MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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ADDRESSING SYSTEMIC HUMAN RIGHTS VIOLATIONS AT THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract for Master´s Thesis

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Abstract:

Over the past decades, the European Court of Human Rights has become overwhelmed by the massive numbers of applicants constantly lodging their complaints with the Court. In the early 2000s, the Court noted that over half of all its judgments concerned repetitive applications complaining of the same systemic violation, and introduced the pilot-judgment procedure in 2004.

The pilot-judgment procedure allows the Court to examine a complaint beyond the situation of the single applicant, directing the respondent State to solve the underlying problem and introduce remedies at the domestic level. The pilot-judgment procedure also allows the adjournment of all repetitive applications while pending the introduction of remedial measures at the domestic level.

However, since the introduction of the pilot-judgment procedure, the Court has routinely sought to address systemic human rights violations even outside the explicit application of the procedure. In so-called quasi-pilot judgments, the Court indicates general remedial measures but does not employ all elements of the 'full' procedure.

The characteristics of both pilot and quasi-pilot judgments vary extensively, and often it remains unclear why the Court selected a certain approach. Furthermore, distinguishing between pilot and quasi-pilot judgments is not always easy. The procedure crucially allows flexibility, but at the same time, to the outside eye the procedure appears unpredictable and inconsistent.

By studying how the Court has in practice applied relevant legal instruments, this thesis undertakes to clarify which considerations influence the selection of the approach. The thesis will show that although certain patterns in the practice of the Court can be detected, much remains inconsistent and lacking transparency.

The study will find that since the adoption of the first pilot and quasi-pilot judgments, some aspects have been streamlined and clarified. In case-law from the last ten years or so, the Court has been increasingly clear in the differentiation of pilot judgments from quasi-pilot judgments.

Yet, for the vast part, it remains unclear how the Court selects its response to a particular systemic problem. This thesis will find that the Court seems to take into consideration for example the level of cooperation of the respondent state and the complexity of the substantive issue at hand. Furthermore, when the Court has identified a systemic problem, its first response is only rarely a

‘full’ pilot judgment. More typically, the Court will employ the ‘full’ pilot-judgment procedure only after numerous declaratory and quasi-pilot judgments in respect of the same systemic problem have been delivered, but proved unsuccessful.	
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Table of Contents

1. Introduction

1.1. Overburdening of the Court and Introduction of the Pilot-Judgment Procedure

The European Court of Human Rights (the Court, or the Strasbourg Court) is infamously overburdened by the number of individual applications it receives. There are many reasons for the massive number of applications lodged. One is that of widespread, systemic problems which affect hundreds or even thousands of people, resulting in repetitive applications complaining of the same systemic problem.

Since the beginning of the 2000s, the Court, together with the other bodies of the Council of Europe, has sought to address the problem of repetitive judgments. In 2003, the Explanatory Report to Protocol 14 recognised that the Court delivered a total of 703 judgments, out of which 60 per cent concerned repetitive issues.[1] In 2004, the pilot-judgment procedure was adopted after the issuing of resolution Res(2004)3 by the Committee of Ministers (CM). The pilot-judgment procedure was introduced to better identify underlying systemic problems and the sources to those problems.[2] The execution process would be clarified, since the Court were to both identify the underlying problem as well as the measures needed to address it in the pilot judgment.[3] In 2011, the pilot-judgment procedure was incorporated into the Rules of Court, Rule 61, therefore strengthening its legal basis.

Through the pilot-judgment procedure, the Court does not need to examine all repetitive cases separately. In practice, if the Court identifies a systemic problem when examining cases, it can choose one case (or a group of cases) to be examined as the *pilot*. The pilot judgment will then serve as an example to help solve the broader problem and be applied to the remaining repetitive cases at the domestic level. The pilot-judgment procedure gives the Court the opportunity to adjourn all repetitive cases pending the examination and execution of the pilot by domestic authorities, reducing backlog, and allowing the Court to better focus on other issues as well.[4]

[1] *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention,* Council of Europe Treaty Series – No. 194, 13 May 2004
[2] 2004 Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session).
[3] *Ibid.*
[4] Rule 61(6)a of the Rules of Court.

The execution of the pilot judgment is indeed critical to effectively solve the underlying systemic problem, and hence, the Court has grown more aware of execution matters.[5] To assist the CM in the execution of pilot judgments, Rule 61(3) of the Rules of Court specifically provides that the Court shall identify "[…] the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment."[6] Hence every pilot judgment has indications of remedial measures in the operative provisions, as provided for by Rule 61(3).

The CM therefore encouraged the Court to indicate remedial measures in pilot judgments to make the execution process more effective, and this practice was later also codified in the Rules of Court. However, the Court has not limited itself to only indicating general measures in pilot judgments. So-called quasi-pilot judgments resemble pilot judgments in that they also concern systemic problems, and the Court indicates general measures for the respondent state to take. However, in a quasi-pilot judgment, the Court does not employ the 'full' pilot-judgment procedure as provided for in the Rules of Court, but instead opts for a 'hybrid' version of it.

1.2. Research Questions and Aim of the Thesis

The aim of this thesis is to study how the Court responds to systemic human rights violations. One of the most prominent responses to systemic problems is the pilot-judgment procedure, but the Court does not apply the procedure to all systemic problems. The application of the pilot-judgment procedure will be examined throughout the thesis in parallel with other responses where the Court did not apply the pilot-judgment procedure. By doing so, this thesis seeks to create a comprehensive analysis of the mechanisms that the Court uses to address systemic problems.

The research questions are: What defines a pilot judgment? Which factors invite the Court to apply the pilot-judgment procedure in cases where it has identified a systemic problem? Further, which factors affect the Court's decision when choosing the type of mechanisms to apply both in pilots and other judgments?[7] To answer the questions and create a comprehensive analysis, this thesis will examine elements of both 'full' pilot judgments and so-called quasi-pilot judgments.

[5] See, for example, *Hutten-Czapska v. Poland* (35014/97), judgment of 19 June 2006, European Court of Human Rights (ECtHR), para. 234, and Donald and Speck, 2017, p. 93.
[6] Rule 61 of the Rules of Court.
[7] Such "mechanisms" applied by the Court in this sense entails, for example, the type of general measures indicated or the adjourning of similar applications.

Earlier studies have found that interlocutors at the Court find the flexibility of the Court's procedures to be an asset.[8] Many argue that flexibility is essential, since systemic problems are so different in every case. In *Rutkowski and others v. Poland* from 2015, the Court itself emphasised that "[…] one of the important features of the pilot-judgment procedure is its flexibility, enabling the Court to adapt it to a variety of legal and factual situations in different States and to its own caseload developments […]".[9]

However, to the outside eye, the pilot-judgment procedure and other 'hybrid' forms of it lack foreseeability and transparency. Therefore, this thesis will carry out a comprehensive analysis, scrutinising the approaches utilised by the Court when tackling systemic problems in judgments.

In addition to the various forms of pilot judgments, the Court has developed a number of other mechanisms to help reduce its caseload resulting especially from repetitive cases. For example, since the entry into force of Protocol 14, a Committee consisting of three judges can declare admissible and even render a judgment if an application is the subject of "well-established case-law of the Court".[10] Another innovation was the Single Judge procedure, also initiated by Protocol 14; if an application is clearly inadmissible, a Single Judge may declare it as such.[11] However, such mechanisms will not be studied for the purposes of this thesis; instead, the aim is to study judgments where the Court has identified, or could have identified, a *new* systemic problem and the approach or approaches it selects to tackle it.[12] Only the Chambers and the Grand Chamber may adopt decisions or judgments in cases where no established case law exists.[13]

After this introductory chapter, chapter 2 will examine distinguishing features of pilot judgments and quasi-pilot judgments, how the Court identifies systemic problems, and how the practice has developed in recent years. Chapter 3 will discuss in more detail how the Court appears to select its approach in a particular case after a systemic problem has been identified. Chapter 4 will then focus on another mechanism that was introduced through the pilot-judgment procedure: the adjournment of repetitive applications, and the several forms in which the Court decides to adjourn or not adjourn

[8] See for example Kindt, 2018, p. 26, and Donald and Speck, 2017, p. 116.
[9] *Rutkowski and others v. Poland* (72287/10 *et al.*), judgment of 7 July 2015, ECtHR, para. 226.
[10] Article 28 of the Convention.
[11] Article 27 of the Convention.
[12] For a more comprehensive study also covering mechanisms that seek to regulate the number of applications allocated to a Chamber or the Grand Chamber, see for example Czepek, 2018.
[13] Articles 27-30 of the Convention.

them. The Court has taken a more active role in the field of execution through these approaches by going beyond the issue of a single case.[14] Although issues surrounding the new role of the Court will rise throughout the thesis, chapter 5 will further examine the Court's role in the execution of pilot and quasi-pilot judgments.

1.3. Material and Method

The relevant primary source of this thesis is the European Convention of Human Rights (the Convention), and especially article 46 on the binding force and execution of judgments. Although the majority of judgments adopted by the Court are declaratory in nature, the Court sometimes indicates remedial measures under article 46 for the respondent state to take. For the purposes of this thesis, general remedial measures will be studied, since they concern the broader situation beyond the single applicant.

Article 46(1) simply provides that "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." It therefore does not explicitly grant the Court the power to indicate remedial measures, an issue which will be discussed further in the thesis.

To analyse the application of the pilot-judgment procedure, Rule 61 of the Rules of Court is of utmost importance. Rule 61 on the pilot-judgment procedure was incorporated into the Rules of Court in 2011, codifying the application of the procedure, although the Court had delivered pilot judgments since 2004. It must be noted that only the Convention may establish competences of the Court, and the Rules of Court cannot establish any new powers without a legal basis in the Convention. The addition of Rule 61 may therefore only be seen as having codified a practice that was already applied by the Court within the powers conferred to it by the Convention.[15]

By studying the case-law of the Court, emphasis will be on how the Convention provisions and the Rules of Court have been applied in practice. Of value are also earlier studies by qualified academics who have had the chance to interview officials within the Court, including judges, providing inside information on their experience about work 'on the ground'. Therefore, by analysing the practical application of legal provisions, the thesis follows a legal dogmatic method.

Since the HUDOC database does not contain any effective search tool to find judgments relating to systemic problems, or even pilot judgments, the Annual Reports on the Supervision of Execution of

[14] See also Buyse, 2016, p. 104.
[15] See also Haider, 2013, p. 181.

Judgments and Decisions of the Committee of Ministers have been used extensively to identify such judgments. Since its 7th Annual Report, from 2013, the reports have included an explicit list of both pilot judgments and "Judgments with indications of relevance for the execution (under article 46)".[16] These categorisations make it considerably easier to find relevant case-law from 2013 onwards than earlier. Due to the absence of an effective search tool for pilot or quasi-pilot judgments in HUDOC, this thesis cannot guarantee to have exhaustively examined all case-law addressing systemic problems.

[16] 7th Annual Report of the Committee of Ministers on the Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, 2013, p. 68.

2. Identifying and Responding to Systemic Problems

2.1. 'Full' Pilot Judgments

The pilot-judgment procedure was incorporated into the Rules of Court in 2011, hence codifying the procedure.[17] The first part of Rule 61 provides that

> The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.

