the processes by which decisions are made rather than the actual outcomes of the decisions.
[18] 'Subsidiarity – *Note by the Jurisconsult*', p. 10.
[19] It is in these regards that the Court gives some deference to the states by applying the margin of appreciation.
[20] Regarding subsidiarity, human rights and pluralism see Poalo G. Carozza, 'Subsidiarity as a Structural Principle of Interntational Human Rights Law', (2003), 97(1) *The American Journal of International Law* 38, p. 68-71.
[21] Helfer, above n 10, p. 128.

role. It could never have the resources or the knowledge that would be required.[22] It should be stressed, finally, that the implications of the principle of subsidiarity are dual; it does not only imply that the Member States should be given some leeway by the Court. It also implies that national authorities take their responsibility and apply the Convention-standards, set out in the Court's case law, in their national legal systems.[23]

2.1.2 The Principle of Effectiveness

The principle of effectiveness is another fundamental principle underpinning the system.[24] It stipulates in its simplest formulation that the Convention is supposed to guarantee rights that are 'not theoretical or illusory, but practical and effective'.[25] The principle is central to the Court's method of adjudication and functions in a sense as a counterweight to the principle of subsidiarity. It is mainly by applying this principle that the Court is contributing to the 'further realization of human rights' in Europe.[26]

The principle of effectiveness has a number of reincarnations and one example is the concept of autonomous interpretation.[27] The Court has held that when considering cases 'it may be necessary [for it] to look beyond the appearances and the language used and concentrate on the realities of the situation.'[28] An illustration of this autonomy is provided by the way the Court has interpreted the concept of 'criminal charge' in Article 6. When assessing whether an individual is subject to criminal allegations the Court has established that the classification in national law is only one aspect that should be regarded. In addition, to give the term its autonomous meaning the charges 'essential nature and the type and severity of the penalty that the applicant risk[s]' should be taken into account.[29]

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[22] Ibid.

[23] See e.g. 'Interlaken Declaration', 'High Level Conference on the Future of the European Court of Human Rights', 19 February 2010, under 'the Conference' point 2, under 'Action Plan' point 4, (hereafter 'Interlaken Declaration'), available at http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf [last accessed 2013-05-23].

[24] Originating mainly in the concept of teleological interpretation mentioned in the Vienna Convention on the Law of Treaties, UN Treaty Series, vol. 1155, p. 331, art 31.1, 'A treaty shall be interpreted in good faith […] and in the light of its object and purpose', see Steven Greer, 'Constitutionalizing Adjudication under the European Convention of Human Rights', (2003), 23(3) *Oxford Journal of Legal Studies* 405, p. 408.

[25] See among others *Artico v. Italy*, App. No. 6694/74, Judgment of 13 May 1980, para 33.

[26] See ECHR, preamble.

[27] The Court has stated that the terms in the Convention shall be given an autonomous meaning detached from their normal meaning in the respondent Member State, see e.g. *DePalle v. France,* App. No. 34044/02, Judgment of 23 March 2010, para 62.

[28] See e.g. *Kafkaris v. Cyprus* [GC], App. No. 21906/04, 12 February 2008, para 116.

[29] See e.g. *O v. Norway*, App. No. 29327/95, Judgment of 11 February 2003, para 33.

The Court has moreover held that the Convention is 'a living instrument which must be interpreted in light of present-day conditions'.[30] This means that 'as society and attitudes change, the ECtHR can change and develop the way in which it interprets the ECHR'.[31] Progressive social and legal developments are taken into account when the Court determines the scope and meaning of specific rights.[32] It has been noted that this dynamic approach has gradually led to quite a significant expansion of the material scope of the Convention.[33] A famous example of an application of the dynamic approach is the Court's interpretation of the due process-right in Article 6. In the cases *Golder*[34] and *Hornsby*[35] the Court held that the right to 'fair, public and expeditious […] judicial proceedings are of no value at all if there are no judicial proceedings', or if judgments are allowed to be 'inoperative'.[36] It thus established that Article 6 included a right of 'access to a court' and to have final binding judgments executed, even though none of these rights are mentioned outright in the text of the Convention.

2.1.3 The Balancing Metaphor

While applying the principle of effectiveness the Court also maintains some self-restraint so as not to unduly interfere with state sovereignty.[37] This is clear from cases dealing with controversial issues such as abortion and euthanasia, where the Court has had the chance to take a principled stand but has avoided doing so.[38] Nevertheless, the Court has been inventive and determined to follow through on the Convention's ultimate purpose of

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[30] *Vo v. France [GC],* App. No. 53924/00, Judgment of 8 July, para 82.

[31] Paraskeva, above n 6, p. 204.

[32] See e.g. *Scopolla v. Italy (No. 2),* App. No. 10249/03, Judgment of 17 September 2009, para 105-109, where developments in EU-law and under the Inter-American Convention of Human Rights was regarded for the purpose of interpreting Article 7 of the ECHR.

[33] Carl Henrik Ehrenkrona, 'Europadomstolen - vadan och varthän?', (2012), (4) *Svensk Juristtidning* 361, p. 364-67; E.g. the Convention now covers a right of children to not be subject to corporal punishment, see *Tyrer v United Kingdom,* App. No. 5856/72, Judgment of 25 April 1978; and the right of asylum seekers to have certain procedural guarantees, see e.g. *Conka v. Belgium*, App. no. 51564/99, para 79, these rights were hardly thought of at the time of the drafting of the ECHR.

[34] *Golder v. United Kingdom*, App. No. 4451/70, Judgment of 21 February 1975.

[35] *Hornsby v. Greece*, App. No. 18357/91, Judgment of 19 march 1997.

[36] Luzius Wildhaber, 'The European Court of Human Rights: The Past, The Present, The Future', (2007), 22(4) *American University International Law Review* 521, p. 524, citing *Golder v. United Kingdom*, para 35; and *Hornsby v. Greece*, para 40.

[37] 'Subsidiarity - *Note by the Jurisconsult*', p. 4.

[38] See Greer, above n 24, p. 425; also *Vo v. France*, App. No. 53924/00, Judgment of 8 July 2004; *A, B and C v Ireland,* App. No. 25579/05, Judgment of 16 December 2010; *Pretty v. United Kingdom*, App. No. 2346/02, Judgment of 29 April 2002.

protecting individual rights.[39] For example, if a state invokes that the applicants have failed to exhaust domestic remedies the Court will still examine the case if it finds that the remedies referred to are 'not objectively capable of providing adequate redress for [the] complaints'.[40] The Court has further pronounced that it is 'empowered to give the final ruling on whether a state's interference with a protected right is consistent with the [Convention].[41] And slightly less authoritatively, that it must 'determine in the last resort whether the [Convention has] been complied with; it has to satisfy itself that the rights [have not been] curtail[ed] […] to such an extent as to impair their very essence and deprive them of their effectiveness'.[42]

The Court firmly maintains, however, that 'it is best for […] issues to be resolved in so far as possible at the domestic level'.[43] It invokes the principle of effectiveness when it considers that failing to act 'would result in a denial of justice on its part, rendering the fundamental rights guarantees under the Convention inoperative'.[44] It is thus in this way that the principle of effectiveness serves as a counterweight to the principle of subsidiarity. It has been recognized that the Court performs its supervisory task by balancing these two fundamental principles.[45] The principles also interact however, as the subsidiarity principle contributes to the institutional effectiveness of the system by limiting the Court's role to supervision.[46] The balancing metaphor has been used in relation to other aspects of the Court's adjudication and is regarded a central feature of its judicial method.[47]

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[39] See e.g. *Loizidou v. Turkey (Preliminary Objections)* [GC], App. No. 15318/89, Judgment of 23 March 1995, para 70, where the Court stated that it 'must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms'.

[40] 'Subsidiarity – *Note by the Jurisconsult*', p. 8.

[41] See *Maslov v. Austria* [GC], Appl. No. 1638/03, Judgment of 23 of June 2008, para 76; *Barfod v. Denmark*, App. No. 11508/85, Judgment of 22 February 1989, para 28.

[42] See among others *Mathieu-Mohin And Clerfayt v. Belgium*, App. No. 9267/81, Judgment of 2 March 1987, para 52.

[43] *Varnava and Others v. Turkey*, para 164.

[44] 'Subsidiarity – *Note by the Jurisconsult*', p. 5.

[45] Helfer, above n 10, p. 138.

[46] See Subsidiarity – *Note by the Jurisconsult*', p. 4; 'Interlaken Declaration', under 'Action Plan' point 2.

[47] It has for example been used to describe how the Court determines whether a restriction of a 'qualified right' is legitimized by a public interest See e.g. Basak Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions', (2007), 29 *Human Rights Quarterly* 251; Steven Greer, 'Balancing and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate', (2004), 63(2) *The Cambridge Law Journal* 412.

2.2 The Court's Functional Aims

This section analyzes the underlying purpose of the Court's supervision. The analysis focuses on two conceptions of the role of the Court: its last resort function and its constitutional function. Furthermore, these conceptions are argued to correspond to the more abstract notions of individual and constitutional justice.

2.2.1 The Court as a Last Resort

The Court is called upon to rule on an issue in accordance with Article 34 of the Convention, which stipulates that applications can be brought by 'individuals claiming to be […] victim[s] of a violation'. Also inter-state complaints can be brought to the Court, but due to the states' unwillingness to 'point fingers' this procedure is practically dormant.[48] The Court is thus engaged almost exclusively via the right of individual petition.[49]

The ECtHR can therefore be described as a last resort for those whose rights, allegedly, have been breached.[50] It reviews whether the national authorities have fulfilled their obligation under the Convention and if this is not the case, it affords effective protection itself. This is the more traditional view of the Court, and it is supported by the fact that most of its judgments are rather standardized decisions that mainly establish whether the specific circumstances of the case reveal a violation or not.[51] The last resort conception implies that the Court is primarily concerned with individual justice as the underlying objective of its adjudication. Seen this way the Court's task is to ensure that applicants are provided with international protection of their fundamental rights, when they have been denied protection on the national level.

2.2.2 The Constitutional Function of the Court

Already in 1978 the Court stated that its task is 'to elucidate, safeguard, and develop the [rights in the] Convention.[52] It has moreover referred to the

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[48] ECHR, Art 34; See Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments', (2009), 9(3) *Human Rights Law Review* 397, p. 432-433.

[49] Wildhaber, above n 5, p. 208.

[50] Sadurski, above n 48, p.412; also Ingrid Nifosi-Sutton, 'The Power of the ECtHR to order specific Non-monetary Relief: a Critical Appraisal form a Right to Health Perspective', (2010), 23 *Harvard Human Rights Journal* 51, p. 69.

[51] Greer, above n 24, p. 407.

[52] *Ireland v. United Kingdom*, App. No. 5310/71, Judgment of 18 January 1978, para. 154.

ECHR as 'a constitutional instrument of European public order'.[53] This suggests that the Court's judgments have a broader purpose than just solving individual disputes and are meant to have some *erga omnes* effect and influence the Member States' in the general sense.[54] Some do in fact see the ECtHR as a type of constitutional court whose main task is to be a pan-European standard setter in the field of human rights.[55] According to this view 'individual cases [should] in effect serv[e] as the vehicle by which problems are signalled and principles established'.[56] Providing redress to applicants is of secondary importance and it is the policy role that is the Court's *raison d'être*.[57] This view corresponds to the notion of constitutional justice meaning that the Court's function is to ensure that 'administrative and judicial processes in member states effectively conform to pan-European Convention standards'.[58] The purpose of the Court's supervision is thus generally the development and consolidation of human rights law as such, rather than the last resort protection for victims of violations.[59]

2.2.3 A Dualilty of Functions

The growing wave of applications to the Court, has given rise to calls for further 'constitutionalization' of its procedures. One proposal is that the Court be given full discretion to decide whether or not to take up a case for examination (a so-called *certiorari*-type of procedure).[60] Admissibility would then be determined not on the basis of formal rules (which currently is the case) but on the basis of the perceived gravity of the violation, or the

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[53] *Loizidou v. Turkey (Preliminary Objections)*, para. 75; *Michaud v. France*, App. No. 12323/11, Judgment of 6 December 2012, para 103; Helfer, above n 10, p. 138.

[54] See Sadurski, above n 48, p. 403-403, arguing that the Court is 'enjoying, through a growingly accepted custom, an authority of *erga omnes* nature, at least as far as the interpretive value of its judgments is concerned'.

[55] Robert Harmsen, 'The European Court of Human Rights as a Constitutional Court: Definitional Debates and the Dynamics of Reform', in John Morison et al (eds), *Judges, Transition, and Human Rights*, (Oxford University Press, 2007), p. 35.

[56] Robert Harmsen, 'The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights', in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics*, (Oxford University Press, 2011) 119, p. 129.

[57] Harmsen, above n 55, p. 36.

[58] Greer, above n 24, p.405.

[59] Markus Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights', in Armin Von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking*, (Springer, 2012) vol 236, 329, p. 330.

[60] See e.g. Rudolf Bernhardt, 'The Admissibility Stage: The Pros and Cons of a Certiorari Procedure for Individual Applications', in Rüdiger Wolfrum and Ulrike Deutsch (eds), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, (Springer, 2009) 29.

importance of the specific issue for human rights law at large.[61] This would give the Court respite to give thoroughly argued judgments setting trans-jurisdictional standards.[62] The argument is that such an approach could solve the docket crisis and if it went hand in hand with prompt implementation at the national level, the system's overall effectiveness would improve.[63]

Although the Court as mainly a constitutional court is not an officially endorsed view within the Council of Europe, the increasing workload has led to the realization that it is a practical necessity that to constrict the Court's tasks. The need to put a stronger focus on the obligation of national authorities is the main message coming from both the Organization itself,[64] and the academia.[65] At the Brighton Conference in 2012, where Member States met to set an action plan for the future of the Court, it was thus agreed that the principle of subsidiarity should be included in the preamble of the Convention.[66] Moreover, a new admissibility criterion has recently been incorporated in the Convention requiring that applicants have suffered a significant disadvantage for their case to be examined by the Court.[67] These developments are indications that the Court is gradually taking on a more constitutional role.

Many commentators oppose to constitutionalization of the Court however, and argue that the individual dimension is the hallmark of the system and the main reason for its high esteem.[68] They claim that the right of individual petition 'lay at the heart of the mechanism of protection of the Convention',[69] and that the Court's commitment to achieving individual justice is what has led to its relative success compared to other human rights regimes.[70] Limiting individuals access to the Court by introducing a 'picking and choosing' type of jurisdiction would compromise its legitimacy. It

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[61] Ibid, p. 34.

[62] Helfer, above n 10, p. 139.

[63] Harmsen above n 55, p. 37-38, citing the reasoning of professor Rick Lawson.

[64] See e.g. Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies, adopted on 12 May 2004; Brighton Declaration, 'High Level Conference on the Future of the European Court of Human Rights', adopted on 19 and 20 April 2012, (hereafter 'Brighton Declaration'), para 7-8, available at https://wcd.coe.int/ViewDoc .jsp?id=1934031.

[65] See among others Jonas Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed', in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics*, (Oxford University Press, 2011) 181.

[66] 'Brighton Declaration', para 12(a).

[67] ECHR, Art 25(b), inserted through Protocol No 14 in 2010.

[68] Harmsen, above n 55, p. 39, restating arguments put forth by Judge Thomassen. See also 'Brighton Declaration', para 13.

[69] Antonio Augusto Cancado Trindade, *The Access of Individuals to International Justice*, (Oxford University Press, 2011), p. 36.

[70] Harmsen above n 56, p. 129.

would, according to this view, not be possible for the Court to preserve a sense of fairness in exercising such discretion, especially considering the diversity of the states that make up the Council of Europe.[71] It is accordingly important that the right of individual petition remains principally unrestricted.

It is argued here that the Court should be considered to have a dual function. On the one hand: the provision of individual justice by adjudicating and redressing violations of individual rights for the purpose of protecting individual victims. On the other hand: the safeguarding and development of the proper minimum standard for rights protection in Europe (*i.e.* constitutional justice).[72] The main reason for giving it such a dual role, and not just focusing on the constitutional aspect of its review, is that the Member States of the Council of Europe have very differing capabilities (and some would argue willingness) to protect fundamental rights themselves.[73] It is thus important that the Court can function as a last resort and provide redress to those that are victims of violations and are unable to be remedied on the national level. Another reason for defending individual justice as a central objective of the system is that the Court is constrained when it comes to the implementation of its rulings. Its capability to bring about change in national laws and practices is largely dependent on the goodwill of the Member States.

2.3 The System's Inherent Limitations

2.3.1 Limits to Constitutional Influence

There are a number of factors that constrain the Court from exercising a fully constitutional function.

First, the Court lacks the power to quash domestic judgments.[74] The Committee of Ministers has indeed called upon the Member States to provide possibilities for the reopening of domestic judicial proceedings,[75] but up until

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[71] Ibid.

[72] In the context of the reform process both the Member States and independent experts have continued to affirm that the Court's role in fact entails a duality of functions, see 'Brighton Declaration', para 31; also 'Report of the Group of Wise Persons to the Committee of Ministers', CM(2006)203, adopted on 15 November 2006, (hereinafter 'Wise Persons Report'), para 23-24.

[73] See Harmsen, above n 56, p. 141; The majority of the judgments finding a violation concern 5 states and it is also clear that most of the graver violations stem from very a few of the 47 Member States, see 'ECHR - Analysis of statistics 2012', p. 8, available at http://echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf [last accessed 2013-05-23]. See also chapter 3.1.2.

[74] 'Principle of Subsidiarity – Note by the Jurisconsult', p. 9.

[75] Recommendation Rec(2000)2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the ECtHR (19 Jan. 2000), at 2.

now only a few states have implemented such legislation. In any case such an option is still entirely in the hands of the domestic courts.[76] Additionally, the Court is not empowered to 'examine *in abstracto* the [Convention]-compatibility of national legislative and constitutional provisions'.[77] The individual right of petition is only available to 'victims' and even though this concept has been interpreted broadly,[78] a causal link between the violation and the person invoking it is still required.[79]

It should also be mentioned that the Member States have retained the prerogative to regulate the domestic effects of the Court's jurisprudence. Although the states have an international obligation to secure the rights in Convention they have full discretion to decide for themselves how to do this.[80] The Convention does not lay down a provision that requires its incorporation into national law and the Court's judgments are not considered to have 'direct effect'.[81] Some states have in fact recognized the binding force of ECtHR's case law on domestic courts, but there are also examples of reluctance to such an order.[82] The German constitutional court, for example, has held that ECtHR jurisprudence can and should be disregarded if 'incompatible with central elements of the domestic legal order, legislative intent, or constitutional provisions.'[83] In Sweden moreover, the Supreme Court has previously held that it will not set aside a national law unless there is clear support in the Court's jurisprudence, that the solution chosen by the Swedish legislator contravenes the Convention.[84]

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[76] Tom Barkhuysen and Michiel L. Van Emmerik, 'A Comparative View on the Execution of judgments of the ECHR', in Theodora Christou and Jean Pablo Raymond (eds), *European Court of Human Rights Remedies and Execution of Judgments* (2005), p. 8-11.

[77] See e.g. *McCann and others v. United Kingdom*, App. No. 18984/91, Judgment 27 September 1995, para 153; *Klass an Others v. Germany*, App. No. 5029/71, Judgment of 6 September 1978, para 33, where the Court held that individuals cannot bring a claim *actio popularis* to the Court in order to test the Convention-compatibility of a national legal norm.

[78] In certain cases the term victim has been found to encompass also 'indirect' and 'potential' victims, see e.g. *X v. France*, App. No. 18020/91, Judgment of 31 March 1992, para 26; and *Dudgeon v. United Kingdom*, App. No. 7525/76, Judgment of 22 September 1981.

[79] See Pieter Van Dijk et al, *Theory and Practice of the European Convention on Human Rights*, (Intersentia United Kingdom, 4 ed, 2006), p. 56. Noting that the states 'are internationally responsible only for the ultimate result'. This is a general principle of international law, which is fundamental for the system set up by the ECHR.

[80] Ibid, p. 28.

[81] Ibid, p. 26.

[82] Sadurski, above n 48, p. 405.

[83] Nico Krisch, 'The Open Architecture of European Human Rights Law', (2008), 71(2) *The Modern Law Review* 183, p. 183, discussing the German *Görgülü*-case (BVG, Judgment of 14 October 2004, 2 BvR 1481/04).

[84] See Nytt Juridiskt Arkiv 2004 p. 840, and Nytt Juridiskt Arkiv 2010 s. 168.

Most domestic courts then,[85] cannot apply the ECtHR's jurisprudence as a matter of national law. Regardless of this formal obstacle, it should be noted that the Court's jurisprudence is cited extensively and has been found to be of significant persuasive authority.[86] Full impact for the Court's rulings require a high degree of persuasiveness however, and can never be guaranteed. Domestic courts retain 'a power to decide on the limits of the authority of the ECtHR'.[87]

2.3.2 Limits to Effective Implementation

Because of the relationship between the ECtHR and domestic courts it is essentially through the executive and legislative powers of the Member States that the Court's judgments has practical effects. This pertains to both the individual and the general effects of the Courts judgments;[88] and also to both the direct and *erga omnes* effect of its jurisprudence.[89] It is in this sense that the Member States goodwill is essential for the effective implementation of the Court's judgments.[90]

Member States are not entirely relieved of the Convention-system after the delivery of a judgment however, as the Committee of Ministers supervises execution.[91] If a state does not comply with a judgment it will be subject to 'peer pressure',[92] where the ultimate sanction is suspension or expulsion from the Council of Europe.[93] In any case, the Committee's main response to non-compliance is the adoption of resolutions expressing varied stages of concern.[94] The process has been labeled a constructive conversation

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[85] Especially in dualistic states, *i.e.* states where international law has to be incorporated into national law to be binding.

[86] Helfer, above n 10, p. 137.

[87] Krisch, above n 83, p. 196.

[88] On the difference between individual and general remedial measures, see chapter 3 and 4.

[89] As has been implied, the notion of harmonization is central to the 'maintenance and further realization of human rights' under the ECHR. The Court is supposed to give authoritative interpretations of individual rights and by doing so systematically raise the standards of protection in Europe see Willem Verrijdt, 'The Limits of the International Petition Right for Individuals: A Case Study of the ECtHR', in Bert Keirsbilck et al (eds), *Facing the Limits of the Law*, (Springer, 2009), p. 334.

[90] Sadurski, above n 48, p. 409-10. Joshua L. Jackson, 'Note: Broniowski v. Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court', (2006), 39 *Connecticut Law Review* 759, p. 782.

[91] ECHR, art 46.2. The Committee consists of the Member States' Foreign Ministers (or their deputies) and is thus an entirely political body.

[92] Jackson above n 90, p. 783.

[93] See 'Statute of the Council of Europe', (ETS No. 001), art 8.

[94] 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements', CM/Del/Dec(2006)964/4.4/appendix4E, adopted on 12 May 2006, Rule 16, 'the Committee of Ministers may adopt interim resolutions, notably

where states work together to find satisfactory solutions.[95] No state has been expelled or suspended and it is improbable that such a sanction will ever be employed.[96] The reality then, is that the system lacks a real coercive mechanism that can be used to secure compliance.[97] It should in any case be noted, that regardless of these weaknesses general compliance with the Court's judgments has been very high, they have even been regarded to be 'as effective as those of any domestic court'.[98]

2.4 Conclusions

The ECtHR occupies a peculiar position as an institution and performs its tasks through a delicate act of balancing. The principle of subsidiarity underpins the Court and stipulates that it can only supplement, not supplant, the human rights protection that is supposed to exist on the national level. It delimits the Court's supervisory powers but emphasizes at the same time that domestic authorities should abide by the law of the Convention. Whenever states fail in these primary responsibilities, the Court should provide international protection and act as the ultimate guardian of the system. Such is the requirement of the principle of effectiveness, which pervades the Convention-system. It is in applying these equally essential principles that the Court 'oscillates between judicial self-restraint and judicial activism'.[99]

It has been argued that from the perspective of individual applicants, the Court's function is to be a last resort that can offer protection when a state has failed to uphold a fundamental right. From the states' perspective, on the other hand, the Court is a pan-European standard setter elucidating and developing the meaning of the ECHR. The thesis makes the case that this duality of aims is essential for the system. Surrendering the protection of individuals to national actors and letting the ECtHR take on an exclusively

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in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution'.

[95] Janneke Gerards, 'The Pilot Judgment Procedure before the European Court of Human Rights as an Instrument for Dialogue', in Monica Claes et al (eds), *Constitutional Conversations*, (Intersentia, 2012), p. 15.

[96] Fyrnys, above n 59, p. 338, noting that '[e]xpulsion would be counterproductive since the violating party would no longer be under the control of the Strasbourg system'. It has moreover been argued that even though the Council of Europe carries a lot of prestige the incentive for states to take action against each other is 'purely moral', and not directly based on self-interest; see also Sadurski, above n 48, p. 406, who contrasts the Convention-system to EU and NATO where there are economic and military benefits for states to secure each other's compliance.

[97] Jackson above n 90, p. 782.

[98] Sadurski, above n 48, p. 404.

[99] See 'Subsidiarity - *Note by the Jurisconsult'*, p. 6; Drogoljub Popovic, 'Prevailing of Judicial Activism over Self-restraint in the Jurisprudence of the European Court of Human Rights', (2008-2009), 42 *Creighton Law Review* 361, p. 395.

constitutional role is not viable at present. A number of factors limit the Court's ability to have a constitutional influence and it is clear that its judgments are inherently dependent on the state for practical effect.

At the end it should be recognized that it is currently impossible for the ECtHR to examine in detail every case that is brought before it. Its wide geographical and demographic reach, together with the expansive material scope of its provisions, has created a docket crisis that cannot be ignored.[100] National authorities must thus be induced to take their primary obligation seriously and it is in this regard that the pilot judgment procedure can play an important role.

[100] See e.g. Helfer, above n 10, p. 139; Fyrnys, above n 59, p. 329-330.

3 The Pilot Judgments Procedure

Chapter 2 argued that the Court has a dual function as the subsidiary guardian of the ECHR. It is both a provider of individual justice and has simultaneously a constitutional task to interpret and develop the ECHR. This chapter analyzes one of the Court's new procedural tools - the pilot judgment procedure, and assesses what effects this procedure has on the Court's role.

The first section discusses the Court's docket crisis, to contextualize the reasons the pilot judgment procedure was developed. Thereafter the second and third section tries to define the procedure and the constitutive elements of a pilot judgment. A case law analysis is thereafter undertaken for the purpose of analyzing what types of cases has been designated pilot judgments, and in what general contexts the Court has adopted the procedure. In the conclusion the development of the pilot judgment procedure is described as the result of three underlying processes within the system.

3.1 The Court's Docket Crisis

As was mentioned, the ECtHR has been under continuous reform during the last decade mainly for the purpose of overcoming the problem with its overburdened docket. The following gives a sense of the scale of the docket crisis, and also some of the reasons for it.

The inflow of applications has increased from around 10,000 per year at the change of the millennium to more than 60,000 per year in 2012.[101] Moreover, in 2005 the Court's backlog was over 60,000 cases and in 2012 this number was more than 120,000,[102] irrespective of that reform measures had been taken.[103] It is important to note that the largest part of the Court's caseload consists of applications that it declares inadmissible; in fact these cases make up over 90 percent of the total amount of applications.[104] Nonetheless, in the beginning of 2012 almost 12 000 cases were pending

[101] '50 Years of Activity: The European Court of Human Rights Some Facts and Figures', p. 4, available at http://echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf [last accessed 2013-05-23].

[102] See 'ECHR – Analysis of statistics 2006', p. 10 available at http://echr.coe.int/Documents/Stats_analysis_2006_ENG.pdf [last accessed 2013-05-23]; and 'ECHR – Analysis of Statistics 2012', p. 6 available at http://echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf [last accessed 2013-05-23].

[103] Primarily the entering into force of Protocol No. 14 in 2010, see 'Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention', adopted on 13 May 2004, (ETS No. 194).