The Rules of Court do not define the terms 'structural', 'systemic', or 'other similar dysfunction', and the Court has never clarified the terms either. Resolution Res(2004)3, which initially introduced the pilot-judgment procedure in 2004, only mentioned the term 'systemic', and in the earliest pilot judgments *Broniowski* and *Hutten-Czapska*, the Court also only used the term 'systemic'.[18] In the *Burdov (no.2)* pilot judgment, the Court used the term 'structural' for the first time, and this time, the Court even referred to the underlying problems in the earlier cases *Broniowski* and *Hutten-Czapska* as 'structural' instead of 'systemic'.[19] Since no explanation can be found, the terms appear interchangeable.[20]

In order to use consistent language, this thesis will use the term 'systemic', unless the underlying problem in a particular case is described by the Court solely as 'structural'. In that case, the language used by the Court will be mirrored when discussing the particular case.

Rule 61(2)(a) goes on to provide that before the procedure is initiated, the Court must seek the views of the parties to the case on the structural or systemic nature of the problem and the suitability of applying the pilot-judgment procedure. Unless this procedural obligation is fulfilled, a judgment cannot be considered a 'full' pilot judgment.[21]

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[17] Rule 61 of the Rules of Court on the pilot-judgment procedure.
[18] 2004 Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session), *Broniowski v. Poland* (31443/96) [GC], judgment of 22 June 2004, ECtHR and *Hutten-Czapska v. Poland* (35014/97), judgment of 19 June 2006 [GC], ECtHR.
[19] *Burdov v. Russia (no. 2)* (33509/04) [GC], judgment of 15 January 2009, ECtHR, para. 129.
[20] The Court has also used both terms to describe the underlying problem in, for example, *Sukachov v. Ukraine* (14057/17), judgment of 30 January 2020, ECtHR, *Zherebin v. Russia* (51445/09), judgment of 24 March 2016, ECtHR, *Neshkov and others v. Bulgaria* (36925/10 *et al*.), judgment of 27 January 2015, ECtHR, and *Kurić and others v. Slovenia* (26828/06), judgment of 26 June 2012 [GC], ECtHR.
[21] See also Sicilianos, 2014, p. 240.

In pilot judgments, the Court always indicates general measures in the operative provisions of the judgment, as provided for by Rule 61(3) on the pilot-judgment procedure. Some sources state that the indication of remedial measures in the operative part of the judgment is defining for a pilot judgment, but in reality, it is not quite as simple.[22] It is true that in quasi-pilot judgments, the Court more commonly suffices to indicate general measures in the reasoning of the judgment only. There are, however, judgments where the Court has indicated general measures in the operative provisions without expressly applying the pilot-judgment procedure.[23] In such judgments, it is not always easy to distinguish whether the pilot-judgment procedure was, in fact, applied – this question will arise in relation to several judgments throughout this thesis.

Rule 61 does not provide an exhaustive definition of the pilot-judgment procedure, and several academics mention the complexity of jurisprudence in the area.[24] Still, only few question *why* the jurisprudence is complex and inconsistent, and whether it should be more foreseeable. Judge Sicilianos, writing extra-judicially, notes the difficulty of distinguishing the features of a quasi-pilot judgment from a pilot judgment.[25] Although briefly analysing the many features that pilot judgments and quasi-pilot judgments have in common, Sicilianos still does not discuss why the Court decides to invoke – or not invoke – the pilot-judgment procedure in certain cases.

Wallace argues that the existence of quasi-pilot judgments as a "sub-category" in itself is an indication of inconsistency in the jurisprudence of the Court.[26] However, his study is focused on the pilot-judgment procedure and merely mentions quasi-pilot judgments, leaving out any further analysis on the matter. The statement is truly thought-provoking: it is indeed unclear why, in quasi-pilot judgments, the Court does not apply the pilot-judgment procedure instead. Clearly, the Court has identified a systemic problem since it seems fit to indicate general measures.

[22] See, for example *Factsheet – Pilot judgments*, published by the Registry of the European Court of Human Rights, updated May 2020, p. 1, footnote 1, accessed at https://www.echr.coe.int/documents/fs_pilot_judgments_eng.pdf on 30 October 2020.
[23] Such judgments are for example *Lukenda v. Slovenia* (23032/02), judgment of 6 October 2005, and *McCaughey and others v. United Kingdom* (43098/09), judgment of 16 July 2013.
[24] See for example Donald and Speck, 2017, Kindt, 2018, Mowbray, 2017, and Sicilianos, 2014.
[25] Sicilianos 2014, p. 240.
[26] Wallace, 2011.

There is no absolute definition as to the features required of a 'full' pilot judgment. In a study from 2010, Philip Leach identified that six 'full' pilot judgments had been delivered at the time, and identified the following common characteristics of the judgments:

(i) the explicit application by the Court of the pilot judgment procedure;
(ii) the identification by the Court of a systemic violation of the Convention;
(iii) general measures are stipulated in the operative part of the judgment in order that the respondent state should resolve the systemic issue (which may be subject to specific time limits).[27]

He therefore suggested that these be the criteria that define a pilot judgment. It must be kept in mind that the study was conducted before 2011, so the pilot-judgment procedure was not yet codified in the Rules of Court. However, these criteria are still often referred to by authors also in more recent literature.[28]

Interestingly, Leach proposed these criteria because according to him, all six 'full' pilot judgments that were identified shared these same characteristics. When examining these judgments – *Broniowski v. Poland, Hutten-Czapska v. Poland, Burdov v. Russia (no. 2), Olaru and others v. Moldova, Yuriy Nikolayevich Ivanov v. Ukraine* and *Suljagic v. Bosnia and Herzegovina* – one can differentiate the application of the procedure in *Broniowski* from the others.[29] In the *Broniowski* judgment on the merits from 2004, the Court never expressly applied the pilot-judgment procedure. It was only in the friendly settlement judgment, from 2005, when the Court explicitly stated that it had indeed applied the pilot-judgment procedure to the case.[30] *Tomov and others v. Russia* from 2019 is another example of a pilot judgment where the Court did not expressly invoke the pilot-judgment procedure in the judgment, but which has all elements of a pilot judgment and is identified as a pilot judgment by the CM.[31] Hence, for the purposes of this thesis, the lack of explicit application by the Court of the pilot-judgment procedure will not automatically categorise a judgment merely as a quasi-pilot.

[27] Leach, 2010, p. 22
[28] See, for example, Glas, 2016, and Kindt, 2018. Also Alastair Mowbray used similar criteria, although without reference to Leach (Mowbray, 2017, p. 472).
[29] *Broniowski v. Poland* (31443/96) [GC], judgment of 22 June 2004, ECtHR, *Burdov v. Russia (no. 2)* (33509/04) [GC], judgment of 15 January 2009, *Hutten-Czapska v. Poland* (35014/97), judgment of 19 June 2006 [GC], *Olaru and others v. Moldova* (476/07 *et al.*), judgment of 28 July 2009, *Yuriy Nikolayevich Ivanov* v. Ukraine (40450/04), judgment of 15 October 2009, and *Suljagic v. Bosnia and Herzegovina* (27912/02), judgment of 3 November 2009, ECtHR.
[30] *Broniowski v. Poland* (31443/96) [GC], judgment (friendly settlement) of 28 September 2005, ECtHR, paras. 34-37
[31] *Tomov and others v. Russia* (18255/10 *et al.*), judgment of 9 April 2019, ECtHR, and *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, 13th Annual Report of the Committee of Ministers, 2019, p. 86.

In addition to Leach, other authors have similarly suggested definitions for pilot judgments; Luzius Wildhaber, President of the Court at the time of the *Broniowski* case, took a stricter approach. In 2007, he identified the "main elements" of the judgment, which included the oft-repeated elements that the Court discloses a systemic problem which may give rise to numerous subsequent applications, and the Court indicates general measures and uses also the operative part to reinforce said measures.[32]

Wildhaber, however, went further and recognised that for the judgment to be considered a pilot, it must be adopted by the Grand Chamber, all pending applications deriving from the same cause must be adjourned, the general measures indicated must have retroactive effect, and information about the approach must be communicated to the CM and the other bodies of the Council of Europe.[33] He commented particularly on the issue of adjourning repetitive applications, stating that "[u]nless the Court adjourns them, the procedure is hardly a pilot judgment procedure. There is always a close connection with the enormity of the Court's workload".[34]

Of course, this was also before the procedure was codified in the Rules of Court, which now expressly state that the examination of all similar applications may be adjourned "as appropriate", and therefore the adjourning of similar applications cannot be considered a requirement for pilot judgments today.[35] There are examples of 'full' pilot judgments where the Court decided not to adjourn repetitive applications, a practice which will be further discussed in chapter 4.

The Rules of Court also do not prevent Chambers from applying the pilot-judgment procedure, and so it would be difficult today to argue why such judgments should be relinquished to the Grand Chamber only.[36] Leach, however, did not propose that all pilot judgments must be delivered by the Grand Chamber, and additionally, noted only that a pilot judgment *may* adjourn all similar applications, but did not include it as a proposed criterium for a pilot judgment (even though at the time, all pilot judgments had indeed adjourned all similar pending applications).[37] His suggestions for the definition of a pilot judgment better reflect the most common perceptions of a 'full' pilot judgment today, which is perhaps the reason his study is still often referred to.

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[32] Wildhaber, 2009, p. 71
[33] *Ibid.*
[34] Wildhaber, 2009, p. 90. Chapter 4 will further examine this issue.
[35] Rule 61(6)(a) of the Rules of Court.
[36] See also Maris Burbergs, "Deciding on the Pilot Judgment Procedure", published in Strasbourg Observers on 15 July 2010, accessed at https://strasbourgobservers.com/2010/07/15/deciding-on-the-pilot-judgment-procedure/ on 23 December 2020.
[37] Leach, 2010, p. 22

2.2. Quasi-Pilot Judgments

The term 'quasi-pilot judgment' is used to describe judgments that are not merely declaratory, but where the Court instead addresses a systemic problem and indicates general measures under article 46. Quasi-pilot judgments resemble pilot judgments, but do not bear all the characteristics; typically, general measures are only indicated in the reasoning of the judgment, and not imposed in the operative provisions. Furthermore, the Court rarely adjourns repetitive applications in quasi-pilot judgments. Since the Court does not employ the 'full' procedure, it does not ask the parties to submit information on the systemic nature of the problem.[38]

The term quasi-pilot has not been used by the Court, but it is a common term found in literature to describe judgments that resemble pilot judgments. The CM has also used the term, for example in its Annual Report from 2012:

> The European Court's interaction with the Committee of Ministers, in implementing Article 46, is constantly evolving. For several years now, the Court contributes to the execution process more and more frequently and in various ways, e.g. by providing, itself, in its judgments recommendations as to relevant execution measures (so called quasi-pilot judgments or 'Article 46 judgments') [...][39]

Quasi-pilot judgments follow no distinct procedure comparable to the pilot-judgment procedure. It is a categorisation of judgments that merely resemble pilot judgments. Unfortunately, it often remains unclear why the Court decides to use this sort of 'hybrid' between a pilot and an ordinary, declaratory judgment.

Interestingly, the Court sometimes refers to earlier quasi-pilot judgments as pilot judgments. For example, in the pilot judgment *Kurić and others v. Slovenia,* the Court expressly referred to "the pilot judgment *Lukenda v. Slovenia*".[40] However, although the Court did indicate general measures in the

[38] As opposed to the 'full' pilot-judgment procedure, where seeking the views of the parties is required as provided for by Rule 61(2)(a) of the Rules of Court.
[39] *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights,* 6th Annual Report of the Committee of Ministers, 2012, para. 37, p. 28.
[40] *Kurić and others v. Slovenia* (26828/06), judgment of 26 June 2012 [GC], para. 413, referring to *Lukenda v. Slovenia* (23032/02), judgment of 6 October 2005.

operative provisions in *Lukenda*, it did not expressly apply the pilot-judgment procedure and did not discuss the option of adjourning repetitive applications.[41]

Similarly, the quasi-pilot judgments *Xenides-Arestis v. Turkey* and *Scordino v. Italy* have in later case-law occasionally been referred to as pilot judgments.[42] The categorisation of *Xenides-Arestis* as either pilot or quasi-pilot is difficult, but the *Scordino* case can hardly be considered a pilot judgment since general measures were indicated in the reasoning only.[43] This, again, seems to indicate the flexible way in which the Court interprets the pilot-judgment procedure and the categorisation of pilot judgments; these judgments are all responses to address systemic problems, although the Court did not adhere to the strict application of the pilot-judgment procedure.