[104] See Lucius Caflisch, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond', (2006), 6(2) *Human Rights Law Review* 403, p. 405-06.

before a chamber after having been declared admissible or communicated to the respondent government.[105]

The reasons for this inflow of cases relate to a number of legal, political and social factors, which are beyond the scope of this thesis to discuss. It should be mentioned, however, that the Council of Europe has been subject to a large expansion since the nineties mainly through the accession by a number of ex-Soviet bloc states.[106] Apart from a general increase in the number of applications to the Court, it has been recognized that this has changed the type of situations complained about. An increasing number of cases regard systemic problems that give rise to repetitive applications.[107]

The problem with repetitive applications (*i.e.* complaints about an already examined issue) has become such a burden for the Court that it has been necessary to change its procedures and adjudicative methods. To mention one such change, a committee procedure has been introduced where three Judges have the mandate to decide cases regarding issues 'already the subject of well-established case-law'.[108] Moreover, the Court has started to examine underlying issues and is no longer considering itself restricted to the specific circumstances of the case under review.[109] The most innovative development, however, is the pilot judgment procedure, which in fact is both a new procedure and adjudicative method.[110]

3.2 The Evolution of the Pilot judgment Procedure

The following section firstly gives an overview of the legal and political process through which the pilot judgment procedure was developed.

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[105] 'ECHR - Analysis of statistics 2012', p. 12.

[106] See Costas Paraskeva, 'Human Rights Protection Begins and Ends at Home: The "Pilot Judgment Procedure" Developed by the European Court of Human Rights', (2007), 3 *Human Rights Law Commentary*, p. 3-4, available at http://www.nottingham.ac.uk/shared/shared_hrlcpub/Paraskeva.pdf [last accessed 2013-05-23].

[107] See ibid, p. 5; also Harmsen, above n 56, p. 121; also Sadurski n 48, p. 409, noting that another change, in some ways even more worrying, is that the Court more often than before has had 'to police the enforcement of basic rights, at a minimum fundamental level'.

[108] ECHR, Art 28(b); traditionally the Court hears cases sitting as a chamber consisting of seven Judges, see ECHR, Art 29.

[109] The Court has increasingly often identified systemic problems and indicated that remedial measures are necessary in the reasoning of the judgment, without ordering such measures in the conclusions, see e.g. *Scordino v. Italy*, Appl. No. 36813/97, Judgment of 29 March 2006, para 237; *Driza v. Albania*, App. No. 33771/02, 13 November 2007, para 125-126; *Ramadhi and Others v. Albania*, Appl. No. 38222/02, Judgment of 13 November 2007, para 93-94; Sejdovic v. Italy, Appl. No. 56581/00, Judgment of 1 March 2006, para 121-23.

[110] It includes the adjudicative aspect that the underlying problem that gives rise to the violation/violations is scrutinized.

Thereafter, an attempt to define the procedure is undertaken mainly by analyzing Rule 61 of the Rules of Court and the legal basis for the procedure.

3.2.1 The Origins of the Procedure

The pilot judgment procedure originates in a proposal that the Court made during the drafting of Protocol No. 14.[111] It proposed that the Convention should be amended to include a provision that mandated it to, firstly, identify a systemic deficiency in a Member State, and, secondly, order the state to implement retroactive national remedies to deal with this deficiency.[112] As the state was implementing the measures the Court would adjourn pending cases regarding the same issue. Moreover, the judgment would be subject to priority supervision by the Committee of Ministers and once the state had taken general measures, pending similar applications would be struck off the Court's docket.[113]

In any event, the final draft of Protocol No. 14 never included a provision regarding pilot judgments.[114] Instead, the Committee of Ministers adopted a resolution that in relevant parts read

> *"The Committee of Ministers […] invites the Court as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments"*[115]

Moreover, the Committee adopted a recommendation that urged Member States 'to ensure that potential applicants have, where appropriate, an effective remedy allowing them to […] obtain redress at national level' when the Court has delivered 'a judgment which points to structural or general deficiencies in national law or practice ("pilot case")'.[116] These documents recall the Court's proposal above and it did not take long before the Court responded to the invitation.

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[111] 'Position Paper of the European Court of Human Rights', CDDH-GDR(2003)024, 12 September 2003.

[112] Ibid, para 12-13.

[113] Ibid.

[114] The response to the idea had been sympathetic and the reason it was not included in the final draft was mainly fear of political resistance within the organization; a provision in the Convention was considered to potentially create a formal obligation for states to implement retroactive general measures, see Fyrnys, above n 59, p. 340.

[115] Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem, adopted on 12 May 2004.

[116] Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, adopted on 12 May 2004.

3.2.2 The first Pilot Judgment

In 2004, in the case *Broniowski v. Poland*[117], the Court examined a legislative scheme recognizing a right to compensation for people who had lost property when an eastern region of Poland was surrendered after the Second World War. The legislation had recognized that those who had been forced to leave their property had a right to compensation, but due to legislative amendments and incoherent practice a large group of people had remained uncompensated. Broniowski, who had inherited his property right (a claim for compensation) from his grandmother, applied to the ECtHR alleging that the situation infringed his right to peaceful enjoyment of property under Article 1 Protocol No. 1 to the Convention. The Court found in his favor and held that the way the legislative scheme was operated put a 'disproportionate and excessive burden [on Broniowski] which [could not] be justified in terms of the legitimate general community interest pursued by the authorities'.[118]

The Court also stated that the case disclosed 'the existence, within the Polish legal order, of a shortcoming as a consequence of which a whole class of individuals [had] been or [were] still denied the peaceful enjoyment of their possessions'.[119] It elaborated on the meaning of Article 46 of the Convention and held that although it was 'in principle not for the Court to determine what remedial measures were appropriate'; such measures were 'undoubtedly called for in execution of the present judgment'.[120] It moreover held that the measures had to 'take into account the many people affected'.[121] Consequently, in the operative part of the judgment the Court ordered Poland to take the appropriate general legal and administrative measures to secure that all the people affected by the systemic deficiency were redressed.[122] It moreover, reserved the question of just satisfaction (*i.e.* damages for the applicant) and gave the government and the applicant six months to submit observations on the matter.[123] The Court held that it would take into account any agreement between the parties and also general measures taken by the government.[124] It lastly decided to adjourn all pending and future applications 'deriving from the same general cause'.[125]

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[117] *Broniowski v. Poland*, App. No. 31443/96, ECHR (GC), Judgment of 22 June 2004.
[118] *Broniowski v. Poland*, para 187.
[119] Ibid, para 192.
[120] Ibid, para 193.
[121] Ibid.
[122] Ibid, operative part - para 4.
[123] Ibid, operative part - para 5.
[124] Ibid.
[125] Ibid, para 198.

The case was closed a year later when the Court approved a friendly settlement between the parties.[126] In that judgment the Court stressed its obligation to ensure that any friendly settlement was reached 'on the basis of respect for human rights as defined in the Convention and the Protocols thereto.'[127] It further held that in the specific circumstances of the case that requirement 'necessarily extend[ed] beyond the sole interests of the individual applicant and require[d] the Court to examine the case also from the point of view of "relevant general measures"'[128]. The Court found that changes in domestic laws 'demonstrated an active commitment to take measures intended to remedy the systemic defects found' and decided that it was satisfied with the measures.[129] Consequently, the first pilot judgment procedure was concluded.

3.3 Defining the Pilot Judgment Procedure

After *Broniowski* followed a period where the Court 'tested' the pilot judgment procedure and used it only by way of exception.[130] It was soon considered a success however, and in the Interlaken Declaration of 2010 the Member States requested that 'clear and predictable standards' for the procedure should be developed.[131] In response to this, a year later, a new Rule of Court was introduced, which *inter alia* stipulates that pilot judgments 'may' be adopted 'where the facts of an application reveal in the Contracting State concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.'[132]

3.3.1 Rule 61 of the Rules of Court

The objective of the pilot judgment procedure is to achieve 'the most speedy and effective resolution of a dysfunction affecting the protection of [a] Convention right […] in the national legal order.'[133] In order to clarify the

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[126] *Broniowski v. Poland (Struck out of the List)*, App. No. 31443/96, ECHR (GC) Judgment (Friendly Settlement) of 28 September 2005

[127] See ECHR, art 39.1.

[128] *Broniowski v. Poland (Struck out of the List),* para 36.

[129] Ibid, para 42.

[130] Antoine Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilites and Challenges', (2009), 57 *Greek Law Journal* 1890, p. 1911; Philip Leach et al, 'Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia', (2010), 10(2) *Human Rights Law Review* 346, p. 347.

[131] 'Interlaken Declaration', para D 7(b).

[132] See, 'Rules of Court' (in force as of 1 September 2012), rule 61.

[133] *Hutten-Czapska v. Poland*, App. No. 35014/97, ECHR (GC) Judgment of 19 June 2006, para 234.

procedure the Court in March 2011 adopted a new Rule of Court, Rule 61, which sets out a framework. It stipulates a number of steps that the Court should take in relation to the issuance of a pilot judgment. Firstly, the Court *shall* seek the view of the parties but can decide to adopt the procedure on its own motion or at the request of one of them.[134] Secondly, the Court *shall* clarify both the nature of the systemic problem it has identified, as well as the type of remedial measures that the state should take to solve it. The Court *may* also set a time limit for when such remedial measures should be implemented.[135] Thirdly, the Court *may* adjourn similar applications pending action by the state. Such adjournment *shall* be withdrawn however, if the state fails to take the required measures or 'where the interests of the proper administration of justice so require'.[136]

It should be noted that the Court uses these procedural steps in a rather flexible manner and there are for example judgments where the Court has decided not to adjourn pending cases.[137] The different types of judgments it issues can therefore be thought of as a continuum where a judgment that includes all the elements above is a 'full' pilot judgment.[138] Below, three main constitutive elements of a pilot judgment will be identified. But first, the legal basis for the order of general remedial measures is analyzed.

3.3.2 The Lack of a Provision in the Convention

As was mentioned above (see Chapter 3.2.1) the Convention was never amended to include a provision mandating the Court to issue pilot judgments and order general measures. Some commentators have considered this problematic; as the conclusion must be that the Court is acting *ultra vires*.[139] As will be further developed below (see Chapter 4) the Court has traditionally been restrictive in relation to the issue of the prescriptive effects of its judgments. In line with the principle of subsidiarity it has left for the states to decide what measures are required in order to comply with them.

Reasoning under article 46 of the Convention the Court has in its pilot judgments invoked Article 1 (which sets out the primary obligation of the

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[134] Rules of the Court, rule 61, para 2. The use of the phrase 'the Court *may* initiate' in the first paragraph of the rule indicates that the Court has full discretion to decide when it is appropriate to adopt the procedure.

[135] Ibid, para 3 and 4.

[136] Ibid, para 6 and 8.

[137] See e.g. *Ananyev and Others v. Russia*, App. No. 2525/07 and 60800/08, Judgment of 10 January 2012, para 236. Where the Court stated that: 'Having regard to the fundamental nature of the right protected by Article 3 of the Convention and the importance and urgency of complaints about inhuman or degrading treatment, the Court does not consider it appropriate to adjourn the examination of similar cases'.

[138] Buyse, above n 130, p. 8.

[139] See e.g. *Hutten-Czapska v. Poland*, Partly Dissenting opinion by Judge Zagrebelsky.

states), and referred to Article 19 (which stipulates the Court's task), as legal grounds for ordering general measures.[140] Evidently neither of these provisions provides an explicit basis for making such orders.

The Court has pointed out the risk of new applications that are inherent in systemic problems however, and stressed that its ability to perform its task would be compromised if the state remains passive.[141] The general obligations flowing from pilot judgments can therefore be seen as specific instances of the obligation of states to provide guarantees of non-repetition.[142] This is a classic principle of international law considered autonomous from the duty to make reparation.[143] By demanding that the state takes general measures to solve the systemic problem, the Court is thus making an explicit reference to the duty of states to guarantee non-repetition of violations. By reading the Convention in light of general international rules on state responsibility the Court can thus legitimize the pilot judgment procedure.[144]

In addition to concurrence with general international law there are other indications that the Court is acting within its legal competence. Notably both the Committee of Ministers, and the Member States independently, has shown support for the procedure as a legal concept.[145] That the states are sympathetic further indicates that the Court is acting within its mandate.

3.3.3 Constitutive Elements of the Pilot Judgment

From the discussion above it can be concluded that there are three main constitutive elements of a pilot judgment. Firstly, the Court's indication that the specific violation it has found stems from a systemic deficiency in a Member State (the nature of the deficiency can for example be a legal norm

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[140] E.g. *Yuriy Nikolayevich Ivanov v. Ukraine*, para 76 and 82; *Greens and M.T. v. the United Kingdom*, App. No. 60041/08 60054/08, Judgment of 23 November 2010, para 106; Article 1 obligates the states to ensure the rights in the ECHR to persons under their jurisdiction, and Article 46 requires them to abide by the Courts judgments in cases to which they are respondents.

[141] E.g. *Hutten-Czapska v. Poland*, para 236.

[142] See Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in the Light of the Assanidze, Broniowski, Sejdowic Cases', (2007), 7(2) *Human Rights Law Review* 396, p. 409.

[143] See e.g. *LaGrand Case* (Germany v. USA), ICJ Judgment of 2 June 2001, para 123-25; also 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', Report of the ILC on the work of its 53rd session (23 April – 1 June and 2 July - 10 August 2001), UN Doc. A/56/10, (hereinafter 'ILC Draft Articles on State Responsibility'), art 30(b); The Draft Articles are generally considered to reflect customary law. Whether these norms apply when a state violates human rights, and not just breaches of inter-state rules, will be discussed below in Chapter 4.3.

[144] Colandrea, above n 142, p. 410.

[145] See Resolution Res(2004)3 of the Committee of Ministers; Also the pilot-judgments procedure has been endorsed in the context of the reform-Conferences, see e.g. 'Interlaken Declaration'), D 7(b); 'Brighton Declaration', D 20(c).

or an administrative practice that contravenes the Convention but that is determined on a case-by-case basis)[146]. The Court usually also indicates that the systemic deficiency could give rise to numerous repetitive well-founded applications. Secondly, an order that the state takes general measures to solve the systemic deficiency, or to remedy those that have been subject to it (or sometimes even an order that encompasses both those aspects). Thirdly, the adjournment of similar pending or future applications for the purpose of letting the state process these, as part of the general measures.

It can be noted that the fact that the Court remands the resolution of cases concerning a systemic problem to the state, is an expression of the principle of subsidiarity. Moreover, adjournment of similar cases maintains the institutional effectiveness of the system since it prevents the Court from drowning under massive potential inflows of cases. It can also be argued that ordering the state to take general measures is an attempt at bringing the national legal order more in line with the Convention, and therefore an expression of the Court's constitutional task. The effects the procedure might have on the potential for achieving individual justice depends very much on the specific case. This will be returned to in Chapter 5. In the following a case law is analyzed to evaluate how the Court has used the procedure.

3.4 Case Law Analysis

The pilot judgment procedure has been used with increased frequency after the *Broniowski*-case. This section gives an overview of recent case law and addresses the following general questions: What types of systemic problems has been chosen for the application of the pilot judgment procedure? What types of legal and political situations has these systemic violations occurred in? What are the differences in outcome for the specific applicant whose case is chosen for a pilot judgment, and other actual and potential applicants affected by the same systemic deficiency?

3.4.1 Types of Systemic Problems

Scholars and judges at the Court have debated the question of what type of systemic problem is suitable for the adoption of the pilot judgment procedure. The main contestation regards whether it should be adopted only in situations where a specific and unchanging group of individuals is deprived of their right/rights (*cf.* 'class action' cases),[147] or if also more endemic problems are suitable (for example systemic problems with

[146] See below Chapter 3.4.1.

[147] See Harmsen, above n 56, p. 138, defining the 'class action logic' as 'circumstances in which a potentially large, but clearly delimited, group share [sic!] a common grievance amenable to collective resolution'.

inefficient judicial systems, which practically can affect anyone that needs to solve a dispute in a court). It has been argued, which this author agrees with,[148] that pilot judgments 'presuppose very particular circumstances, as a rule a legislative norm which leads to thousands of cases all with the same parameters'[149]. Thus the procedure should primarily be adopted in class action-type cases.[150]

3.4.1.1 The Class Action-Logic

Apart from *Broniowski* another case with class action-type of circumstances was *Kurić and Others v. Slovenia*[151]. It regarded former citizens of the Socialist Federal Republic of Yugoslavia who had lost their status as permanent residents after Slovenia's declaration of independence in 1991. Over 25,000 people were 'erased' from the relevant register, simply due to the fact that they had not complied with a set of formal requirements.[152] The Court found that the applicants, owing to the 'erasure', had experienced 'a number of adverse consequences,[153] which amounted to violations of *inter alia* their right to private and family life under Article 8.[154] The Court also noted that 13 000 people were still unregulated in 2009, which clearly revealed a systemic problem affecting a substantially larger number of people than the 8 applicants. The Court held that notwithstanding that new legislation had entered into force in 2010 and provided a possibility for the 'erased' to be reinstated as residents, the violation was still not sufficiently remedied.[155] It therefore ordered the state to set up an ad hoc domestic compensation scheme within one year of the delivery of the judgment. It further decided to adjourn pending and future applications regarding the same issue.[156]

A third case regarding a class action-type of situation is *Manushaqe Puto and Others v. Albania*[157]. It concerned nationalization of property that

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[148] More arguments on this are provided in Chapter 5 below.

[149] See Luzius Wildhaber, 'Pilot Judgments in Cases of Structural or Systemic Problems on the National Level ', in Rüdiger Wolfrum and Ulrike Deutsch (eds), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Springer, 2009), p. 77. Comment by Judge Mark Villiger.

[150] Philip Leach, 'Beyond the Bug river – a new dawn for redress before the European Court of Human Rights?', (2005), 10(2) *European Human Rights Law Review*, p. 150-51.

[151] *Kurić and Others v. Slovenia*, App No. 26828/06, Judgment of 26 June 2012.

[152] Ibid, para 25-27, the requirements were *inter alia* that the person actually resided in Slovenia and that he or she applied for citizenship before a specific date.

[153] Ibid, para 356, the Court mentioned 'the destruction of identity documents, loss of job opportunities, [and the] loss of health insurance'.

[154] Ibid, 360-62.

[155] Ibid, para 412.

[156] Ibid, para 414-15.

[157] *Manushaqe Puto and Others v. Albania*, App. No. 604/07 34770/09 43628/07 46684/07, Judgment of 31 July 2012.

took place during the communist regime in Albania, and the applicants complained that compensation awards in their favor had remained unenforced.[158] The Court ordered Albania to take general measures that secured either financial or in-kind compensation for those affected (according to the Government this group consisted of almost 40 000 former property-owners)[159], within 18 months of the judgment becoming final.[160] The Court also held that it would adjourn similar applications lodged after the judgment became final, whereas applications already pending before it would be subsequently examined.[161]

3.4.1.2 Other Types of Cases

Despite many commentators preference for class action cases, the Court has used the pilot judgment procedure also in situations where a systemic problem did not affect a specific identifiable group of individuals. For example, the case *Hutten-Czapska v. Poland* concerned Polish housing legislation that the Court found imposed a number of restrictions on landlords' rights, in particular a ceiling on rent levels. This constituted a violation of the right to peaceful enjoyment of possessions,[162] especially since the rent that landlords received was lower than the costs of maintenance.[163] The Court thus ordered Poland to amend the applicable legislation to secure a 'fair balance between the interests of landlords and the general interest of the community, in accordance with the principles of the protection of property rights under the Convention'.[164] It furthermore adjourned pending and future applications and the issue of pecuniary damages for the applicant.[165]

Moreover, in *Burdov v. Russia (no. 2)* the Court found that there was a systemic problem on account of prolonged non-enforcement of judicial decisions delivered against the state or its entities.[166] This was a large-scale and very complex problem, which was not due to a specific lacuna in the law but required comprehensive reform of both the applicable rules, and the administrative practice of federal and local level authorities. Such measures raised a number of legal and practical issues, which were beyond the Court's

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[158] The Court had examined this problem in a number of earlier cases such as *Gjonbocari and Others v. Albania*, App. No. 10508/02, Judgment of 23 October 2007; and *Ramadhi and Others v. Albania*, Appl. No. 38222/02, Judgment of 13 November 2007.
[159] *Manushaqe Puto and Others v. Albania*, Annex.
[160] Ibid, operative part - para 6.
[161] Ibid, para 119-21.
[162] *Hutten-Czapska v. Poland*, para 225.
[163] Ibid, para 237.
[164] Ibid, operative part - para 4.
[165] Ibid, para 247.
[166] *Burdov v. Russia (No. 2)*, App. No. 33509/04, Judgment of 15 January 2009, para 131-35.

judicial function to rule on.[167] However, as a consequence of finding a violation of Article 13, the Court ordered the state to implement effective domestic remedies, which would secure adequate and sufficient redress for those affected by non- or delayed enforcement.[168] The Court also adjourned pending and future applications and set a time limit within which the state should award redress to those who had already applied to it.[169]

Finally, also the widespread problem with excessive length of judicial proceedings has been subject to the pilot judgment procedure, for example in relation to Greece and Turkey.[170] In most of these cases, like in cases regarding non-enforcement of judgments, the Court has ordered the implementation of domestic remedies capable of affording redress for delays. It has refrained from making pronouncements on the measures required for dealing with the underlying causes of the inefficiency. In *Lukenda v. Slovenia*[171], nevertheless, the Court did in fact stipulate that 'the respondent State must, through appropriate legal measures and administrative practices, secure the right to a trial within a reasonable time'.[172] This was criticized by Judge Zagrebelsky, in his dissenting opinion, as falling 'outside the scope of a judgment of [the] Court', as it was 'too general' and not capable of 'execut[ion] as judicial orders usually are'.[173] He finished in very critical words by asking, rhetorically, how this type of order would make the work of the Committee of Ministers easier and more effective? Concluding he stated that the order could do nothing but undermine the Court's authority.

3.4.1.3 Conclusions

As can be seen, the Court is still in the process of developing the procedure and it has even been held that it is 'not yet susceptible to a formal definition'.[174] Its been used in varied types of cases and it has also been applied in slightly differing ways. It is thus difficult to give any general criteria for when the procedure should be applied. However, it is argued here that the number of potential applicants a case reveals cannot be the only criteria for the adoption of the procedure.[175] Such an approach risks a flawed

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[167] Ibid, para 136-37.
[168] Ibid, operative part - para 6.
[169] Ibid, para 143-46.
[170] See *Michelioudakis v. Greece*, App No. 54447/10, Judgment of 3 April 2012; *Ümmühan Kaplan v. Turkey*, App. No. 24240/07, Judgment of 20 March 2012.
[171] *Lukenda v. Slovenia*, App. No. 23032/02, Judgment of 6 October 2005.
[172] Ibid, operative part - para 5.
[173] Ibid, Partly Dissenting Opinion by Judge Zagrebelsky.
[174] Helen Keller et al, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals', (2011), 21(4) *European Journal of International Law* 1025, page 1042.
[175] See e.g. Costas Paraskeva, 'The Application of the Pilot Judgment Procedure to the Post Loizidou cases – the Case of Xenides-Arestis', in *Pilot Judgment Procedure in the European*

balance between the aims of individual and constitutional justice. While the adoption of the pilot judgment procedure is well in line with the Court's constitutional task it is not necessarily contributing to individual justice to a sufficient extent. The Court must give the interests of the individual victims sufficient weight when deciding whether to adopt the procedure. Chapter 5 will go more into detail on this.

3.4.2 The Broader Context

As regards the broader context, it can be concluded that pilot judgments have frequently been applied to deal with systemic deficiencies stemming from historical injustices. Several of the cases scrutinized above have regarded transitional legislation, which has been disproportionate, unjustified, or applied in such a way.[176] Looking at the broader context it is obvious that the former Soviet states are over-represented as respondents to cases of this type.[177] The widespread nationalization of property and the lack of respect for individual rights that was prevalent in these states still have real effects for people today, and are difficult for governments to deal with.[178] It is worth noting that only four pilot judgments have been delivered in cases against a 'Western-European' state,[179] three of which have regarded the notorious problem with excessively lengthy judicial proceedings.[180]

A case that should be mentioned specifically is *Xenides-Arestis v. Turkey* where the pilot judgment procedure was adopted in a rather atypical context. It regarded the issue of denial of access to property in Northern Cyprus.[181] The applicant had been barred from enjoying her property since the 1970s and she had no available national remedies through which she could be redressed. The Court thus ordered the state to set up such a remedy within three months of the judgment becoming final, and it adjourned the

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Court of Human Rights, 3rd Informal Seminar for Government Agents and Other Institutions, Warsaw 14-15 May 2009, (Kontrast, Warsaw 2009), p. 100.

[176] Other examples than the ones mentioned are *Maria Atanasiu and Others v. Romania, App. Nos. 30767/05 and 33800/06, Judgment of October 2010*; and *Suljagic v. Bosnia and Herzegovina*, App. No. 27912/02, Judgment of 3 November 2009.

[177] Gerards, above n 95, p. 3.

[178] The Court has scrutinized similar issues long before the pilot-judgment procedure was introduced, see *e.g. Pincová and Pinc v. the Czech Republic*, App. No. 36548, judgment of 5 November 2002; *Gratzinger and Gratzingerova v. the Czech Republic* [GC], decision of 10 July 2002; *Jantner v. Slovakia*, App. No. 39050/97, judgment of 4 March 2003.

[179] See *Greens and M.T. v. the United Kingdom*; *Rumpf v. Germany*, App. No. 46344/06, Judgment of 9 February 2010; *Michelioudakis v. Greece,* App. No., Judgment of 3 April 2012, by 'Western-European' I mean states that were not part of the former East-bloc and are currently part of the EU.

[180] See Caflisch, above n 104, p. 405, footnote 5: noting that the length of domestic proceedings has been a particular problem over the years.

[181] *Xenides-Arestis v. Turkey*, App. No. 46347/99, Judgment of 22 December 2005.

approximately 1 400 pending applications that regarded the same issue. The particularities pertaining to the case was firstly that the Court had examined the problem before which meant that Turkey had been aware of its obligations for many years, but had still failed to solve the problem.[182] Secondly, the property complained of was located in a region with a very specific legal and political environment, as the international community deems Turkey's occupation illegal.[183]

3.4.3 The Issue of Damages in Pilot Judgments

The Court's approach to damages in the pilot judgments procedure might have consequences for the potential for achieving individual justice. [184] So far the Court has approached this issue rather inconsistently. In some cases, such as *Broniowski*, the Court has adjourned the issue with the intention of dealing with it as a part of the follow-up on the general measures.[185] In other cases, the Court has awarded both pecuniary and non-pecuniary damages to the applicants regardless of the fact that other similar applications have been adjourned.[186] In *Hutten-Czapska* the Court held that it saw reason to depart from the approach taken in *Broniowski* on 'an exceptional basis'. It stated that given the personal circumstances of the applicant (*inter alia* her age and the emotional stress she had suffered) and that she had 'taken upon herself the trouble and burden of acting […] on behalf of [other individuals] in a similar situation', it was appropriate to award her 30 000 euros in non-pecuniary damages.[187] In *Xenides-Arestis* moreover, the issue of damages was adjourned but, due to the failure of the state and the applicant to reach a friendly settlement, the Court, a year after its judgment on the merits, decided to award the applicant a large sum encompassing both pecuniary and non-pecuniary damages.[188] With regards to similar applications, however, the Court found that the new restitution and compensation mechanism set up by the government had fulfilled the requirements set out in the pilot judgment.[189]

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[182] E.g. *Loizidou v. Turkey (Merits)*, App. No. 15318/89, Judgment of 18 December 1996. *Cyprus v. Turkey*, App. No. 25781/94, Judgment of 10 March 2001.

[183] A region called the Turkish Republic of Northern Cyprus, Paraskeva, above n 106, p. 16.

[184] For more details on the Court's approach to damages, see below regarding just satisfaction (chapter 4.2.3).

[185] See also *Xenides-Arestis v. Turkey*, operative part - para 6, *Greens and M.T v. United Kingdom*, para 98.

[186] *Manushaqe Puto and Others v. Albania,* operative part - para 9; *Kuric and Others v. Slovenia*, operative part - para 11.

[187] *Hutten-Czapska v. Poland*, para 248-49.

[188] *Xenides-Arestis v. Turkey (Just Satisfaction),* App. No. 46347/99, Judgment of 7 December 2006, operative part - para 1.

[189] Ibid, para 37.