2.3. Defining Systemic Problems

2.3.1. Identification of the Underlying Problem

When the Court issues a quasi-pilot or pilot judgment, it usually makes an assessment on the systemic nature of the problem. Especially to apply the pilot-judgment procedure, the Court must first identify a "structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications".[44] The requirement is two-fold; there must exist a systemic problem, and that problem must have given rise or possibly give rise to similar applications.

Systemic human rights violations in this sense are most often attributable to deficiencies in the legislation or administrative practices of the State party.[45] Such systemic deficiencies reveal failures of the state party in fulfilling its obligations under the Convention.[46] The Court stated already in *Broniowski* that the denial of the applicant's right to peaceful enjoyment of his possessions

[41] The Court always discusses the option of adjourning repetitive applications in pilot judgments, even when the outcome is not to adjourn them. See chapter 4.
[42] See, for example, *Vassilios Athanasiou and others v. Greece* (50973/08), judgment of 21 December 2010, paras. 44 and 58, *Michelioudakis v. Greece* (54447/10), judgment of 3 April 2012, paras. 64 and 79, *Glykantzi v. Greece* (40150/09), judgment of 30 October 2012, paras. 67 and 82.
[43] *Scordino v. Italy (no. 1)* (36813/97), judgment of 29 March 2006, ECtHR. For further discussion about the case of *Xenides-Arestis,* see section 4.3.
[44] Rule 61(1) of Rules of Court.
[45] The Court recognised this already in *Broniowski v. Poland* (31443/96) [GC], judgment of 22 June 2004, para. 189. See also Haider, 2013, p. 37.
[46] See, for example, Haider, 2013, pp. 37-38, and Keller and Marti, 2015, p. 832.

> […] was neither prompted by an isolated incident nor attributable to the particular turn of events in his case, but was rather the consequence of administrative and regulatory conduct on the part of the authorities towards an identifiable class of citizens […][47]

The identification of a systemic problem and its underlying causes is essential in pilot judgments to assist the respondent state in finding the right remedial measures for execution of the judgment. The other essential requirement, that the problem must affect a large number of individuals, relates again to the need to effectively resolve the violation in order to both prevent and relieve the ever-growing workload of the Court. Application of the pilot-judgment procedure is intended to be beneficial to the individual applicants as well, since a more effective and streamlined procedure to address the systemic problem means that their case is more effectively resolved.[48]

Only one pilot judgment can be found where the Court used only the great number of applicants as an indication of a systemic problem – *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* from 2014. In all other 'full' pilot judgments, the Court has made a separate assessment on the underlying problem giving rise to the applications. *Ališić and others* is a complex case, but essentially it concerned violations of the right to peaceful enjoyment of property (article 1 of Protocol 1) and the right to an effective remedy (article 13 of the Convention). The applicants, who had been citizens of the former Yugoslav Republic, had made foreign-currency savings but had been unable to withdraw them due to a series of events and the absence of an agreement between the successor states.[49] The number of similar applications were over 1,800, lodged by over 8,000 applicants.[50] The Court seems to have based its finding of a systemic problem solely off of the high number of repetitive applications, since no further assessment was made on the nature of the problem.

In all other pilot judgments, recognising the sheer number of similar applications has only been part of the broader assessment made by the Court about the systemic nature of an underlying problem. The following sections will further explore to what extent the number of repetitive applications influence the Court's decision to apply the pilot-judgment procedure.

[47] *Broniowski v. Poland* (31443/96) [GC], judgment of 22 June 2004, ECtHR, para. 189.
[48] In practice, it is not as simple; see, for example, Kurban, 2016, on the implications of the pilot-judgment procedure on individual justice.
[49] *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia, and the former Yugoslav Republic of Macedonia* (60642/08), judgment of 16 July 2014 [GC], ECtHR.
[50] *Ibid.,* para. 144.

2.3.2. Significance of the Number of Applications

As of February 2021, the number of pending applications allocated to a judicial formation of the Court is 65,100.[51] The enormous workload caused by the number of pending cases was one of the main reasons to introduce the pilot-judgment procedure in 2004.

Rule 61(1) of the Rules of Court provides that the Court may initiate the procedure if a systemic problem "[…] has given rise or may give rise to similar applications." Therefore, to apply the pilot-judgment procedure, a great number of applications is not explicitly required. A systemic problem that *may* give rise to similar applications is sufficient.

However, case-law of the Court reveals that the pilot-judgment procedure has only been applied when a systemic problem already has given rise to repetitive applications. The number of repetitive applications has varied extensively; in *Hutten-Czapska v. Poland*, the number of repetitive applications was a modest 18, while for example in *Greens and M.T. v. United Kingdom,* the number of repetitive applications was approximately 2,500.[52]

Indeed, the small number of pending applications in *Hutten-Czapska* did not prevent the Court from invoking the pilot-judgment procedure; although it must be noted that the actual number of applicants was higher than 18, as one of the applications had been lodged by an association of approximately 200 applicants.[53]

In the judgment, the Court argued that the application of the pilot-judgment procedure does not have to be linked, or based on, the number of similar pending applications, which is true, based on Rule 61(1) of the Rules of Court.[54] The Court further argued that it must take into consideration the potential inflow of future applications, and so prevent potential backlog before it happens.[55] The case

[51] Pending Application Allocated to a Judicial Formation on 28 February 2021: https://www.echr.coe.int/Documents/Stats_pending_month_2021_BIL.PDF, accessed on 8 April 2021. Factsheets regarding statistics at the Court are published on https://www.echr.coe.int/pages/home.aspx?p=reports, accessed on 8 April 2021. Although the Court still processes enormous numbers of applications, at the end of 2009, the number of pending applications was at a high of 119,298 (statistics from the Court's Annual Report from 2009, p. 140). Various reforms, such as the pilot-judgment procedure, have evidently relieved a great part of its workload.
[52] *Hutten-Czapska v. Poland* (35014/97), judgment of 19 June 2006 [GC], ECtHR, and *Greens and M.T. v. the United Kingdom* (60041/08 *et al.*), judgment of 23 November 2010, ECtHR.
[53] *Hutten-Czapska v. Poland* (35014/97), judgment of 19 June 2006 [GC], ECtHR, para. 236
[54] *Ibid.*
[55] *Ibid.*

concerned inadequate housing legislation, and the Court estimated that as many as 100,000 landlords in Poland were affected by the legislation.[56]

It seems that the *potential* inflow of future applications alone is not sufficient for the Court to invoke the pilot-judgment procedure, although the Rules of Court would not prevent it. So far, the Court has never invoked the pilot-judgment procedure unless repetitive cases already existed.

For example, in the case *Suso Musa v. Malta*, the Court identified serious weaknesses in the respondent state's legislation but refrained from applying the pilot-judgment procedure. The applicant, an irregular immigrant, had been detained in Malta for 18 months without an effective remedy that would have allowed him to challenge the lawfulness of his detention.[57] The Court therefore stated that the respondent state must "[…] secure in its domestic legal order a mechanism which allows individuals taking proceedings to determine the lawfulness of their detention […]".[58]

Furthermore, the Court concluded that both the duration of his detention and the inadequate conditions of the detention facility amounted to a violation of article 5(1) of the Convention. The Court recommended that the respondent state take the necessary general measures to improve the conditions of detention as well as limit the detention periods in the context of immigration.[59] The general measures were indicated in the reasoning of the judgment only, which is typical for quasi-pilot judgments.

The Court motivated the indication of general measures by, *inter alia*, stating that the identified problems may give rise to numerous applications in the future.[60] This argument can be found in both pilot judgments and quasi-pilot judgments. The difference seems to be whether, at the time of the judgment, similar applications already have been lodged. In the case of *Suso Musa*, the Court referred to just one previous judgment regarding the issue.[61] There were eventually five cases under the *Suso Musa* group when the CM closed its supervision of them in 2016, declaring that all individual and general measures had been implemented.[62]

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[56] *Grand Chamber Judgment Hutten-Czapska v. Poland,* Press release issued by the Registrar on 19.6.2006.
[57] *Suso Musa v. Malta* (42337/12), judgment of 23 July 2013, ECtHR.
[58] *Ibid*., para. 122.
[59] *Ibid*., para. 123.
[60] *Ibid*., para. 121.
[61] *Louled Massoud v. Malta* (24340/08), judgment of 27 July 2010, ECtHR.
[62] Committee of Ministers, *Final Resolution CM/ResDH(2016)277*, adopted on its 1265th meeting on 20-21 September 2016.

The number of repetitive applications was only a handful, and the Court did not give any estimation as to how many individuals were potentially affected. However, it is apparent from the *Suso Musa* group of cases that Malta, as a small island nation at the external border of the EU, had had difficulties in coping with the influx of immigrants.[63] Considering that Malta had had problems with the number of arriving immigrants, coupled with the issues raised by the applicants in just these five cases, one can only imagine the number of possible similar applications that the Court could have received. The group of people affected was presumably by no means limited to these five applicants, as the Court itself noted in *Suso Musa.* However, it made no further assessment on the scope or systemic nature of the problem, although it is implicit in the judgment.

The small number of repetitive applications is, however, not a sufficient answer as to why the Court refrains from invoking the pilot-judgment procedure in certain cases. While the Court has refrained from invoking the pilot-judgment procedure when there have been no similar applications pending, it has in some cases refrained from invoking the pilot-judgment procedure despite great numbers of similar pending applications. The following section will examine cases where the Court clearly identified large-scale human rights violations which had already resulted in numerous repetitive applications, but the Court refrained from invoking the 'full' pilot-judgment procedure.

2.3.3. Systemic Problem, But No Pilot Judgment

The case of *Scordino v. Italy* is an early example of a quasi-pilot judgment where numerous similar applications were already pending. As the case is from 2006, the first pilot judgment *Broniowski v. Poland* had been adopted only two years earlier. *Scordino* is a complex case, essentially concerning the excessive length of domestic judicial proceedings and property rights regarding adequate compensation for expropriated land. The Grand Chamber found violations of the right to peaceful enjoyment of possessions (article 1 of protocol 1) and the right to a fair trial (article 6(1)).