The issue of damages to victims in pilot judgments will be returned to in Chapter 5 below and for now it suffices to point out that as a provider of individual justice it is important that the Court is perceived as fair. When it awards redress it must make sure that everyone affected by a systemic problem is considered 'equal before the law' and that certain applicants are not subject to preferential treatment.

3.5 Conclusions

The pilot judgment procedure is the result of three broad developments within the Convention-system, all of which relate to the question of the Court's fundamental function. Firstly, the ever-increasing docket crisis has created a need for new methods aimed at dealing more efficiently with individual cases. The Court has held that in light of the significant number of repetitive cases it is called to rule upon, its task under Article 19 is 'not necessarily best achieved by repeating the same findings in large series of cases'.[190] Secondly, as was described above the Court has a constitutional function in that it is supposed to set standards and general principles regarding human rights. In line with this it has generally started to abandon its former strict *in casu* approach to adjudication and does nowadays examine broader issues such as underlying causes for violations.[191] The pilot judgment procedure is another indication of this trend and does to some extent reinforce the Court's constitutional function.[192] The Court sets broad policies in its judgment that the state is obliged to implement with the view of bringing the national legal order more in line with the Convention. Thirdly, pilot judgments are generally an outflow of the principle of subsidiarity which importance has been continuously stressed recently. The Court has stated that pilot judgments are a means of implementing the principle of subsidiarity by 'induc[ing] the respondent State to resolve large numbers of individual cases arising from the same structural problem'.[193] For this purpose the Court frequently orders the enactment of new national remedies, which can be seen as attempts at pushing the responsibility for protection of the Convention back to the domestic judicial and administrative authorities.

As was mentioned above the pilot judgment procedure is still not perceptible to formal definition and though subject to a number of procedural norms, the Court's approach is still rather fluid. The three constitutive elements derived above will be returned to in Chapter 5 where a number of

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[190] *Burdov v. Russia (No. 2)*, para 127.
[191] Sadurski, above n 48, p. 449.
[192] Sadurski, above n 48, p. 450, arguing that pilot judgments 'are an emphatic expression of [a] constitutional turn'.
[193] *Maria Atanasiu and Others*, para 212.

parameters regarding when the procedure should be applied will be provided. First though the next chapter will give insights into the concept of remedies.

4 Remedies: Achieving Individual Justice

A novel aspect of the pilot judgment procedure is that the Court stipulates the prescriptive effect of its finding of a violation. The general remedial orders it makes have a twofold purpose: firstly, to resolve the systemic problem at the root of the violations, and secondly, to remedy those that have already been victims of the systemic deficiency.

This chapter analyses the concept of remedies, which is a fundamental issue in the sphere of human rights law. The purpose of the analysis is to substantiate the notion of individual justice and suggest ways that the Court can better contribute to achieving it.

The first section discusses the theory of remedies and establishes a typology. The second section focuses on international practice and compares the ECtHR with the Inter-American Court of Human Rights (hereinafter 'the IACtHR'). The third section gives insights into some recent developments in international law, and in the fourth section some suggestions and general conclusions are provided.

4.1 Remedial Theory

It is commonplace in almost any legal context that a violation of a right gives rise to an obligation for the wrongdoer to remedy the victim.[194] This is a core postulate of justice regardless of whether one discusses human rights or some other form of normative system. This chapter will attempt to give insights into what remedies are and what purposes they serve.

4.1.1 Theoretical Underpinnings

The underlying justifications for affording redress to victims, or, seen from the other perspective, commanding an offender to repair a breach, can crudely be divided into three categories: compensatory justice, retributive justice and deterrence. [195]

In the first category, the focus is on the victim and the aim of remedies is to 'place an aggrieved party in the same position as he or she would have been had no injury occurred'. [196] Remedies are supposed to reestablish

[194] I use the term remedy in its substantive sense in this chapter. It thus refers to the outcome of a judgment, *i.e.* the redress attained, and not procedural remedies, *i.e.* judicial authorities mandated to hear claims from plaintiffs.

[195] See Dinah Shelton, *Remedies in International Human Rights Law*, (Oxford University Press, 2 ed, 2006), p. 7-21.

[196] Ibid, p. 10.

equilibrium between victim and wrongdoer and need therefore be proportional to the injury sustained.[197] They serve a moral purpose and are meant to 'restore to individuals to the extent possible their capacity to achieve the ends that they personally value'.[198]

In the second category, that of retributive theory, a central recognition is that it is the wrongfulness of acts that warrants remedies. According to this notion the wronging is essential as it sets apart a violation of a right from an injury incurred by an accident or 'an act of nature'. The remedies thus serve the general interest of condemning the wrongdoer to assert and reinforce social values.[199] For retributive justice to be done the wrongdoer must acknowledge the wrongdoing, which also functions as a justification for transferring something to the victim.[200]

In the third category the justification for remedies is future-oriented: they are costs inflicted on a wrongdoer, as a disincentive to repeat the wrong. They are moreover directed at influencing all actors, not just the specific subject of a particular case.[201] Deterrence can be explained as an economic model where incentives (costs and benefits) are used to encourage right and deter from wrong behavior.[202] The intensity of the remedy is thus not corresponding to the injury suffered by the victim, but is determined on the basis of what is appropriate for preventing a repetition of the act.[203]

The right to an effective remedy is since long an established fundamental right.[204] The reason for this secondary norm is that human rights violations are considered to constitute infringements of the freedom and dignity of the human person,[205] and therefore they cannot be disregarded. It is argued here that compensatory justice theory most accurately captures the reasons that states should provide remedies.[206] As in human rights law in general, the individual person must be considered to be at the center of the concept. This should not be taken to mean that retribution and deterrence are

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[197] William Blackstone, 'Reverse Discrimination and Compensatory Justice', (1975), 3 *Social Theory and Practice,* p. 254.
[198] Shelton, above n 195, p. 11.
[199] Shelton, above n 195, p. 12.
[200] Bernard R. Boxill, 'The Morality of Reparation', in Richard A. Wasserstrom (ed.), *Today's Moral Problems*, (Macmillan New York, 1979) 255, p. 259.
[201] Shelton, above n 195, p. 13-14.
[202] This is normally referred to as punitive damages, see e.g. Ibid, p. 12.
[203] Ibid, p. 17.
[204] ECHR, Art 13, IACtHR, Art 25, see also Universal Declaration of Human Rights, GA resolution 217 A (III), adopted on the 10 December 1948, Art 8.
[205] Ibid, p.11.
[206] In international legal practice compensation and reparation of the victim is the most cited justification for remedial orders, see below chapter 4.2.

irrelevant however, as both affirmation of social values and prevention of future violations are, at least indirectly, objectives of remedial orders.[207]

4.1.2 Different Types of Remedial Orders

Courts in general, and international human rights courts in particular have a range of different remedies to choose from when it comes to ordering the provision of redress for rights-violations. The types of measures thinkable are infinitely varied and it is thus difficult to establish any meaningful typology. In the following however, three general categories are presented.

4.1.2.1 Non-monetary Remedies: the Victims Perspective

For victims of rights-violations, the preferred remedy is usually if the situation that existed before the breach is restored (*i.e. restitutio in integrum*).[208] Consequently, courts frequently order states to take some specific action to this end. One advantage of such orders, from the victim's perspective, is that when something as important as a human right has been breached 'it is [often] not adequate to allow the wrongdoer simply to pay for the injury'.[209] This could in fact exacerbate the violation as the victim might be forced to substitute his right for money (*e.g.* if the violation is ongoing). Non-monetary remedies can furthermore be tailored to the specific situation to fit the needs and preferences of the victim.[210] Damages, on the other hand, can be hard to calculate adequately if no *de facto* economic loss has occurred. It has been recognized moreover, that victims of human rights violations often seek moral vindication in the first place and regard an apology and recognition of responsibility as more important than money.[211] The apology has a restorative function and sends a message regarding responsibility, which victims often value.[212]

Non-monetary remedies generally have the most potential of living up to the ideal of compensatory justice. In the sphere of human rights adjudication, monetary compensation can only function as a complement. In any case, non-monetary remedial orders can be rather intrusive on state

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[207] Shelton above n 195, p. 20.
[208] Ibid, p. 269.
[209] Ibid, p. 270.
[210] Ibid, p. 170.
[211] Thomas M. Antkowiak, 'Remedial Approaches to Human Rights Violations: the Inter-American Court of Human Rights and Beyond', (2008), 46(2) *Columbia Journal of Transnational Law* 351, p. 387; Brent T. White, 'Say you're Sorry: Court-ordered Apologies as a Civil-Rights Remedy', (2006), 91 *Cornell Law Review* 1261, 1271-72.
[212] Ibid, p. 384-85.

sovereignty as they limit the choices the state has in executing a judgment. They do moreover often involve an element of policy-making.[213]

4.1.2.2 Damages: the Compliance Perspective

When restitution is impossible (or too costly), courts frequently resort to ordering damages.[214] Compensation is by far the most common type of remedy and can, in contrast to other types, easily 'be adjusted to reflect the magnitude of [a] particular injury.'[215] However, in the human rights context exact calculation of damages is often impossible because of 'the inherently uncertain character of the damage flowing from the violation'.[216] This pertains especially to moral injuries stemming from violations of intangible rights (how does one for example translate the injury flowing from a violation of the right to privacy or religion to a monetary sum?).[217] Human rights courts have often adopted the approach to determine compensation on the rather vague basis of 'equity'.[218]

The advantage with monetary remedial orders is primarily that their relative non-intrusiveness makes them resistant to non-compliance. They are easy to implement and follow-up on, and it is difficult for states to justify not honoring an order. Studies have showed that compensation orders are rarely disregarded,[219] and since supranational courts are reliant on high compliance-rates to maintain their authority, this serves a broader purpose than just remedying the victim. It must be recognized however, that in some situations the scale of a violation might require very high damages to a substantive number of victims.[220] This might result in considerable costs even for a state

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[213] Shelton, above n 195, p. 290; see also Jackson, above n 90, p. 802, discussing how policy-making 'will inevitably reside within the Court's adjudication'.

[214] See Thomas M. Antkowiak, 'An Emerging Mandate for International Courts: Victim-centered Remedies and Restorative Justice', (2011), 47 *Stanford Journal of International Law* 279, p. 284; Shelton, above n 195, p. 20.

[215] Sonja B. Starr, 'Rethinking Effective Remedies: Remedial Deterrence in International Courts', (2008), 83 *New York University Law Review* 693, p. 703.

[216] See *Akdeniz and others v. Turkey,* App. No. 23954/94, Judgment of 31 May 2001, para 128.

[217] Also more pecuniary injuries, such as those induced by breaches of someone's right to property, are often hard to quantify however, see e.g. *Sporrong Lönnroth v. Sweden (Just Satisfaction)*, App No. 7151/75 7152/75, Judgment of 18 December 1984, para 27.

[218] See among others *B.B. v. United Kingdom,* App. No. 53760/00, Judgment of 10 February 2004, para 35; also *Velásquez Rodríguez v. Honduras (Compensatory Damages)*, Judgment of 21 July 1989, IACtHR, (Ser. C) No. 7, para 27; more on this below in chapter 4.2.1.2.

[219] Hawkins and Jacoby has identified monetary compensation as the remedy with the best compliance rate both at the ECtHR and the IACtHR, see Darren Hawkins and Wade Jacoby, 'Partial Compliance: A study of the European and the Inter-American Courts for Human Rights', (2010), 6(1) *Journal of International Law and International Relations* 35, p. 40.

[220] Starr, above n 215, p. 755.

and in such cases the court should take into account that the compensation awards can have spillover effects outside the context of the specific case.

4.1.2.3 Declaratory Relief: Remedial Shortfall?

International courts often resort to merely declaring that a violation has occurred. Declaratory relief is the least invasive type of remedy from the states' perspective, but that doesn't mean that it is insignificant for victims. This has three main reasons. First, states are sensitive to being called on breaches on the international arena, as there are great stakes in human rights reputations.[221] This implies that a declaratory judgment can be a catalyst that induces the state to take action. Second, as pointed out above victims are often pursuing a verification that they are in the right, and therefore a declaration from an international tribunal can serve to morally vindicate the victim.[222] Third, in cases regarding imminent violations, a declaratory judgment can function as an injunction that prevents the state from taking an action that would violate the right (*e.g.* executing an expulsion order)[223]. It should also be noted, that in some cases the behavior of the victims might call the appropriateness of redress into question. For example if the victim committed a crime in connection with the human rights violation.[224]

It must be recognized, in any case that the adequacy of declaratory relief can be questioned both for principled and practical reasons. Principally, declaratory relief 'fails to justify or even acknowledge […] shortfall. [I]t claims to grant an effective remedy while in fact granting no remedy at all'.[225] From a practical perspective, a mere pronouncement of a breach can put the state in a situation of uncertainty over what is required of it. The transparency of what obligations a judgment entails has in fact been recognized as a critical factor for states' ability (and willingness) to execute judgments.[226]

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[221] See Hawkins and Jacoby, above n 219, p. 42.

[222] See Shelton, above n 195, 257.

[223] Many countries have national laws that stipulates that expulsion cannot take place after a finding by an international body that it would violate an international norm, see e.g. the Swedish Aliens Act (SFS 2005:716), Chapter 12, Section 12.

[224] Such was for example the situation in *McCann and others v. United Kingdom*, which regarded the question whether the killing of three terrorists who were about to plant a bomb in Gibraltar, had been in accordance with the exceptions stipulated in Article 2 paragraph 2 (the right to life). The ECtHR concluded that the force used had not been absolutely necessary 'in defense of persons from unlawful violence' and thus declared a violation. The applicants, who were relatives to the terrorists, were not awarded moral damages however, since it was deemed inappropriate considering the nature of the victims' criminal acts, see *McCann and others v. united Kingdom*, para 219.

[225] Starr above n 215, p. 762.

[226] See e.g. Hawkins and Jacoby, above n 219, p. 81.

4.2 Analysis of International Norms and Practice

As has been mentioned above pilot judgments include remedial orders partly meant to redress victims of systemic human rights deficiencies. This is a novel feature of the Court's adjudication as it traditionally has taken a restrictive approach to the issue of remedial orders. The following section analyzes the ECtHR's practice and for the purpose of arguing that the Court should adapt a more active commitment to remedying victims, some general comparisons to the Inter-American Court of Human Rights (hereinafter 'the IACtHR') are provided.[227] The reason for this is that the latter in many ways is a similar institution to the ECtHR, which has indeed been less reluctant to focus on the needs and preferences of victims.[228]

4.2.1 Remedial Approaches Compared

4.2.1.1 Declaratory Relief and Non-monetary Remedies

As indicated above, the ECtHR has often merely declared that a state has violated the Convention. Especially when the victim either has suffered only moral injury, or has provided insufficient evidence regarding pecuniary damage.[229] The IACtHR has been more hesitant to regard declaratory relief as an appropriate remedy for human rights violations.[230] The court has indeed held that theoretically, a declaration of a breach can be sufficient redress for the applicant.[231] In practice however, it has never accepted such an outcome. To redress non-pecuniary injuries it has frequently ordered measures meant to reinstate victims to their previous position. It should be noted however, that a significantly large part of the IACtHR's caseload has concerned grave violations, for which declaratory relief would be a rather hollow victory.[232]

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[227] The IACtHR was established by the Organization of American States (OAS) in 1979 to enforce and interpret the Inter-American Convention of Human Rights. It has an adjudicatory and an advisory role. Under the former it hears complaints regarding human rights violations and issues legally binding judgments much like the ECtHR. It sister-body the Inter-American Commission of Human Rights has a screening function and individuals cannot not submit complaints directly to the Court but must go through the Commission.

[228] See e.g. Antkowiak, above n 214, p. 292-303.

[229] See e.g. *Kress v. France*, App. No. 39594/98, Judgment of 7 June 2001; *Christine Goodwin v. United Kingdom*, App. No. 28957/95, Judgment of 11 July 2002; *Folgero and others v. Norway*, App. No. 15472/02, Judgment of 29 June 2007; also Shelton, above n 195, p. 257.

[230] Shelton above n 195, p. 266.

[231] *El Amparo v. Venezuela (Reparations)*, Judgment of 14 September 1996 IACtHR (ser. C) No. 28, para 35.

[232] See e.g. *Godínez Cruz v. Honduras*, Judgment of 21 July 1989, IACtHR, (Ser. C) No. 8, para 55.

In accordance with the principle of subsidiarity, the ECtHR has remanded the choice of remedial measures, after the finding of a violation. It has traditionally not ordered non-monetary remedies but left it up to the respondent state to decide on the implementation of such measures (and to the Committee of Ministers to supervise execution). Antkowiak has classified the ECtHR as 'cost-centered' as it avoids ordering more far-reaching measures than monetary compensation. His assessment is that the Court 'seems particularly worried about state disobedience, which would likely erode [its] credibility and efficacy.'[233]

In any case, the Court has held that the states' obligation under Article 46 of the Convention includes a duty to put an end to the violation and restore as far as possible the situation existing before the breach (*i.e. restitutio in integrum*). It has established, however, that 'the respondent states are free to choose [for themselves] the means whereby they comply with a judgment […], the Court will not make consequential orders or declaratory statements in this regard'.[234]

The IACtHR has taken a different approach than its European counterpart and is described by Antkowiak as 'victim-centered'. This denotes that it has based its decisions on the needs of victims and ordered the type of redress it has found appropriate considering the context of the case.[235] It has ordered states to implement a whole array of both individual and general measures, for example to: make a public recognition of responsibility,[236] initiate the construction of memorials,[237] establish a village housing program,[238] implement human rights education for law enforcers,[239] annul criminal convictions and/or re-open trials,[240] or make legislative amendments.[241] It should be stressed that the cases at the IACtHR, in contrast to (at least earlier) ECtHR jurisprudence, often have involved 'egregious violations of uncontroversial […] human rights,' that often took place within

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[233] Antkowiak, above n 214, p. 290.

[234] See e.g. *Selcuk v. Turkey*, Appl. No. 23184/94 23185/94, Judgment of 24 April 1998, para 125.

[235] Antkowiak above n 214, p. 291-92.

[236] See e.g. *Plan de Sanchez v. Guatemala (Reparations),* Judgment of 19 November 2003, IACtHR, (Ser. C) No. 116, para 125.

[237] See e.g. *Gómez-Paquiyauri Bros. v. Peru*, Judgment of 8 July 2004 IACtHR, (Ser. C) No. 110, para 236.

[238] *Plan de Sanchez v. Guatemala (Reparations),* para 125.

[239] See e.g. *Caracazo v. Venezuela (Reparations and Costs)*, Judgment of 29 August 2002, IACtHR, (Ser. C) No. 95, para 127.

[240] See e.g. *Herrera-Ulloa v. Costa Rica*, Judgment of 2 July 2004, IACtHR, (Ser. C) No. 107, para 195; *Fermin-Ramirez v. Guatemala*, Judgment of 20 July 2005 IACtHR, (Ser. C) No. 126, para 138.

[241] See *Castillo-Petruzzi v. Peru*, Judgment of 27 Nov 1998, IACtHR, (Ser. C) No. 43.

contexts of mass abuses.[242] This has been regarded a main reason for the court's active commitment to making sure that victims are redressed.[243]

4.2.1.2 Assessing Injuries and Compensation

As has been mentioned compensatory damages is a difficult matter in the context of human rights adjudication. The nature of the injury is often not translatable to a monetary sum. In any case, in many occasions there is simply no other measure available and therefore the courts scrutinized here has adopted the approach of making such awards rather habitually. This section analyzes whether any general principles regarding calculation of damages, can be derived from case law.

Both the ECtHR and the IACtHR have established that issues regarding compensation are governed under international law.[244] The ECtHR has stated that it has 'a certain discretion in the exercise of the power [to afford compensation]',[245] and it is therefore difficult to discern any general principles or standards.[246] Decisions regarding non-pecuniary damages are rarely supported with detailed reasoning, and the Court has often used a standard phrase such as 'ruling on an equitable basis and having regard to all the circumstances of the case'[247]. The IACtHR has taken the view that damages are determined by the 'American Convention and the applicable principles of international law'.[248] Nevertheless, when quantifying damages the court has generally referred to 'equity'.[249]

Despite scarce reasoning in relation to damages, there are in certain cases some indications as to how the ECtHR views the issue. In a recent case against the United Kingdom, for example, the Court held that:

'it has in the past examined claims by applicants for punitive damages to reflect the particular character of the violations suffered by them and to serve as a deterrent in respect of violations of a similar nature by the respondent State, and for

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[242] Starr, above n 215, p. 733.

[243] Ibid.

[244] Article 41 of the ECHR stipulates that 'if the Court finds […] a violation of the Convention […], […], the Court shall, if necessary, afford *just satisfaction* to the injured party'. Article 63(1) of the Inter-American Convention of Human Rights similarly states that the IACtHR shall rule 'if appropriate, that the consequences of [any Convention violation] be remedied and that *fair compensation* be paid', [Italics added by the author].

[245] E.g. *Perdigao v. Portugal* [GC], App. No. 24768/06, Judgment of 16 November, para 85.

[246] The Court often finds a certain amount 'equitable' without giving reasons for its finding.

[247] *Ukrainian Media Group v. Ukraine*, App No. 72713/01, Judgment of 29 March 2005, para 75. The Court sometimes classifies moral injury as some form of physical pain or mental suffering stipulating that the situation must have given rise to *e.g.* frustration, distress, anxiety or uncertainty for the applicant, see Shelton, above n 195, p. 306-07.

[248] *Velásquez-Rodríguez v. Honduras (Compensatory Damages),* para. 31.

[249] *Aloeboetoe v. Suriname (Reparations),* Judgment of 10 September 1993, IACtHR, (Ser. C), para 87.

aggravated damages to reflect the fact that they were victims of an administrative practice. [The Court] has declined to make any such awards.'[250]

This quote reveals the minor importance of deterrence as an underlying justification for compensation orders at the ECtHR.

The Court does not strictly adhere to a compensatory justice model either however, which is clear from case law regarding the right to property. In judging whether an expropriation has been sufficiently compensated, the Court has usually not required that the property's full value be reimbursed. It has been satisfied with compensation that is 'reasonably related' to the loss.[251] In relation to this the Court has stated that:

[it] is sensitive to the effect which […] awards under Article 41 may have and makes use of its powers under that Article accordingly […], the awarding of sums of money to applicants by way of just satisfaction is not one of the Court's main duties but is incidental to its task of ensuring the observance by States of their obligations under the Convention'.[252]

Consequently, the Court acknowledges that remedial rights, just like qualified rights,[253] can be outweighed by important public interests and thereby justify the sacrifice of effectiveness.[254] This is an important recognition, which is even more essential in relation to general remedial measure (such as in the case of pilot judgments) as the risk for spillover effects of such orders is even larger than in the normal case.

4.2.1.3 Conclusions

The discussion above shows how the principle of subsidiarity and effectiveness plays out also in the ECtHR's adjudication regarding remedies. Compared to its American counterpart the ECtHR is more mindful of its subsidiary role and it generally orders only damages in its judgments. The Court has traditionally regarded it entirely up to the state to decide on non-monetary remedial measures and left for the Committee of Ministers to oversee that such action is taken. The argument here is that the Court should take a more assertive approach to remedies. This would enhance its

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[250] *Greens and M.T. v. United Kingdom*, para 97.

[251] The Court takes into account that broader social interests (such as the feasibility of an economic reform) might justify lower compensation than the market value of the property, see *The former King of Greece and Others v. Greece (Just satisfaction)*, App. No. 25701/94, Judgment of 28 November 2002, para 78-79; *The Holy Monasteries v. Greece*, App No. 13092/87 13984/88, 9 December 1994, para 71, *Yildirir v. Turkey (Just Satisfaction)*, App. No. 21482/03, Judgment of 5 April 2011, para 18-19.

[252] See *Salah v. The Netherlands*, App. No. 8196/02, Judgment of 6 July 2006, para 70.

[253] The ECHR includes a number of rights that are considered absolute (e.g. Article 3 and 7) but also a number of rights that are qualified in the sense that restrictions are allowed as long as they fulfill a set of formal and substantial requirements (e.g. Article 8-11).

[254] Public interests are thus of relevance not only in relation to whether a violation has occurred, but also in relation to redress.

commitment to individual justice. To support the claim the following section gives an overview of remedial obligations in international law and how a stronger focus on individuals' rights has materialized recently. Also some recent developments in the ECtHR's remedial approach are analyzed.

4.2.2 States' Remedial Obligations: Recent Developments

This section gives an overview of broad developments in international law regarding states obligations to remedy rights-violations. The first section provides a short overview of general international law and analyzes applicable legal norms. The second part will show how these general developments have started to influence the ECtHR.

4.2.2.1 Developments in International Law

Under general international law, it is commonplace that the breach of a primary substantive norm engages secondary norms. When a violation of an international norm is established the state is obliged to make full reparation *e.g.* by providing cessation, restitution, compensation and satisfaction.[255] The rules on reparations are part of the general law of state responsibility and are applicable in inter-state situations. Since modern international law confers rights on individuals however, one can legitimately ask why the breach of an individual's right should not engage the responsibility of the state to make reparation?[256] Traditionally, states' obligation to redress individuals has materialized within the context of regional human rights regimes,[257] but a growing convergence between human rights law and general international law has started to change this.[258]

One example of such convergence is that the United Nations' (UN) General Assembly in 2005, after an extensive drafting process,[259] adopted the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and

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[255] 'ILC Draft Articles on State Responsibility', art 30-31 and 34-37. Interestingly, the ILC Draft Articles provide that satisfaction 'may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality', see art 37(2).

[256] Shelton, above n 195, p. 157-58

[257] Starr, above n 215, p. 700.

[258] The ECtHR has often referred to how 'the Convention cannot be interpreted and applied in a vacuum'. Rules of general international law must be taken into account when appropriate and the Convention must in so far as possible be applied in harmony with these rules, see e.g. *Al-Adsani v. United Kingdom*, App. No. 35763/97, 21 November 2001, para 55; and *Loizidou v. Turkey*, para 43.

[259] Christian Tomuschat, 'Reparation for Victims of Grave Human Rights Violations', (2002), 10 *Tulane Journal of International and Comparative Law* 157, p. 361, describing the drafting as an 'arduous process of that extends back to 1988'.

Serious Violations of International Humanitarian Law'.[260] This document is a non-binding resolution but does according to the preamble reflect 'existing legal obligations' and identifies 'mechanisms, modalities, procedures and methods for [their] implementation'. It avoids defining gross human rights violations but gives an overview of the different types of remedies that should be provided victims. In most respects it mirrors the rules on state responsibility, as it stipulates that 'victims of gross violations of international human rights law […] should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, […] which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.'[261]

4.2.2.2 Recent Developments at the ECtHR

The developments in international law have indeed already influenced the ECtHR in some respects. The traditional reluctance to non-monetary remedial orders has slowly been abandoned and the Court has in the last years made such orders in a few specific types of cases.

In the case *Assadnidze v. Georgia*, for example, a breach of Article 5 was found due to the states arbitrary detention of the applicant. The violation was ongoing, meaning that the applicant continued to be detained, and for the first time, the Court in the operative part of the judgment ordered the state to 'secure the applicant's release at the earliest possible date'.[262] It also awarded monetary compensation in respect of the damage the applicant had sustained. The Court held that although its judgments are 'essentially declaratory in nature' and it is 'for the State to choose the means by which it will comply' the case at hand left no real choice as to the measures that would remedy the victim.[263] The Court has subsequently adopted similar orders in other judgments regarding ongoing arbitrary detentions.[264] Moreover, in a number of cases involving unlawful confiscation of property the Court has ordered the state to return the property or, failing this, to pay its full value as an

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[260] 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', adopted at the 60th session of the General Assembly (21 March 2006), UN. Doc. A/RES/60/147, (hereafter 'Basic Principles on the Right to a Remedy').

[261] Ibid, para 18, the concept of rehabilitation is understood to comprise 'medical and psychological care as well as legal and social services', see para 21. What the services entail is not further defined in the document.

[262] *Assadnidze v. Georgia*, App. No. 71503/01 Judgment of 8 April 2004, operative part - para 14(a).

[263] *Assadnidze v. Georgia*, para 202.