The Grand Chamber indicated general measures under article 46 in paragraphs 182-189 of the judgment. The measures were not imperative, but instead resembled suggestions to help the state party execute the judgment. For example, the Grand Chamber noted that preventive measures were

[63] *Aden Ahmed v. Malta* (55352/12), judgment of 23 July 2013, ECtHR, para. 90,
Suso Musa v. Malta (42337/12), judgment of 23 July 2013, ECtHR, paras. 33 and 79-80, *Louled Massoud v. Malta* (24340/08), judgment of 27 July 2010, ECtHR, para. 44.

the best solution; instead of only instituting a remedy to compensate victims of lengthy judicial proceedings, it would be more effective to organise the domestic judicial system so that it can meet the requirements and keep up with its caseload.[64]

In the judgment, the Court noted that there were "hundreds" of similar applications from Italy, all concerning the length of proceedings in similar expropriation of property cases.[65] For some reason it still refrained from invoking the pilot-judgment procedure. A year later, in the just satisfaction judgment of *Scordino v. Italy (no. 3)*, the Court, again, noted that no effective remedy was in place, but made no explanation as to why not invoke the pilot-judgment procedure.[66]

The *Scordino* cases are already 15 years old, but the Court has taken a similar approach in more recent case-law. For example, *Luli and others v. Albania* from 2014 also concerned the excessive length of judicial proceedings. The judgment encompassed six applications on the same issue, which the Court had joined. In the judgment, the Court also referred to several previous judgments concerning the same issue.[67]

Furthermore, the Court noted that there were several dozens of similar applications pending.[68] Clearly, there was not just a risk of future similar applications – similar applications, and even judgments on the same issue, existed already.

In the judgment, the Court indicated general measures "[…] so that the Court does not have to reiterate its finding of a violation in a long series of comparable cases".[69] The Court even continued by "drawing attention" to Resolution Res2004(3) and Recommendation Rec 2004(6) of the Committee of Ministers regarding the effectiveness of the Convention system.[70] Despite this, the judgment did not so much as even mention the possibility of invoking the pilot-judgment procedure, and general measures were indicated in the reasoning of the judgment only. The Court referred to the general

[64] *Scordino v. Italy (no. 1)* (36813/97), judgment of 29 March 2006, ECtHR, para. 183.
[65] *Ibid.*, para. 238.
[66] *Scordino v. Italy (no. 3)* (43662/98), Just Satisfaction judgment of 6 March 2007, ECtHR, para. 28.
[67] *Luli and others v. Albania* (64480/09), judgment of 1 April 2014, ECtHR, para. 114.
[68] *Ibid.*, para. 115.
[69] *Ibid.*, para 116.
[70] *Ibid.*, para. 117. In Recommendation 2004(6), the CM recommended the state parties to the Convention to establish, on the national level, effective remedies for anyone who has a complaint regarding the excessive length of judicial proceedings. The CM was particularly concerned with the caseload of the Court regarding length of proceedings issues, and therefore pleaded to the state parties to remedy the issue.

measures indicated in *Scordino v. Italy* regarding excessive length of proceedings, providing a number of examples of remedies that the respondent state could utilise to comply with the judgment.[71]

As this chapter has demonstrated, the Court has so far not invoked the pilot-judgment procedure unless a number of similar applications were already pending before it. The Rules of Court do not provide for such a requirement, but perhaps the Court does not want to depart from the initial intentions of pilot judgments, one of which was to relieve the burden of having to examine repetitive cases.

What is more difficult to explain are the cases were repetitive applications already did exist, but the Court still did not invoke the pilot-judgment procedure. In these cases, the Court indicated general measures to remedy the problems and to prevent the future inflow of similar applications. However, since it did not adopt a pilot judgment, all repetitive applications remained for the Court to examine separately.

Over the years, the decision to apply the pilot-judgment procedure or another 'hybrid' form of it has rarely been consistent or predictable. The following section will further look into certain 'trends' concerning pilot judgments and quasi-pilot judgments, such as the substantive issues these judgments have sought to tackle, the frequency of pilot judgments and quasi-pilot judgments issued, and how they have changed over the years.

2.4. Prevalence of Pilot Judgments and Quasi-Pilot Judgments

In recent years, the number of new pilot judgments has been sparse. In 2020, 2019, 2017, and 2016 only one pilot judgment was issued each year; in 2018, the Court did not issue a single pilot judgment.[72] It is, however, impossible to assess the Court's enthusiasm to issue pilot judgments in the future – the number of pilot judgments issued by year has fluctuated since the introduction of the procedure in 2004. Between 2006 and 2008, the Court did not issue a single pilot judgment, but in the following years, it picked up on the practice again. It culminated in 2012, when a record-breaking

[71] *Luli and others v. Albania* (64480/09), judgment of 1 April 2014, ECtHR, para. 118.
[72] *Sukachov v. Ukraine* (14057/17), judgment of 30 January 2020, *Tomov and others v. Russia* (18255/10 *et al.*), judgment of 9 April 2019, *Rezmives and others v. Romania* (616467/12 *et al.*), judgment of 25 April 2017, *W.D. v. Belgium* (73548/13), judgment of 6 September 2016, ECtHR.

number of seven pilot judgments were issued, and since then, the number has varied between zero and four per year.[73]

The number of quasi-pilot judgments issued by year has constantly been slightly higher than that of pilot judgments.[74] For example, in 2020 the CM identified 13 judgments with remedial indications, nine of which concerned general (as opposed to individual) measures.[75] However, considering that the Court delivered a total of 871 judgments in 2020, the vast majority of them remain declaratory in nature.[76]

Interestingly, in all four pilot judgments adopted between 2016 and 2020, the Court found violations of article 3 relating to inadequate conditions of detention (although one of the cases related solely to the transport of prisoners).[77] Out of three pilot judgments issued in 2015, an additional two cases concerned inhuman or degrading treatment in detention.[78] The third pilot judgment from 2015 concerned the excessive length of domestic judicial proceedings.[79]

The substantive rights addressed in pilot judgments have varied somewhat, but there seem to have been certain 'trends'. All but two pilot judgments have fallen into one of four categories: excessively lengthy domestic judicial proceedings, non-enforcement of domestic judicial decisions, property rights, or inhuman or degrading treatment in detention.[80]

Based on views expressed by former president of the Court Luzius Wildhaber, Kindt argues that the pilot-judgment procedure may also be viewed as a tool to effectively dispose of applications of more technical issues, such as excessively lengthy judicial proceedings or the prolonged non-enforcement

[73] Statistics are based on the Annual Reports of the Committee of Ministers on the Supervision of the execution of judgments and decisions of the European Court of Human Rights, 2007-2020, all of which can be downloaded on https://www.coe.int/en/web/execution/annual-reports (last visited on 20 April 2021) as well as research by Donald and Speck, 2017, p. 88.
[74] Statistics gathered by Donald and Speck, 2017, p. 88.
[75] *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, 13th Annual Report of the Committee of Ministers, 2019.
[76] *The European Court of Human Rights in Facts and Figures 2020*, issued by the Public Relations Unit of the Court in February 2021.
[77] *Sukachov v. Ukraine* (14057/17), judgment of 30 January 2020, *Tomov and others v. Russia* (18255/10 *et al.*), judgment of 9 April 2019 (concerning prisoner transports), *Rezmives and others v. Romania* (616467/12 *et al.*), judgment of 25 April 2017, *W.D. v. Belgium* (73548/13), judgment of 6 September 2016, ECtHR.
[78] *Varga and others v. Hungary* (14097/12 *et al.*), judgment of 10 March 2015, and *Neshkov and others v. Bulgaria* (36925/10 *et al.*), judgment of 27 January 2015, ECtHR.
[79] *Gazsó v. Hungary* (48322/12), judgment of 16 July 2015.
[80] See also Buyse, 2016, pp. 109-110. The two remaining pilot judgments are *Greens and M.T. v. the United Kingdom* (60041/08 *et al.*), judgment of 23 November 2010, ECtHR, on prisoner voting rights, and *Kurić and others v. Slovenia* (26828/06), judgment of 26 June 2012 [GC], ECtHR, on the status of 'erased' persons.

of national judgments.[81] In the pilot judgment *Gerasimov and others v. Russia* (from 2014) on the excessive length of judicial proceedings, the Court indeed explicitly noted that as an international human rights court, it is not appropriate for it to continuously issue repetitive judgments with basic calculations of monetary compensation.[82] Such task is better fit for domestic authorities, and therefore the Court has presumably thought it suitable to apply the pilot-judgment procedure to such issues.

While the portion of pilot judgments addressing more 'technical' violations has traditionally been predominant, it is interesting to note that pilot judgments in recent years have, instead, shifted to concern such absolute rights as the prohibition of torture and inhuman and degrading treatment, guaranteed by article 3 of the Convention. Out of all seven pilot judgments issued since 2015, the Court found violations of article 3 in six of them. The particular reasons for the growing number of pilot judgments addressing rights protected by article 3 are impossible to know; the Court has addressed other systemic problems in recent years as well, but refrained from applying the pilot-judgment procedure to those.

For example, the quasi-pilot judgment *Zherebin v. Russia* concerned disproportionately extensive pre-trial detentions amounting to a violation of article 5(3) of the Convention.[83] The Court recognized some 700 similar applications pending before it, and made an assessment on the underlying systemic nature of the problem and acknowledged it as being widespread.[84] It indicated general measures in the reasoning of the judgment but did not apply the pilot-judgment procedure.[85]

The cases *Riedel and others* and *Mečiar and others* against Slovakia concerned an inadequate rent-control scheme in breach of article 1 of Protocol 1 on the right to peaceful enjoyment of property.[86] The Court recognised some 200 applicants in a similar situation whose cases were pending before it (although the number of applications was only 14, as some of them were submitted by groups of

[81] Kindt, p. 113, referring to Wildhaber, 2007, p. 91.
[82] *Gerasimov and others* (29920/05 *et al.*), judgment of 1 July 2014, ECtHR, para. 207.
[83] *Zherebin v. Russia* (51445/09), judgment of 24 March 2016, ECtHR.
[84] *Ibid.,* para. 74.
[85] *Ibid.,* para. 82.
[86] *Riedel and others v. Slovakia* (44218/07 *et al.*), judgment of 10 January 2017, and *Mečiar and others v. Slovakia* (62864/09), judgment of 10 January 2017, ECtHR.

individuals).[87] Additionally, it had already delivered several judgments on the same issue, where it had indicated general measures which the Slovakian government had failed to implement.[88]

These are just two examples of systemic problems in recent years that did not concern article 3. The number of similar applications cannot have been the determining factor to refrain from applying the pilot-judgment procedure; in pilot judgments concerning article 3, the numbers of pending applications have varied extensively. There were approximately 120 similar pending applications in *Sukachov* (2020), 680 in *Tomov* (2019), 3,200 in *Rezmives* (2017), and 450 in *Varga* (2015), but merely 50 similar applications in *W.D.* (2016) and 40 in *Neshkov* (2015).[89] It seems that the Court's new tendency to apply the pilot-judgment procedure to these types of cases is, at least to some extent, motivated by something other than just concerns over its caseload.

It has become clear that the number of repetitive applications is not necessarily decisive when the Court chooses its approach regarding a systemic problem. The following chapter will discuss other factors that affect the Court's choice of approach to a specific systemic problem.

[87] *Riedel and others v. Slovakia* (44218/07 *et al.*), judgment of 10 January 2017, para. 37, and *Mečiar and others v. Slovakia* (62864/09), judgment of 10 January 2017, ECtHR, para. 32.
[88] *Riedel and others v. Slovakia* (44218/07 *et al.*), judgment of 10 January 2017, paras. 7 and 37, and *Mečiar and others v. Slovakia* (62864/09), judgment of 10 January 2017, paras. 7 and 32. For the general measures indicated, see *Bittó and others v. Slovakia* (30255/09), judgment of 28 January 2014, paras. 134-135.
[89] *Sukachov v. Ukraine* (14057/17), judgment of 30 January 2020, para. 138, *Tomov and others v. Russia* (18255/10 *et al.*), judgment of 9 April 2019, para. 177, *Rezmives and others v. Romania* (616467/12 *et al.*), judgment of 25 April 2017, para. 109, *W.D. v. Belgium* (73548/13), judgment of 6 September 2016, para. 165, *Neshkov and others v. Bulgaria* (36925/10 *et al*.), judgment of 27 January 2015, para. 270, *Varga and others v. Hungary* (14097/12 *et al*.), judgment of 10 March 2015, para. 98.

3. After a Systemic Problem Has Been Identified

3.1. The Importance of State Cooperation

3.1.1. Pilot Judgments

The previous chapter recognised that the identification of a systemic problem which has given rise (or may give rise) to an inflow of applications does not necessarily lead to a pilot judgment. This chapter will further discuss factors which affect the decision of the Court when choosing its approach. One major consideration it takes into account is the level of cooperation from the respondent state, especially if the Court considers invoking the 'full' pilot-judgment procedure.[90]

As Rule 61(2)(a) provides, the Court must always seek the views of the parties to the case before initiating the pilot-judgment procedure, both on the existence of a systemic problem and on the application of the procedure.

When examining pilot judgments, it becomes apparent that states are rarely eager to have the Court initiate the pilot-judgment procedure and instead, might even oppose its application.[91] Although the Court takes into account the level of cooperation from the side of the state, initial opposition towards the application of the procedure does not prevent the Court from initiating it. Respondent states might often also be cooperative, at least to some degree, even when they have first opposed the application of the pilot-judgment procedure.[92]

At the early stage of the procedure, the respondent state might be reluctant to submit information on the systemic nature of the problem.[93] If that is the case, the Court admits amicus briefs from third party interveners or relies on reports by third parties.[94] The comprehensive information received by the Court allows it to substantiate and gain credibility in its assessment on the systemic nature of the

[90] See, for example, Donald and Speck, 2017, p. 97, Kindt, 2018, p. 58, Leach, 2010, pp. 173-174, Sicilianos, 2014, p. 240.
[91] For some recent examples, see *Sukachov v. Ukraine* (14057/17), judgment of 30 January 2020, para. 133, *Rezmives and others v. Romania* (616467/12 *et al.*), judgment of 25 April 2017, para. 97, *W.D. v. Belgium* (73548/13), judgment of 6 September 2016, para. 157, and *Gazsó v. Hungary* (48322/12), judgment of 16 July 2015, ECtHR, para. 27. See also Kindt, 2018, p. 56.
[92] Glas, 2016, p. 50. For a recent example, see *Sukachov v. Ukraine* (14057/17), judgment of 30 January 2020, where the Ukrainian government acknowledged the problem but denied the suitability of the pilot-judgment procedure because in its view, adequate reforms were underway.
[93] Gerards, 2012, p. 381.
[94] See, for example, *Neshkov and others v. Bulgaria* (36925/10 *et al.*), judgment of 27 January 2015, and *Rezmives and others v. Romania* (616467/12 *et al.*), judgment of 25 April 2017, ECtHR.

problem. Gerards argues that this is the first step in convincing the domestic authorities of the existence of a widespread problem that must be remedied, and a method to make an initially uncooperative state potentially more cooperative.[95]

The role that cooperation plays in the selection of the approach cannot be read from case-law of the Court. In the admissibility decision *Demopoulos and others v. Turkey*, the Grand Chamber remarked that the speedy execution of judgments is "greatly assisted" in cases where the respondent state is cooperative.[96] However, in the same paragraph, it continued by stating that

> Contracting States are bound, in any event, to comply with the Court's judgments, whether or not they have been engaged in a dialogue as to their willingness to find general solutions to a widespread problem. The Court's competence to undertake a pilot-judgment procedure in respect of a series of repetitive or clone cases is not conditional on a Government's conduct.[97]

In practice, the level of cooperation of the respondent state has greatly affected the Court's decision to apply the 'full' pilot-judgment procedure since the beginning.[98] Even today, the fact that the Rules of Court require the Court to seek the views of the parties implies that the Court does take into account the stance of the state.

Regarding the early pilot judgments *Broniowski v. Poland* and *Hutten-Czapska v. Poland*, the Polish Constitutional Court had already declared the relevant domestic legislation as deficient in its judgments prior to the pilot judgments adopted by the Strasbourg Court.[99] Despite judgments by the Constitutional Court, the executive and legislative branches of the government failed to address the problem, until the Strasbourg Court provided its support through the pilot judgments and therefore secured cooperation between the Constitutional Court and the other branches of the Polish government.[100] Also Luzius Wildhaber, President of the Court at the time of the *Broniowski* judgment, noted that the pilot-judgment procedure was particularly applicable to the *Broniowski* case because of the receptiveness of the Polish government.[101]

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[95] Gerards, 2012, p. 381.
[96] *Demopoulos and others v. Turkey* (46113/99 *et al.*), Decision of 1 March 2010, ECtHR, para. 81.
[97] *Ibid.*
[98] See, for example, Donald and Speck, 2017, p. 97, Kindt, 2018, p. 58, Leach, 2010, pp. 173-174, Sicilianos, 2014, p. 240.
[99] Leach, 2010, p. 74
[100] Leach, 2010, p. 74.
[101] Wildhaber, 2009, p. 75

The majority of judges of the Court and its Registry seem to agree with the substance of the statement by Wildhaber: cases where the respondent state is cooperative are particularly suitable for the pilot-judgment procedure.[102] Academic research has typically come to the same conclusion.[103] Interviews conducted by Kindt with members of the Registry even revealed that the level of state cooperation is one of the most crucial factors taken into account when the Registry proposes the application of the pilot-judgment procedure to a certain case.[104]

Since cooperation of the state party is crucial in the successful application of the pilot-judgment procedure, cooperation is crucial also in the reduction of the caseload of the Court.[105] Delivering judgments on an individual basis only does not solve the underlying systemic problem, and so the Court will have to continuously examine new applications on the matter. Furthermore, it can be argued that applying the pilot-judgment procedure better reflects the principle of subsidiarity.[106] It shifts the responsibility of solving the underlying problem from the Court to the respondent state.[107] Judge Spano has even called the era after the Interlaken Declaration 'the age of subsidiarity', "[…] empowering the Member States to truly 'bring rights home'[…]".[108] Indeed, the role of the state is at the core of a successfully executed pilot judgment. Although the Court is the one to order general measures, said measures include setting up a domestic remedy so that all repetitive applications can be processed at national level.[109]

Interestingly, in pilot judgments, occasionally the cooperative stance extends also to the side of the Court. The remedial measures it indicates might give leeway to the national authorities in order to be received well on the domestic level. In *Broniowski*, for example, the Court recognised the "state of the country's finances" and stated that article 1 of Protocol 1 did not guarantee a right to full compensation for all claimants in all circumstances.[110] Thus, Gerards notes that through the pilot-judgment procedure, the Court has taken a more sympathetic and understanding approach rather than

[102] Based on interviews conducted by Donald and Speck, 2017, p. 98, and Kindt, 2018, p. 58.
[103] Buyse, 2009, Yildiz, 2015, p. 94, Glas, 2016, p. 50, Leach, 2010, pp. 156-160, Kindt, 2018, pp. 55-60, Donald and Speck, p. 98.
[104] Kindt, 2018, p. 58.
[105] Gerards, 2012.
[106] Earlier, arguments were typically the opposite: concerns were raised that the pilot-judgment procedure excessively encroached the freedom of the State to choose the remedial measures and did not adequately take into account the principle of subsidiarity. The perspective has since shifted, but concerns are occasionally still raised. See also Kindt, 2018, pp. 48-51.
[107] Keller, Fischer and Kühne, 2011, p. 1043.
[108] Spano, 2014, p. 491. The Interlaken process is a reform package (including the Interlaken Declaration) introduced in 2010 aimed to cope with the growing influx of applications.
[109] Keller, Fischer and Kühne, 2011, p. 1043.
[110] *Broniowski v. Poland* (31443/96) [GC], judgment of 22 June 2004, ECtHR, paras. 182-183.

being harsh and reprimanding.[111] She argues that the success of the execution of the judgment is determined less by the mere authority of the Court, and more by its ability to understand the situation and persuade the state into compliance.[112] Fikfak, while recognising this very same pattern in follow-up judgments to *Ivanov v. Ukraine,* instead regrets the unfavourable position for the applicants.[113] Indeed, one judge admitted in her interview that such 'award decreases' may be due to their worries about state compliance with the judgment.[114] The practice therefore is intended to enhance execution of the judgment, but at the expense of lower just satisfaction awards for the individual applicants in the case.

The fact that the pilot-judgment procedure will more likely be applied to a case where the state party is cooperative resembles more a political than judicial explanation as to why the procedure is applied to systemic problems inconsistently. Admittedly, the pilot-judgment procedure is heavy and lengthy. All parties involved, including the Court, are more inclined to apply it if they can expect the respondent state to execute the judgment.[115] The pilot-judgment procedure also shifts the workload from the docket of the Court to that of national authorities, which is one reason why the Court would want to be assured that national authorities will follow through.

3.1.2. Quasi-Pilot judgments

State cooperation is important not only in pilot judgments. When the Court indicates any type of remedial measures, it makes an assessment to determine the type of approach that will have the most impact.[116] This entails a similar assessment as when adopting a pilot judgment. Also outside the pilot-judgment procedure, the successful execution of a judgment is most likely when the respondent state can agree with the substance of the judgment, and remedial measures are clear and straightforward.[117] However, it is not solely a matter of the state agreeing with the substance of the judgment, but even just understanding what is required of it. The indication of remedial measures makes it easier for the respondent state to interpret judgments of the Court and identify what is required of it to execute the judgment.[118]

[111] Gerards, 2012, p. 384.
[112] *Ibid.*
[113] Fikfak, 2019, pp. 1110-1111.
[114] *Ibid.*
[115] Kindt, 2018, p. 58.
[116] Fikfak, 2018, p. 1099.
[117] *Ibid.,* p. 1098.
[118] Gerards, 2012.

Judges have expressed concerns that imposing excessively prescriptive and ambitious general measures might actually cause the state to become more hostile towards the Court.[119] When the indication of general measures is intended to assist the implementation of judgments, in such a case the result could be the exact opposite. However, not all judges seem to agree; some judges do not find it appropriate to be concerned of backlash, and truly enough, concerns about the resulting situation for the victims should be more important than political considerations.[120]

Still, there are practical implications if the Court were to completely disregard the stance of the respondent state; the Court is not equipped with strong enforcement mechanisms and cannot, for example, order sanctions in cases of non-compliance.[121] Selecting the most appropriate form of measures – not necessarily the most prescriptive or ambitious – might therefore be the Court's best bet to ensure compliance and best possible outcome for the victim.

On the other hand, if the Court was excessively worried about the reaction of the state, many opportunities to indicate remedial measures would have been lost. The fact that the respondent state is uncooperative does not automatically entail non-enforcement of the judgment or hostility by the state. Academics and judges alike have noted that in some instances where the state is already uncooperative, it might take advantage of a vague and merely declaratory judgment to do nothing but the bare minimum.[122] An indication of general measures in the judgment is a useful point of reference for the CM and civil society to establish whether implementation has been carried out properly, and makes it more difficult for the state to get away with poor execution measures.[123]

Evidently, the importance of cooperation from the respondent state is highlighted in pilot judgments, but even outside the 'full' procedure, judges are aware of the stance of the respondent state when selecting their approach towards a systemic problem. The weight attached to the stance of the state, however, varies even within the Court. Cooperation is not the only pragmatic consideration that plays a part in the decision; the substance of the issue at hand, especially if it is of a complex nature, affects the decision as well.

[119] Donald and Speck, 2017, p. 98.
[120] *Ibid.*
[121] The Court can only order payments directly connected to compensation of the violations found under article 41 of the Convention, not as a punitive measure.
[122] Keller and Marti, 2015, p. 840, and Donald and Speck, 2017, p. 104 (based on an interview with one of the Strasbourg Judges).
[123] Keller and Marti, 2015, p. 840.