[264] *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, Judgment of 8 July 2004.

alternative.[265] This shows that the scope for making this type of order encompasses only situations where the violation 'by its very nature' gives but one possible way to achieve adequate reparation.[266]

Colandrea has pointed out that the orders referred to above can be seen as references to the duty to put an end to internationally wrongful acts.[267] This is a classic rule of state responsibility, which furthermore is mentioned in the 'Basic Principles on the Right to a Remedy'-document.[268] The orders emphasize the general duty of cessation and therefore the Court requests such measures only in cases regarding continuing violations. The legal basis for the order is the substantive right in question, read in conjunction with the general duty to secure the rights in the Convention in Article 1.[269]

As to reparation for other types of violations (including satisfaction and rehabilitation) the Court is still reluctant to make any such 'policy statements'.[270] In a number of cases the Court has indicated what it deems appropriate, in its reasoning on the merits.[271] But it has not yet ordered such individual remedies in the operative part of the judgments.

4.3 Suggestions: The Enhancement of Individual Justice

This section makes some general suggestions on how the Court can enhance its commitment to individual justice by developing a more assertive approach to remedies. The argument is that the Court's subsidiary role should not exempt it from considering how the violations it establishes can be properly remedied. Although it is the states' primary responsibility to provide redress, the Court should nevertheless not hesitate to stipulate the nature of appropriate remedial measures, in cases where such can be identified.

The ECtHR's reluctance to order non-monetary remedies seems largely unjustified.[272] Such remedies can provide justice for victims and remedial orders would at the same time simplify for states in the sense that they clarify

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[265] *Papamichaloupolous v. Greece (Just Satisfaction)*, App. No. 14556/89, Judgment of 31 October 1995, para 38-39 and operative part – para 2-3; *Brumarescu v. Romania*, App. No. 28342/95, 23 January 2001, para 22-23 and operative part – para 1-2; *Ramadhi and Others v. Albania*, Appl. No. 38222/02, Judgment of 13 November 2007, operative part – para 6.

[266] See *Assadnidze v. Georgia*, para 202.

[267] Colandrea, above n 142, p. 401.

[268] 'ILC Draft Articles on State Responsibility', art 30; and 'Basic Principles on the Right to a Remedy', para 22(a).

[269] Colandrea, above n 142, p. 401.

[270] Ibid, p. 403.

[271] *Scozzari and Giunta v. Italy*, App. No. 67790/01, Judgment of 19 September 2010, para 249-50; *Gencel v. Turkey*, App. No. 53431/99, Judgment of 23 October 2003, para 27; *Somogyi v. Italy*, App. No. 67972/01, Judgment of 18 May 2004, para 86.

[272] Antkowiak, above n 214, p. 317-326.

what measures are required for execution of the judgment. With regard to the question whether the Court is competent to make 'policy-statements' it should be recalled that the Court's constitutional function mandates it to interpret the Convention, and elucidate what the rights imply in different circumstances. Why then should it not have the power to elucidate the remedial obligations of the state after a violation has been established?[273] The Court can obviously not be overly detailed, and need to leave room for state discretion, but that does not necessitate an absolute rule against non-monetary remedial orders.

The Court can take inspiration from the IACtHR, which has been less reluctant to include non-monetary orders in its judgments. It must be recognized however, that the two courts function within distinct legal and political environments and deal with very different caseloads, both quantitatively and qualitatively.[274] The ECtHR should not just transplant the Inter-American approach but must develop its own methodology in relation to non-monetary remedies. According to this author however, a more activist stance is viable and a comparison with the IACtHR's compliance rates shows that it is unfounded to fear that it would hurt the Court's authority.[275]

It should be added as a general caveat that in developing its approach the Court must be sure to have the necessary legal basis. A lack of legal grounds would give room for objections from respondent states, which would risk undermining the Court's authority. It is argued here that a reading of the Convention in light of general principles of international law can provide the legal basis for new types of remedial orders (see chapter 4.2.2).

As regards damages the Court's approach lacks transparency and seemingly no general principles for what guides the calculation of damages exist. In order to assist national courts that have to grapple with damage awards for human rights violations the Court should be more open about how it calculates damages, and what considerations should be taken into account.

A move to a more assertive approach in relation to remedies would lead to an enhancement of the individual justice dimension of the system. This would be a welcome development as it is clear that without international

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[273] Antkowiak has pointed out that the term satisfaction (in art 41) never has been restricted to monetary compensation in international practice, and that the drafters intended that international principles of state responsibility should be applied to determine states remedial obligations, see ibid, p. 320.

[274] The IACtHR has a very small caseload compared to the ECtHR, which partly is due to the fact that the admissibility screening function is left to the Inter-American Commission of Human Rights. As has been noted above, another difference is that the IACtHR often has heard cases concerning large-scale and grave abuses often committed by authoritarian ex-governments.

[275] It has been shown that the compliance rates at the two Courts are more similar than what is commonly believed; see Hawkins and Jacoby, above n 219, p. 45.

pressure some states are disinclined towards providing relief to victims of violations.[276] The argument that it would lead to an even greater workload is not relevant in this authors view. This problem must be solved with other tools than by sacrificing the Court's function as a provider of individual justice. One example of such a tool is the pilot judgment procedure, which will be returned to in Chapter 5 below.

[276] The large number of repetitive applications at the Court is the biggest indication of this. Such applications have in fact been estimated to make up around 60% of the Court's judgments, see Paraskeva above n 6, p. 213.

5 Reconciling Individual Justice in the Pilot Judgment Procedure

For practical reasons, partly described above (see Chapter 3.1), the provision of individual justice to every applicant with a well-founded case is an impossible task for the ECtHR. Such an approach would eventually lead to it collapsing under the workload that would ensue.[277] It has moreover been argued that prioritizing individual justice would be contrary to the intention of the founders of the system.[278]

Thus, other procedural methods for ensuring respect for the Convention are required and the pilot judgments procedure can be a useful tool in this regard. There are however, some inherent risks mainly due to the fact that similar applications are adjourned and potentially struck out. There is also the risk that systemic problems are not defined accurately or that the general measures ordered do not solve them. This chapter addresses these concerns and answers the questions posed in the introduction of the thesis: when should the pilot judgment procedure be applied? And how should the Court approach the different elements of the procedure?

The first section assesses in what types of cases the Court should apply the pilot judgments procedure. It proposes a number of parameters that can be used when deciding on this issue. The second section discusses some methods for enhancing the effect of the procedure; it suggests that the Court should be more assertive regarding remedial measures and also have a role in relation to the supervision of execution. The last section will include some final conclusions regarding the current and future role of individual justice at the ECtHR.

5.1 Adoption of the Pilot Judgment Procedure

Among commentators the pilot judgment procedure has been a cherished development and is largely considered a progressive jurisprudential achievement.[279] However, some researchers have held that the procedure has

[277] Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about 'constitutionalising' the European Court of Human Rights', (2013), 12(4) *Human Rights Law Review* 655, p. 657. Not even to try to persuade the Member States to increase the Court's budget is viable, especially considering the current political and financial reality of many European states.

[278] Ibid, 665, arguing that the provision of systematic individual relief 'was not what the Convention system was originally set up for'. See also Sadurski, above n 48, p. 401; and Wildhaber, above n 5, p. 226, holding that the Court was established to defend democracy in the wake of the atrocities of the Second World War, and it was meant to do this by ensuring that the Member States honored their primary obligations.

[279] See e.g. Jackson above n 90; and Sadurski above n 48.

been only 'relatively successful' in certain types of cases, and 'less so in others'.[280] The following will suggest a number of parameters that can indicate whether the Court should adopt the procedure or if it should process the applications, even those regarding a systemic deficiency, through some other procedural track.[281] Before presenting these parameters however, a brief overview of the Court's new priority policy is provided.

5.1.1 The Court's Priority Policy

In 2009 the Court amended its Rules of Court and stipulated that '[i]n determining the order in which cases are to be dealt with, the Court shall have regard to the importance and urgency of the issues raised on the basis of criteria fixed by it'.[282] This was a direct consequence of the Court's increasing workload, which had resulted in 'that certain very serious allegations of human rights violations were taking too long to be examined by the Court'.[283] The new priority policy categorizes applications in relation to their relative urgency (the first category being the most prioritized).[284]

The first category covers applications where there is a risk to life or health of the applicants or where the circumstances are linked to the applicants' personal or family situation especially when children are involved.[285] The second category includes applications that raise questions affecting the effectiveness of the system, which includes applications revealing potential systemic problems or issues 'capable of having major implications for domestic legal systems or for the European system'.[286] Under the third category falls applications alleging violations of the right to life, liberty or the prohibition of torture (Article 2, 3 and 5) whereas the fourth category covers 'manifestly well-founded' applications regarding the other rights in the Convention.[287]

In October 2012, the Court published a report in which it stated that its policy regarding repetitive applications is that 'if it concerns a fresh issue

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[280] Greer and Wildhaber, above n 277, p. 672.

[281] The main tracks being to have the Chamber (or exceptionally the Grand Chamber) to issue a judgment if the issue is new, or the Committee of three judges to issue a judgment if there already exists well-established case law regarding the matter, see ECHR, art 28 and 29.

[282] 'Rules of Court', art 42.

[283] 'The Court's Priority Policy', Published online 2009, p. 1, available at http://echr.coe.int/Documents/Priority%20policy_ENG.pdf [last accessed 2013-05-23].

[284] Before the amendment applications had been dealt with principally on a chronological basis. It can be questioned whether this is in line with the notion that human rights are universal, indivisible, interdependent and interrelated, see e.g. 'Vienna Declaration and Programme of Action' UNGA, A/CONF.157/23, adopted on 12 July 1993.

[285] Ibid, p. 2, Category I.

[286] Ibid, Category II.

[287] Ibid, Category III and IV.

which has not previously been dealt with by the Court, it will aim to select some applications and process them in accordance with the pilot judgment procedure'.[288] Consequently, as of now the pilot judgment procedure is fully endorsed by the Court and is applied with increased frequency.

5.1.2 Parameters for Application

There are many factors that affect whether it is appropriate to apply the pilot judgment procedure. Maybe the most important recognition, however, is that the identification of a systemic deficiency giving rise to multiple similar (alleged) violations cannot be the only relevant factor. Based on the discussion above the following will suggest some parameters that could assist in the process of deciding whether a case should be subject to the procedure. The parameters proposed should be seen as guiding principles rather than strict rules and it is inevitable that the Court will retain some discretion.

5.1.2.1 The Nature of the Violation

As a general rule, pilot judgments should not be adopted in cases regarding serious violations of fundamental human rights (in principal applications that fall in category one or three of the Court's priority policy). The reason for this is that in such situations the interest of providing individual justice outweighs the interest of systemic effectiveness and it is moreover essential for the Court's legitimacy that it responds strongly to grave violations.[289]

The Court has already adopted the pilot judgment procedure in relation to violations of Article 3 (prohibition of torture and inhuman or degrading treatment) in two cases. First on account of the poor conditions in pre-trial detention centers in Russia in the case *Ananyev and Others*,[290] and moreover, in relation to Italy in a case regarding a widespread problems with over-crowded prisons.[291] In both cases the Court ordered the implementation of preventive and compensatory national remedies capable of affording

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[288] 'The Interlaken Process and the Court', ECHR, published online 2012-10-16, para 12, available at http://echr.coe.int/Documents/2012_Interlaken_Process_ENG.pdf [last accessed 2013-05-23].

[289] These types of situations often necessitates that the Court takes on a more active role in its adjudication and it has even conducted fact-finding missions on some occasions, see e.g. *Imakayeva v. Russia*, App. No. 7615/02, Judgment of 9 November 2006; *Avsar v. Turkey*, App. No. 25657/94, Judgment of 10 July 2001.

[290] See *Ananyev and Others v. Russia*, para 185 where the Court found a systemic deficiency due to a 'lack of personal space in […] cells, a shortage of sleeping places, unjustified restrictions on access to natural light and air, and non-existent privacy when using the sanitary facilities'.

[291] *Torreggiani and Others v. Italy*, App. No. 43517/09, Judgment of 8 January 2013.

adequate redress.[292] In the Russian case the Court decided not to adjourn similar applications owing to the seriousness of the issue.[293] In the Italian case however, it stated that similar applications raising exclusively the issue of prison overcrowding would be adjourned.[294]

These cases can be seen as exceptions to the rule above and does not necessarily represent a flawed balance. Of importance is that similar cases were either not adjourned at all, or only to the extent that they raised the exact same allegation. A broader scope for adjournment would risk resulting in denial of justice on part of future victims, which would be contrary to the Court's function.

5.1.2.2 The Nature of the Systemic Problem

An indication that a case is suitable for the pilot judgment procedure is if the applications reveal a class action situation. The reason for this is that it is more likely that the scope of a class action type of case can be evaluated appropriately as it entails only a specific group of individuals affected by a systemic deficiency. The success of the pilot judgment procedure is dependent on that measures are taken on the national level and such measures are often complex and comprehensive. In class action cases it is easier for the Court (together with the state) to assess the scope what is required, which makes the remedial measures more predictable.

This should be a general principle and not a requirement. There are other types of cases that are suited for the procedure notwithstanding that they lack the class action element. For example, a suitable type of case are cases with less serious violations (Category IV type of cases) where the systemic problem is the result of a rather isolated legal norm. An example is *Greens M.T. and Others v. United Kingdom*, which regarded applicants who were denied being recorded on the electoral register because they were convicted criminals. The systemic deficiency was a direct consequence of a law that stated that '[a] convicted person during the time that he is detained in a penal institution in pursuance of his sentence [...] is legally incapable of voting at any parliamentary or local election'.[295] In such a situation it is not in the best interest of either individual justice or effectiveness for the Court to examine every single relevant application. It is more appropriate that it adopts the pilot judgments procedure and brings pressure on the state to change its laws (which in fact the Court also did)[296].

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[292] *Ananyev and Others v. Russia,* operative part - para 7; *Torreggiani and Others v. Italy*, operative part - para 4.

[293] *Ananyev and Others v. Russia,* para 236.

[294] *Torreggiani and Others v. Italy*, operative part - para 5.

[295] *Greens M.T. and Others v. United Kingdom*, para 19.