3.2. Significance of the Complexity of the Systemic Issue

3.2.1. No Clear Source of the Systemic Problem

Although the level of state cooperation is a major consideration for the Court to take into account, the nature and complexity of the substantive issue at hand also affects its selection of the approach. For example, *S.Z. v. Bulgaria* concerned an inadequate investigation into a case of human trafficking, where the Court found a violation of the procedural limb of article 3 of the Convention.[124] It noted that it had already delivered numerous judgments concerning inadequate investigations in Bulgaria, often finding violations of the procedural limbs of articles 2 and 3.[125] The Court recognised that the problem was systemic and structural, but could not pinpoint the exact cause of the problem or the measures needed to improve the quality of investigations, and so it did not indicate any general measures but left the matter to be supervised by the CM.[126]

In their study on the Court's remedial practice, Donald and Speck also found that judges were hesitant to indicate remedial measures when the issue was of a complex nature.[127] In an interview they conducted, one of the judges expressed their concern about making any speculative assessments and hence indicating general measures that would discredit the competence of the Court.[128] For example, the structural problem examined in *S.Z.* was of a very broad nature, namely ineffective investigations, and from the outset, the cases did not seem to have any single 'common denominator' which could have been pointed out with certainty.

When the Court applies the pilot-judgment procedure, the parties are invited to submit further information about their views on the causes of the problem and the appropriate remedial measures; in quasi-pilot judgments, it is unusual for extensive information on the underlying systemic problem to be part of the parties' pleadings.[129] Hence, when issuing quasi-pilot judgments, the Court might not be as well-equipped to indicate elaborate general measures as in 'full' pilot judgments. This,

[124] *S.Z. v. Bulgaria* (29263/12), judgment of 3 March 2015, ECtHR.
[125] *Ibid.,* para. 56.
[126] *S.Z. v. Bulgaria* (29263/12), judgment of 3 March 2015, ECtHR, para. 58.
[127] Donald and Speck 2017, p. 96
[128] *Ibid.*
[129] "The Evolving Remedial Practice of the European Court of Human Rights", report compiled of seminar held on 8 November 2017 at the Council of Europe by Donald, Alice, and Speck, Anne-Katrin, p. 3. Accessed at http://www.bristol.ac.uk/media-library/sites/law/hric/2018-documents-/2018%2001%2012%20SXB%20Seminar%20report_final%20(MDX)%20(003).pdf on 16 February 2021.

however, seems somewhat like a self-fulfilling prophecy; the Court does not consider applying the pilot-judgment procedure, so it does not ask the parties to submit their views on the underlying systemic problem, and consequently, it does not have enough information about the problem to indicate elaborate general measures.

Inevitably, the question arises whether issues regarding remedies should be included in the parties' submissions routinely. It would most certainly advance the practice if both the applicant and the respondent state had the chance to be more involved at the pre-judgment stage.[130] Engaging the parties could make the process more transparent and assert the legitimacy of the final pronouncements under article 46 by the Court. Further, it would assist the Court in identifying the underlying problem without having to do all the investigative work alone.

3.2.2. Complex Technicalities

In other cases, while the source of the systemic problem is clear, the details of the case and the measures needed to remedy it are so complex that the Court refrains from indicating any prescriptive remedial measures.

Cases under article 1 of Protocol 1 concerning, for example, rent control schemes or restitution for expropriated property are often complex in nature, and at least one judge has explicitly stated that the indication of elaborate remedies is not suitable in such cases.[131] There have been pilot and quasi-pilot judgments concerning such issues, but only in exceptional cases has the Court been elaborate in its description of required general measures.[132] More often, the Court has either suggested a variety of remedies for the respondent state to choose from (such as in the quasi-pilot judgment *Scordino v. Italy*) or simply stated that legislative amendments must be made or a domestic remedy instituted, leaving the domestic authorities and the CM to work out the details.[133]

[130] See also Keller and Marti, 2015, p. 845.
[131] Donald and Speck, 2017, p. 97.
[132] For an exception, see, for example, *Manushaqe Puto and others v. Albania* (604/07 *et al.*), judgment of 31 July 2012, ECtHR, paras. 111-118.
[133] *Scordino v. Italy (no. 1)* (36813/97), judgment of 29 March 2006, paras. 182-189. See, for example, the pilot judgment *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia, and the former Yugoslav Republic of Macedonia* (60642/08), judgment of 16 July 2014 [GC], para. 146, and *Broniowski v. Poland* (31443/96) [GC], judgment of 22 June 2004, paras. 193-194.

The complex technicalities of a case have therefore not necessarily prevented the Court from applying the pilot-judgment procedure. Yet, in *Cordella and others v. Italy,* the Court refused to apply the pilot-judgment procedure, explaining that it had no expertise regarding the technical measures needed to clean up an area polluted by a steelwork plant.[134] The case encompassed two applications lodged by some 180 applicants, and additionally, the Court found that the pollution endangered the health of not only the applicants, but the entire population living in the area.[135]

The applicants expressly requested for the pilot-judgment procedure to be invoked, since it was clear that a great number of people were affected.[136] They also asked the Court to impose general measures to remedy the situation.[137]

Under article 46, the Court reiterated that the cleaning of the polluted area was essential and urgent, and that the 'environmental plan' must be implemented as rapidly as possible.[138] This environmental plan for the clean-up of the area had been approved by domestic authorities already in 2012, and had been set out to be implemented in 2014, but the implementation had been postponed until 2023.[139] Hence, the Court decided to indicate general measures, emphasising the urgency of the matter, but refraining from indicating anything prescriptive. Judges have also expressed that when seemingly effective reforms are already underway at the domestic level, they rarely wish to interfere – but on the other hand, instead of simply appraising the reform process, they often try to "inject urgency" into the process.[140]

The Court, understandably, refrained from prescribing general measures regarding the technical issue, a task which was better suited for domestic authorities. However, since earlier pilot judgments have been adopted where the Court similarly did not want to pronounce itself on the specific means to achieve a certain goal, it seems peculiar that the Court's lack of expertise in the field of environmental clean-up is what prevented it from applying the pilot-judgment procedure to this case.

[134] *Cordella and others v. Italy* (54414/13 and 54264/15), judgment of 24 January 2019, ECtHR, para. 180.
[135] *Cordella and others v. Italy* (54414/13 and 54264/15), judgment of 24 January 2019, ECtHR.
[136] *Ibid.,* para. 177.
[137] *Ibid.*
[138] *Ibid.*, para. 182, see also para. 168.
[139] *Ibid.,* paras. 69 and 168.
[140] Donald and Speck, 2017, p. 96-97.

It must be noted that the problem in *Cordella* was confined to a very limited area: that of just a few municipalities whose environment was most affected by the steelwork plant.[141] It is unclear whether the Court would be willing to apply the pilot-judgment procedure to a systemic problem limited to such a small area; as of now, it has not done so. In two earlier cases from Slovenia, *Mandić and Jović* and *Strucl and others*, adopted on the same day in 2011, the Court did not recognise a structural problem of overcrowding in Slovenian prisons despite arguments by the applicants.[142] It stated that "[…] the Court does not consider that it can at present conclude that there exists a structural problem consisting of 'a practice that is incompatible with the Convention' nationwide […]".[143] It quoted the Rules of Court but added the word 'nationwide', implying that in its view, problems that were not nationwide could not be considered structural or systemic.

However, when an administrative practice is deficient regionally, such as in *Cordella, Mandic and Jovic,* and *Strucl and others,* resulting in a systemic problem and capable of causing an influx of applications, it seems unnecessary to restrict the pilot-judgment procedure only to nationwide human rights violations. The Court provided no reason why it would be necessary to differentiate between nationwide and regional problems. Since the intention of the pilot-judgment procedure is to effectively dispose of repetitive applications and solve the underlying problem, such differentiation between nationwide and regional does not seem to serve any practical purpose.

3.2.3. No Pilot Judgment Despite Extensive Information About the Systemic Problem

Typically, the Court only receives information on the systemic nature of a problem when it considers the application of the pilot-judgment procedure, but occasionally the parties to the case submit such information also outside the procedure. In *Aslakhanova and others v. Russia*, the Court "put a number of specific questions to the parties" to better understand the scope of the issue.[144] The case concerned five applications that the Court had joined: they all complained of disappearances of their relatives, evidence suggesting that state agents were responsible. Particularly the applicants, but also the government, provided the Court with extensive information about the issue. The applicants also submitted their views on the flaws and the ineffectiveness of the existing legislation, even suggesting specific provisions of the domestic law to be amended.

[141] *Cordella and others v. Italy* (54414/13 and 54264/15), judgment of 24 January 2019, ECtHR, para. 102.
[142] *Mandić and Jović v. Slovenia* (5774/10 and 5985/10), judgment of 20 October 2011, and *Strucl and others v. Slovenia* (5903/10 *et al.*), judgment of 20 October 2011, ECtHR.
[143] *Mandić and Jović v. Slovenia* (5774/10 and 5985/10), judgment of 20 October 2011, para. 127, and *Strucl and others v. Slovenia* (5903/10 *et al.*), judgment of 20 October 2011, para. 140.
[144] *Aslakhanova and others v. Russia* (2944/06 *et al.*), judgment of 18 December 2012, ECtHR, para. 159

The Court noted that by the time of the judgment in 2012, it had already delivered more than 120 similar judgments, and there were still similar applications pending against Russia.[145] Although the issue was clearly systemic, and the Court received extensive information on the matter, it did not invoke the pilot-judgment procedure. In 16 paragraphs of the body of the judgment, the Court indicated exceptionally prescriptive general measures for the respondent state to take.[146]

The answer as to why the pilot-judgment procedure was not applied cannot be found in the judgment; it does not reveal whether the question was raised. Both parties to the case did provide the Court with information about the issue, and the general measures indicated by the Court seem to be largely based on those submissions. However, the respondent state mostly denied the existence of a systemic problem and reassured the Court of amendments and other measures that had already been taken regarding disappearances.[147] It seems that what all pilot judgments have in common is the willingness by the respondent state to cooperate and address the issue, at least to some degree. Perhaps that is exactly what the case lacked.

The Court also stated that although similar applications were pending, it would not adjourn them because of the serious and continuing nature of the issues. The adjourning of cases is a typical feature of pilot judgments, but not a defining one. The Court has adjourned applications outside the pilot-judgment procedure, and it has also adopted pilot judgments where it did not adjourn similar applications, especially when the case has concerned article 3, such as this one.[148] Therefore the decision not to adjourn similar applications is not necessarily what prevented the Court from applying the pilot-judgment procedure in the case of *Aslakhanova and others.*

In the case of *Aslakhanova and others*, the Court relied on the information provided by the applicant to indicate exceptionally prescriptive measures without invoking the pilot-judgment procedure. The Court does not, however, always indicate general measures even when the applicant expressly makes such a request and provides information. In the case of *Abu Zubaydah v. Lithuania*, the Court received comprehensive information and explicit requests by the applicant on the measures they wished to be taken. The Court eventually only endorsed some of the measures requested by the applicant.[149] It

[145] *Ibid.*, para. 216
[146] *Ibid.*, paras. 223-238.
[147] *Ibid.*, paras. 179-209.
[148] See section 4.2.
[149] *Abu Zubaydah v. Lithuania* (46454/11), judgment of 31 May 2018 [GC], ECtHR, para. 683.

stated that it is not "for the Court to address to the respondent State detailed, prescriptive injunctions of the kind requested by the applicant", without offering further explanation.[150] Such lack of consistency and transparency considerably complicate the finding of patterns or conclusions in the Court's practice to apply the pilot-judgment procedure or indicate general measures under article 46.