[296] It should be noted that the pilot judgment in *Greens M.T. and Others* has not yet lead to any general measures. The judgment met fierce criticism from the Parliament and large parts

In cases such as *Hutten-Czapska* and *Lukenda* on the other hand, which regarded flawed housing legislation and widespread inefficiency of judicial proceedings, it is questionable whether a pilot judgment will have any real effect. It is questionable whether the sweeping general orders given by the Court will simplify for the states and whether international pressure will have any effect. In *Hutten-Czapska*, the Polish government was against the adoption of the procedure as they argued that the applicant's situation was unique. The important thing to note is that in such a situation it is likely that other individuals in a similar situation perceive adjournment of their case as denial of justice. From the victims' perspective it must be frustrating to have one's application adjourned with a view to having the state, which already has showed negligence towards the rights in question, take general measures. It is in this author's view it is imperative that the Court makes an assessment of how an adjournment is perceived by those who are subject to it. A disregard for this could in the long run be detrimental for individuals trust in the Court.

5.1.2.1 The Broader Context and the State's Attitude

It has been argued that the pilot judgment procedure's potential lies in its dialogical nature: it is the conversation that the state becomes engaged in with the organs of the Council of Europe that solutions can be fostered. This implies that the Court must listen to the state in order for a systemic problem to be met by a proper judgment.[297] The consultation-clause in rule 61 should thus be applied strictly and the Court should try to gauge the state's attitude regarding the issue. Also information provided by the applicant can be of value, and should be taken into account to the extent possible. It is in the end the government's willingness to cooperate that is crucial, and it will naturally depend on the type of case, the nature of the alleged violation, and the political and economic benefits that cooperating with the Court can give.[298]

That the state is cooperative should not be a requirement for adoption of the procedure but it is in any case important that the Court is well informed about the national situation and the nature of the systemic deficiency.[299]

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of the public in the UK that considered disenfranchisement to be a tradition and based on a democratically legitimate law. The general view was that the Court had overstepped its authority and not given enough latitude to democratic decision-making, see e.g. 'Give prisoners the vote. But not because Europe says so', *The Guardian* Thursday 22 November, http://www.guardian.co .uk/commentisfree/2012/nov/22/give-prisoners-vote-not-because-europe-says. 'Prisoner votes: Strasbourg should give way to national independence', *The Guardian* 29 October 2012, available at http://www.guardian.co.uk/law/2012/oct/29 /prisoner-votes-strasbourg-national-independence. It remains to see whether the British Parliament will come through and honor their international obligation.

[297] Gerards, above n 95, p. 9.

[298] Ibid, p. 10.

[299] Ibid, p. 9.

One commentator has noted that the weakness of the pilot judgment procedure is that it is often applicable in contexts with the least prospect for success. Many systemic problems occur as consequences of a state's failure to implement the Court's judgments correctly and its habitual disregard for a specific issue.[300] In a case like *Xenides-Arestis* for example, where the state had been aware of its obligation but had refused to take action for many years, it is very much questionable whether a pilot judgment is an appropriate response from the Court. One can legitimately ask if it is not in exactly this type of situation that the Court needs to function as a last resort and provider of individual justice?[301]

In any case, the fact that a respondent state is a notorious re-offender on a specific issue does not necessarily mean that the pilot judgment procedure cannot be applied. It has for example been recognized that in situations where the national constitutional court has already struck down on a national legal regime (for example for violating the national constitution) a pilot judgment from the ECtHR can lead to a type of partnership between the two judicial bodies, which can compel the state to take action.[302]

5.2 Enhancing the Effect of Pilot Judgments

This section gives some suggestions regarding how to enhance the effect of pilot judgments in order to achieve both a more effective and speedy change of the general situation and also relief for victims.

5.2.1 Selecting the Pilot-case

For the pilot judgment procedure to be effective the Court must choose a case that discloses all the different violations that a given systemic deficiency gives rise to.[303] This calls for meticulousness in examining the broader problem before selecting the application or applications that will be chosen as a pilot-case. Consequently, to choose the first application or applications that reveals a systemic deficiency might not always be the most efficient approach.[304] For example, if an application regards a national compensation scheme for nationalized property, the first applicant might complain that the sums awarded are insufficient. If the Court adopts the pilot-judgment procedure in relation to this application, it might oversee that the

[300] See Paraskeva, above n 175, p. p. 105.
[301] More effectively achieved by examining complaints individually and ordering specific remedies. Since well-established case law on the issue existed the processing could have been made through the Committee, ECHR, Art 28.
[302] Sadurski, above n 48, p. 452.
[303] Helfer, above n 10, p. X.
[304] Helfer, above n 10, p. 154.

compensation scheme was also lacking in effectiveness or that the tribunal administering it was not impartial.

5.2.2 Non-monetary Remedial Orders

It has been noted that the Court approaches its new instrument of ordering general remedial measures with great caution. In line with the principle of subsidiarity it leaves to the state to decide what the general measures should entail in more detail. This is a consequence of the fact that general measures, to a greater extent than individual measures, must '[fit] in well with [the states] constitutional and legal systems, their historical and political traditions, and the limitations of their national budget'.[305] Caution from the Court is thus required before being to specific.

However, in its reasoning on the merits the Court has sometimes given recommendations regarding the general measures.[306] In *Manushaqe Puto and Others* for example the Court gave more or less specific guidelines regarding the compensation scheme it ordered the state to implement. It recommended *inter alia* that the state should avoid making frequent changes in the applicable legislation, which had been one of the causes of the violations (non-enforcement of compensation awards, see above Chapter 3.4.1). It further stated that a database of all the relevant decisions should be compiled, that transparent enforcement procedures should be established and that the results of these should be made public and disseminated. Finally it recommended that new decisions should be subject to judicial appeal and that realistic time limits should be set for payment of the compensation.[307]

In line with the arguments in Chapter 4 of this thesis it is suggested that the Court should take on a more assertive approach also when it comes to general remedial orders. If it can identify issues that are important that the state takes into account when solving the systemic deficiency, it should not hesitate doing so. Ordering such measures in the operative part of the judgment, compared to just recommending them on the merits, means that the state has a legal obligation of implementation and that the Committee of Minister execution. This would enhance the prospects for success.

It should be noted however, that there is an obvious tension between the international obligation arising from the Court's remedial orders and the sovereign right of the state to manage its internal affairs through democratic decision-making. This is all the more obvious if an order stipulates for example that the state 'should avoid frequent changes of the legislation and carefully examine all legal and financial implications before introducing

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[305] Gerards, above n 95, p. 13.

[306] It is only orders that are included in the operative part of the judgment that are legally binding for the state, see Colandrea, above n 142, p. 397-99.

[307] *Manushaqe Puto and Others*, para 110-18.

further modifications' (which was recommended in *Manushaqe Puto*).[308] The Court has the to be aware of this and give room for democratic decision-making, but it should also make sure not to loose sight of the victims' needs.

5.2.3 The issue of Fairness in Relation to Damages

As indicated in Chapter 3.3 above, the Court's practice in relation to damages in pilot judgments has lacked consistency. In *Broniowski* it seemed as if the intention was that this issue would be dealt with as part of the follow-up on the general measures. The Court seems to have changed this practice however, and has more often awarded the applicant compensation within the scope of the actual pilot judgment.

There are two reasons that this difference for actual and potential victims is problematic. Firstly, if the Court awards damages to the specific applicants of a pilot judgment, these will be calculated in accordance with the Courts case law and the national law of the respondent state will not be taken into account. If the issue is left to the state as part of the general measures however, it is probable that the sums will be based, at least partially, on national law. Whether the Court awards damages or not can therefore have an effect on the actual sums the different victims are awarded.[309] Secondly, an award by the Court is accompanied with a time limit of three months and instructions regarding interest, and the state is expected to report to the Committee of Ministers when the compensation has been paid. This means that the Court's awards will be subject to a prompt follow-up on the international level, which is not necessarily the case in relation to redress granted on the national level.[310]

It is advisable that the Court finds a way to ensure that similar cases are treated equally. It could do so either by leaving the issue entirely up to the state as part of the general measures. Or it could order the state to follow the approach taken in the pilot case. The latter requires that the Court sets transparent standards and as was showed in Chapter 4, that presents evident difficulties in the context to human rights violations.

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[308] Ibid, para 110.

[309] Obviously an applicant who is not satisfied with the compensation obtained on the national level can bring a new complaint to the Court. The Court would then only review if the remedy was effective however, and this does not require a sum equal to what the Court would have awarded, see *The Holy Monasteries v. Greece,* para 71.

[310] As was described above, in *Broniowski* the Court found that legislative amendments were sufficient for it to strike out the case and it did not scrutinize the outcome for every individual affected by the systemic problem.

5.2.4 The Process of Supervising Execution

Parallel to the massive increase of applications to the Court, and mainly as a consequence of it, there has been a decreasing success in the process of execution of judgments.[311] The Committee of Ministers is flooded with cases much like the Court, and this has lead to that lesser time can be devoted to following-up on judgments and putting pressure on states that have failed to act. The following scrutinizes some issues regarding the Court's role in relation to this complex process. The argument is that a more assertive approach regarding individual and general remedial orders requires the Court's involvement in the supervision of execution.

Traditionally, the ECtHR plays no part in monitoring compliance with its judgments.[312] Whether the measures taken by the state are 'compatible with the conclusions set out in the Court's judgment', is exclusively up to the Committee of Ministers to determine. Protocol No. 14, which recently came into force, has however changed the situation somewhat as there now is a possibility for the Committee to refer a case to the Court in order to have it interpret a remedial order, or determine whether the state has fulfilled its obligation to comply with it (so called infringement-proceedings).[313] Supervision of execution is nevertheless still mainly a political process, and it has been recognized that the Court only intervenes when new legal issues are raised by the measures a state has taken.[314]

The development and increased use of individual remedial orders, as well as the general orders included in pilot judgments, will probably require the Court to take a more active role in relation to supervision of execution. The need for interpretation of the orders and the risk for new legal issues arising from them will undoubtedly be higher than in relation to damages. The Committee of Ministers should thus adopt Article 46.4 referrals more

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[311] This is a political procedure involving primarily the Committee of Ministers and its different sub-committees, and lately also contributors from the Parliamentary Assembly of the Council of Europe (PACE), see 'Implementation of judgments of the European Court of Human Rights', Parliamentary Assembly Committee on Legal Affairs and Human Rights, Doc. 12455, 20 December 2010, (hereinafter 'Implementation of judgments of the European Court of Human Rights'), p. 6-7.

[312] This can be contrasted to the IACtHR which in line with its more assertive approach to remedies, has considered supervision of compliance to be part of its general jurisdiction (There is no political body with this task within the OAS), see *Baena Ricardo et al v. Panama (Competence)*, Judgment of November 28 2003, (Ser. C) No. 104. The American Court performs supervision by investigating reports from both victims' representatives, the American Commission of Human Rights, and also the state itself. It then issues compliance decisions and will occasionally hold a new hearing to determine the level of compliance and put pressure on the state, Hawkins and Jacoby, above n 219, p. 52-54.

[313] See current Article 46.3 and 4, which require a two-thirds majority of the Committee to be in favor of such a referral.

[314] Gerards, above n 95, p. 17-18.

frequently, and the Court should not hesitate to take a stand on the appropriateness of the measures taken by states. Such a development will enhance the individual justice dimension of the Court's adjudication. It must be recognized however; that it will not do much to alleviate the Court's already strained workload, at least not in the short perspective. Better implementation of remedial measures will be crucial for the long-term effectiveness of the system however.

5.3 Conclusions

The Pilot judgment procedure has the potential to be a useful tool for the Court in handling its difficult task of protecting human rights in Europe. It is important however, that the notion of individual justice is not disregarded and that the Court maintains a commitment to making sure that victims of human rights violations are adequately redressed. The pilot judgment procedure must therefore not be seen as a solution for all systemic problems and should only be applied when there is a real prospect of success.

For the purpose of deciding when the procedure should be applied this Chapter suggested a number of parameters that can be used in the initial assessment. It was recognized that the Court should assess four issues when determining whether to apply the procedure: the type of violation the case regards, the nature of the underlying systemic problem, the context and the states attitude. What the different conclusions from each parameter will imply must be determined on a case-by-case basis but the important point is that a thorough assessment is made before decision to apply the procedure is taken.

It was also suggested that there are a number of other measures the Court could take to enhance the effect of the procedure. Firstly, be meticulous when selecting the pilot case and maybe select a number of cases to process simultaneously in order to capture all the possible issues. Secondly, be assertive in relation to the orders regarding general measures in order to simplify for the state and for the Committee of Ministers in executing the judgment. And thirdly, be clear and strive for fairness in relation to damages for those individuals that are subject to a systemic deficiency.

6 Conclusions

This thesis discussed the role of the ECtHR in light of recent developments connected to its docket crisis. The argument was made that the Court's role entails a duality of functional aims as it is supposed to contribute both to individual and constitutional justice. Notwithstanding that constitutionalization of the Court to a certain extent is necessary, it was argued that it should retain the notion of being a last resort for individuals.

An analysis of the pilot judgment procedure provided that this tool is still under development by the Court and not yet susceptible to formal definition. It was pointed out, however, that a pilot judgment encompasses three constitutive elements: the identification of a systemic problem, the order that the state should take general measures to solve this problem, and the adjournment of similar cases flowing form the problem. The increased use of the pilot judgment procedure was found to represent a constitutionalization of the Court's procedures.

The argument was made that the Court should commit itself to individual justice by way of taking a more active role in relation to remedies. Such a commitment was found to have been nearly non-existent in the Court's earlier jurisprudence but indications of a change is visible. Moreover, a comparison with the IACtHR showed that a more assertive approach to remedies is viable and enhances the prospect of individuals being redressed.

It was finally argued that the pilot judgment procedure should not be regarded as a solution for all systemic problems identified by the Court. It is very important that the Court is meticulous when assessing whether to apply the procedure or not. It is also important that it is actively committed to achieving justice for all the individuals whose interests are affected by the application of the procedure. This will retain the individual justice function of the Court and also the trust and esteem the ECtHR enjoys among the public.

In the end it should be noted that the most important participants in the pilot judgments procedure, who has not been the focus of this thesis, are after all the Member States themselves. It is only through the good faith actions from national authorities that the procedure really can lead to the goal of making the Convention-standards reality for the people of Europe. If such good faith exists, at least in some branch of a domestic government, the pilot judgment procedure can be effective tool for implementing the ECHR on the national level.

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