3.3. No Indications of Remedial Measures

When the Court has identified a systemic problem, it does not always issue even a quasi-pilot judgment. There are examples of judgments where the existence of a systemic problem seems apparent, but the Court either does not make an assessment on the systemic nature of the problem, or, in some cases, does identify a systemic problem but refrains from indicating general measures. This section will further examine such examples.

In *Sejdovic v. Italy*, the Court identified a systemic problem concerning the lack of effective mechanisms to secure the right of persons convicted *in absentia*.[151] However, it refrained from indicating general measures since the respondent state had already adopted new legislation to tackle the problem.[152] The new legislation had not yet been implemented in case-law, making it difficult to assess its effectiveness.[153]

The Court adopted similar approaches in *Kauczor v. Poland* and two years later in *Kharchenko v. Ukraine*, where it identified structural problems concerning article 5 of the Convention in both cases.[154] In each case, the Court noted the numerous similar judgments it had adopted on the issue as well as applications that were still pending.[155] In the case of *Kauczor,* the Court had specifically requested the Polish government to submit its views on the structural nature of the problem, while in *Kharchenko,* the Court itself described the issue as structural.[156] In both cases, the Court welcomed amendments that had been made in domestic legislation, but stated that further measures were needed

[150] *Ibid.*
[151] *Sejdovic v. Italy* (56581/00), judgment of 1 March 2006 [GC], ECtHR.
[152] *Ibid.,* paras. 123-124.
[153] *Ibid.*
[154] *Kauczor v. Poland* (45219/06), judgment of 3 February 2009, ECtHR, and *Kharchenko v. Ukraine* (40107/02), judgment of 10 February 2011, ECtHR.
[155] *Kauczor v. Poland* (45219/06), judgment of 3 February 2009, ECtHR, para. 56, and *Kharchenko v. Ukraine* (40107/02), judgment of 10 February 2011, ECtHR, paras. 98-100.
[156] *Kauczor v. Poland* (45219/06), judgment of 3 February 2009, ECtHR, para. 56, and *Kharchenko v. Ukraine* (40107/02), judgment of 10 February 2011, ECtHR, para. 101.

to comply with the Convention requirements.[157] The judgments lack further indications of general measures, simply stating that such measures will be required.

In *Kauczor* and *Kharchenko*, the absence of general measures is not as easily explained as in *Sejdovic.* In *Sejdovic,* the Court stated that if the newly adopted legislation proved to be effective, no further general measures were necessary.[158] In *Kauczor* and *Kharchenko*, however, the Court acknowledged the newly adopted legislation, but could already determine it as insufficient to address the problems.[159] Strangely, it did not elaborate on the issue, nor indicate the measures needed to achieve compliance with article 5 of the Convention. The judgments therefore do not offer any assistance on *how* to execute them, leaving it to the CM to supervise the general measures which the respondent states would choose to adopt. The decision not to indicate general measures seems odd since the CM, in resolution Res(2004)3, expressly invited the Court to do so whenever it identified a systemic problem so as to assist it in the execution stage.[160] The Court even acknowledged this in *Kharchenko*, and yet without further explanation, decided not to indicate such measures.[161]

The case of *Volodina v. Russia* is considerably more recent.[162] The applicant had suffered from domestic violence, including severe physical abuse as well as death threats when she tried to leave her abuser. Authorities remained passive to the situation despite the applicant's repetitive complaints. The Court took a gender-sensitive approach, and reiterated earlier case-law when concluding that violence against women is a form of discrimination against women.[163] The judgment cites statistical data on domestic violence in Russia, which confirms that it mainly affects women, as well as reports on the generally passive attitude of local authorities who often treat domestic violence as a private issue.[164] The Court briefly acknowledged this existing "large-scale structural bias", but did not elaborate on it further and did not come back to the issue.[165] It found violations of article 3 as well as article 14 taken in conjunction with article 3.

[157] *Kauczor v. Poland* (45219/06), judgment of 3 February 2009, ECtHR, para. 62, and *Kharchenko v. Ukraine* (40107/02), judgment of 10 February 2011, ECtHR, para. 98.
[158] *Sejdovic v. Italy* (56581/00), judgment of 1 March 2006 [GC], ECtHR, paras. 123-124.
[159] *Kauczor v. Poland* (45219/06), judgment of 3 February 2009, ECtHR, para. 62.
[160] 2004 Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session). See also Keller and Marti, 2015, p. 838.
[161] *Kharchenko v. Ukraine* (40107/02), judgment of 10 February 2011, ECtHR, para. 101.
[162] *Volodina v. Russia* (41261/17), judgment of 9 July 2019, ECtHR
[163] *Ibid.,* para. 110.
[164] *Ibid.,* para. 113.
[165] *Ibid.,* para. 114.

Judge Pinto de Albuquerque issued a separate opinion where he regretted the missed opportunity to indicate general measures under article 46.[166] Indeed, in the judgment, the Court stated that the Russian legal framework is inadequate in several important aspects; for example, domestic violence is not defined as a separate offence and there is a threshold for the gravity of injuries required before a public prosecution can be launched (which additionally does not take into account any other form of abuse than the physical aspect, leaving out, for example, death threats in this case).[167] The problem is clearly systemic, and the Court even partly acknowledged this – so why did it not impose general measures?[168]

As evident from the separate opinion of Judge Pinto de Albuquerque, there are disagreements even within the Court on the suitability to indicate general measures in any given case. As for addressing the issues in *Volodina* as systemic, developments might be forthcoming. *Tunikova v. Russia* is a group of four pending applications that have been communicated to the Russian government. The cases reveal that the Court has submitted questions to all parties on the existence of an underlying systemic problem regarding "the absence of any legislation dealing with the phenomenon of domestic violence in Russia".[169] The Court also asked whether the deficiencies would call for indications of general measures under article 46. This signifies that the Court is prepared to indicate general measures to address the problem – perhaps we might even acquire a pilot judgment.

3.4. The Ideal Moment to Adopt a Pilot Judgment?

The previous section discussed cases where the Court seemed aware of a systemic problem, but only issued a declaratory judgment. This section will further discuss why pilot judgments or quasi-pilot judgments rarely are the first responses by the Court.

There have been instances where the Court has not invoked the pilot-judgment procedure, but instead issued a quasi-pilot judgment as a 'warning' to the respondent state, and even instances where the Court was clearly aware of a systemic problem, but only issued a declaratory judgment. In an

[166] *Volodina v. Russia* (41261/17), judgment of 9 July 2019, ECtHR, Separate Opinion of Judge Pinto de Albuquerque.
[167] *Volodina v. Russia* (41261/17), judgment of 9 July 2019, ECtHR, paras. 78-85.
[168] See also Heri, Corina, "Volodina, Article 3, and Russia's Systemic Problem Regarding Domestic Violence", published on *Strasbourg Observers* on 30 July 2019, accessed on 2 February 2021 at https://strasbourgobservers.com/2019/07/30/volodina-article-3-and-russias-systemic-problem-regarding-domestic-violence/ .
[169] *Tunikova v. Russia and 3 other applications* (55974/16 *et al.*), communicated to the Russian government on 28 June 2019, ECtHR, see "Questions to the parties".

interview conducted by Kindt, one respondent said that such an approach can be used when the Court does not yet find it necessary to apply the 'full' pilot-judgment procedure. Similarly, in interviews conducted by Donald and Speck, they found that judges regularly engage in discussions on the 'optimal' moment to move beyond mere declaratory judgments.[170]

Such evaluation can sometimes even be read from the judgments. In *Lakatos v. Hungary*, the Court seemed to be unable to conclude whether extensively ordered pre-trial detentions in Hungary could amount to a systemic problem. It noted that since 60 similar applications were pending before it, the applicant's situation was not "prompted by an isolated incident", but right after, explained that the 60 similar applications had accumulated over quite a long time, a period of five years.[171] That, together with on-going efforts by the Hungarian government to remedy the situation, led the Court to conclude that a pilot judgment was not necessary at this point, but

> […] should the efforts made by the Government to tackle the underlying Convention problem prove to be insufficient, the Court may reassess the need to apply the pilot-judgment procedure to this type of cases […][172]

Similarly, in *Novruk and others v. Russia*, the applicants were HIV-positive foreigners in Russia, who, on the sole basis of their diagnosis, were denied entry, stay and/or residence in the country.[173] The Court noted that measures to reform the legislation were already underway at the time of the judgment, but that the proposed draft legislation was not adequate.[174]

In *Novruk and others,* the Court, again, must have contemplated invoking the pilot-judgment procedure, since it is apparent that the parties to the case had been asked to submit their views on the structural nature of the problem.[175] Submissions by the respondent state reveal that it would not welcome the application of the pilot-judgment procedure, and that in its view, no structural problem existed.[176] Although the level of state cooperation is important when the Court considers the application of the procedure, initial opposition is not conclusive.

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[170] Donald and Speck, 2017, p. 97.
[171] *Lakatos v. Hungary* (21786/15), judgment of 26 June 2018, ECtHR, para. 86.
[172] *Ibid.*, para. 91.
[173] *Novruk and others v. Russia* (31039/11), judgment of 15 March 2016, ECtHR.
[174] *Ibid.*, para. 134.
[175] *Novruk and others v. Russia* (31039/11), judgment of 15 March 2016, ECtHR, paras. 129-130.
[176] *Ibid.*

Indeed, the respondent state cannot have been said to be entirely disapproving, since new draft legislation had already been proposed. The Court still deemed the proposal to be inadequate; as it was, it only applied to foreigners who had spouses, parents or children in Russia.[177] It was also unclear whether the proposed legislation would have retroactive effect, affecting individuals such as the applicants who had already been denied entry, stay or residence. The Court refrained from indicating general measures, but, again, stated that if the efforts made to tackle the problem proved to be insufficient, "[…] the Court may reassess the need to apply the pilot-judgment procedure to this type of cases."[178]

Although the Court itself stated in the judgment that it will refrain from indicating general measures, the reasoning makes clear that general measures are required since the Court described what the proposed draft legislation lacked.[179] No pilot judgment on the issue has since been adopted, even though execution of the case is still pending before the CM.[180]

Although the Court has not (yet) lived up to the 'ultimatums' it gave in *Novruk and others* or *Lakatos,* there are earlier examples of quasi-pilot judgments that have later been followed by pilot judgments. The quasi-pilot judgment *Iacov Stanciu v. Romania* from 2012 concerned overcrowded prisons, and the Court indicated general measures in the reasoning of the judgment.[181] Subsequently, the pilot judgment *Rezmiveş and others v. Romania* concerned the same structural issue and was adopted in 2017.[182] In *Rezmiveş and others,* the Court referred to *Iacov Stanciu* and the guidance it had offered, but regretted the inadequacy of measures adopted since.[183] By the time of the *Rezmiveş and others* pilot judgment, there were already some 3,200 repetitive applications pending before the Court on the issue.[184] This time, it ordered general measures in imperative terms and held that the respondent state must, within six months, submit a timetable for their implementation.[185]

[177] *Ibid.*, para. 134.
[178] *Ibid.*, para. 135
[179] *Ibid.*, para. 134.
[180] See the Hudoc-Exec database for *Novruk and others v. Russia* (31039/11), judgment of 15 March 2016, direct link http://hudoc.exec.coe.int/eng?i=004-23164, accessed on 11 February 2021.
[181] *Iacov Stanciu v. Romania* (35972/05), judgment of 24 July 2012, ECtHR, paras. 197-199.
[182] *Rezmives and others v. Romania* (616467/12 *et al.*), judgment of 25 April 2017, ECtHR.
[183] *Ibid.*, paras. 107-109 and 122-124.
[184] *Ibid.*, para. 109.
[185] *Ibid.*, operative provisions.

Pilot judgments and quasi-pilot judgments are typically adopted after a number of declaratory judgments have already been issued.[186] In fact, it is rare for the Court to adopt a quasi-pilot or pilot judgment on a newly identified problem.[187] This chapter has discussed not only how the Court takes into account the receptiveness of the state or the nature of the systemic problem, but also the 'ideal' moment to move beyond mere declaratory judgments. In some examples, the Court has started by issuing declaratory judgments, then moved onto indicating general measures through a quasi-pilot judgment, and if the problem has still persisted, escalated the matter and adopted a 'full' pilot judgment. These assessments made by the Court seem to be greatly influenced by its expectation of the most effective approach to ensure compliance by the respondent state.

The following chapter will discuss the Court's approaches to handling repetitive applications concerning certain systemic problems, and how the Court varies also these approaches partly depending on its expectation of how it will affect execution.

[186] For some recent examples, see for example *Sukachov v. Ukraine* (14057/17), judgment of 30 January 2020, ECtHR, para. 135 (55 earlier judgments on the issue), *Tomov and others v. Russia* (18255/10 *et al.*), judgment of 9 April 2019, ECtHR, para. 177 (over 50 earlier judgments), *Riedel and others v. Slovakia* (44218/07 *et al.*), judgment of 10 January 2017, para. 7 (4 earlier judgments) and *Mečiar and others v. Slovakia* (62864/09), judgment of 10 January 2017, para. 7 (4 earlier judgments).

[187] Compare *Broniowski v. Poland* (31443/96) [GC], judgment of 22 June 2004, ECtHR, and *Hutten-Czapska v. Poland* (35014/97), judgment of 19 June 2006 [GC], ECtHR, which are exceptions of pilot judgments where the Court identified the problem for the first time, without referring to previous judgments. *Cordella and others v. Italy* (54414/13 and 54264/15), judgment of 24 January 2019, ECtHR, is an example of such an exception of quasi-pilot judgments.

4. The Element of Adjourning Repetitive Applications

4.1. Pilot Judgments Concerning Violations of Article 6(1) of the Convention

4.1.1. Rumpf v. Germany *and* Vassilios Athanasiou v. Greece*: The First of Their Kind*

One distinct feature of the pilot-judgment procedure is the adjourning of similar cases while examining the one case that the Court has chosen as the pilot. It is not an exhaustive rule; there are instances where cases have been qualified as pilot judgments, although the Court refrained from adjourning repetitive applications. This chapter will examine such exceptions, beginning with the earliest example *Rumpf v. Germany.* A comprehensive analysis of the adjournment of applications in pilot judgments since then reveals a pattern; the Court has refrained from adjourning only in cases either relating to article 6(1) of the Convention, or when the pilot judgment has revealed an exceptionally urgent problem, such as violations under article 3 of the Convention. The following sections will further analyse case-law from this perspective.

In *Rumpf v. Germany*, the Court continued to process similar cases to remind the respondent state on a regular basis of the obligations resulting from the judgment.[188] The systemic issue in *Rumpf* concerned article 6(1) of the Convention, specifically the excessive length of judicial proceedings, and it was the first pilot judgment where the Court did not resort to adjourning similar applications.

Although the reasoning sounds noble, at the time of adoption in 2010, the decision was questioned.[189] Pilot judgments are always processed as matters of priority, not just in the case of *Rumpf*.[190] If the Court had indeed revealed a systemic problem, and it considered the problem to be so urgent that the state party must be reminded of it in repetitive judgments, then why adjourn applications under the pilot-judgment procedure in most other cases? The reasoning did not strike as consistent with the spirit of all earlier pilot judgments, implying that in some cases the respondent state must be reminded regularly through new judgments, while in others not.

Since the judgment is from 2010, the pilot-judgment procedure had not yet been codified in the Rules of Court. Since 2011, Rule 61(6)(a) has provided that repetitive applications may be adjourned "as

[188] *Rumpf v. Germany* (46344/06), judgment of 2 September 2010, ECtHR, para. 75.
[189] See for example Maris Burbergs, "A flight without passengers – new pilot judgment issued", published in *Strasbourg Observers* on 8 September 2010, accessed at https://strasbourgobservers.com/2010/09/08/a-flight-without-passengers-%e2%80%93-new-pilot-judgment-issued/#more-534 on 3 December 2020.
[190] Rule 61(2)(c) of the Rules of Court.

appropriate". Therefore, the question has been clarified and the Court is not obliged to adjourn applications in 'full' pilot judgments.

Still, chapter 2 recognised the adjourning of similar cases as one of the features that makes the pilot-judgment procedure so effective in reducing the backlog caused by repetitive applications. The Court has never applied the pilot-judgment procedure unless similar applications have already been lodged, although neither the Rules of Court nor Resolution Res2004(3) require it. Perhaps it doesn't want to depart from one of the initial intentions of the pilot-judgment procedure, namely relieving its workload resulting from systemic problems.

Not adjourning repetitive applications undermines these arguments. So, the Court chooses to apply the pilot-judgment procedure, but not to relieve the burden of its caseload. If relieving its caseload is not essential, then, moreover, the Court could apply the pilot-judgment procedure in cases where no similar applications exist *yet,* but it has identified a systemic problem.

Regarding the case of *Rumpf*, Gerards suggests that the Court seems to take different approaches concerning the adjournment of similar applications based on what it expects will be the most effective instrument to put pressure on the respondent state.[191] Indeed, as noted, the Court wanted to remind the respondent state on a regular basis of its obligations; perhaps, in the case of *Rumpf,* the Court believed that the continued processing of pending applications would be the most effective means to put pressure on the state into executing the judgment. Gerards also goes on to suggest that the number of pending applications might affect whether the Court will adjourn similar applications.[192] In the case of *Rumpf*, the number of similar applications pending was some 55, which is admittedly not a significant increase in the workload of the Court.[193]

The pilot judgment *Vassilios Athanasiou and others v. Greece* was adopted just a few months later the same year.[194] Interestingly, the Court did not adjourn similar applications in that case either. The case also concerned the excessive length of domestic judicial proceedings, and the Court explained that it wanted to avoid a situation where applicants who already suffered from excessively lengthy proceedings would have to have their case put on hold once again.[195] The concerns raised by the

[191] Gerards, 2012, p. 379, footnote 30.
[192] *Ibid.*
[193] *Rumpf v. Germany* (46344/06), judgment of 2 September 2010, ECtHR, para. 69
[194] *Vassilios Athanasiou and others v. Greece* (50973/08), judgment of 21 December 2010, ECtHR.
[195] *Ibid.*, para. 58.

Court in *Vassilios Athanasiou* related therefore to arguments also put forward by numerous authors: the pilot-judgment procedure raises issues regarding individuals' access to justice.[196] Since the case of *Rumpf* was another excessive length of proceedings case, the Court might have had similar reasons not to adjourn repetitive applications at the time, although no expression of such is found in the judgment.

In *Vassilios Athanasiou*, the number of repetitive applications pending before the Court was approximately 200. Since the Court was concerned about the proceedings eventually only becoming lengthier if it adjourned all repetitive cases, one might conclude that it would continue the examination of repetitive applications in all pilot judgments concerning the excessive length of proceedings. Indeed, two pilot judgments concerning the excessive length of proceedings against Bulgaria were adopted the following year, in 2011, on the same day; *Finger* and *Dimitrov and Hamanov*.[197] The Court decided to continue processing all repetitive applications in the usual manner, although it already recognised approximately 500 and 200 of them in each case, respectively.[198] Since then, however, it seems that the Court has continued to take the issue into account, but the approaches have somewhat varied. Different variations will be discussed below.

4.1.2. Adjourning Part of the Repetitive Applications

Ümmühan Kaplan v. Turkey is an example of a pilot judgment in which the Court continued the examination only of those applications that had already been communicated to the respondent state.[199] As Gerards notes, the burden that the examination of all repetitive cases imposes on the Court might affect its decision on the adjournment of them, and indeed, in this case the Court recognised a total of approximately 2,700 repetitive applications pending.[200] Examining them all separately would certainly have required an immense effort. Of the 2,700 applications, just over 300 had been communicated to the government, allowing the Court to adjourn 2,373 applications.[201] The approach seems to strike a balance between two competing interests. It allowed the adjudication of those

[196] See, for example, Yildiz, 2015, Fyrnys, 2011, pp. 1257-1258, Kindt, 2018, Kurban, 2016, and Haider, 2013, p. 285.
[197] *Finger v. Bulgaria* (37346/05), judgment of 10 May 2011, and *Dimitrov and Hamanov v. Bulgaria* (48059/06 and 2708/09), judgment of 10 May 2011, ECtHR.
[198] *Finger v. Bulgaria* (37346/05), judgment of 10 May 2011, paras. 115 and 135, and *Dimitrov and Hamanov v. Bulgaria* (48059/06 and 2708/09), judgment of 10 May 2011, ECtHR, paras. 110 and 133.
[199] *Ümmühan Kaplan v. Turkey* (24240/07), judgment of 20 March 2012, ECtHR.
[200] Gerards, 2012, p. 379, and *Ümmühan Kaplan v. Turkey* (24240/07), judgment of 20 March 2012, ECtHR, para. 64.
[201] *Ümmühan Kaplan v. Turkey* (24240/07), judgment of 20 March 2012, ECtHR, para. 64.

applications that were already being processed, not delaying their proceedings any further. It *also* relieved a significant part of the burden that the systemic problem imposed on the Court.

The Court drew attention to the fact that a new remedy regarding the issue had already been introduced in Turkey, which was a welcomed development to address the systemic problem.[202] The sheer number of applications was therefore seemingly not the only reason to adjourn them. Since Turkey had already introduced a new remedy to address the problem, the Court had reason to believe in the respondent state's capability of offering redress to the applicants. After the judgment, further remedies were introduced in Turkey, and in two separate inadmissibility decisions of 2013, the Court accepted the new remedies as effective.[203] The CM has since closed its supervision of the judgment, declaring it executed.[204]

Later the same year, the Court took a similar approach in the pilot judgment *Manushaqe Puto and others v. Albania* concerning the systemic problem of prolonged non-enforcement of national judgments.[205] The judgment reveals that the applicants expressly requested that the Court continue the processing of those applications that had been communicated to the government.[206] The Court not only continued to process the communicated applications, but all applications lodged before the delivery of the judgment.[207] It only adjourned potential *new* applications for a period of 18 months, expecting the government to implement remedial measures within that time limit.[208] In *Gazsó v. Hungary*, adopted in 2015, the Court similarly adjourned all potential new applications, but continued to process the pending applications in a usual manner.[209]

4.1.3. Continuing the Communication of Applications

In 2009, the Court adopted three pilot judgments concerning the prolonged non-enforcement of domestic judgments: *Olaru and others v. Moldova, Burdov v. Russia (no. 2)* and *Yuriy Nikolayevich*

[202] *Ibid.*, paras. 73-74.
[203] *Turgut and others v. Turkey* (4860/09), decision of 26 March 2013, and *Uzun v. Turkey* (10755/13), decision of 30 April 2013.
[204] Department for the Execution of Judgments of the ECHR, *Ümmühan Kaplan v. Turkey* (24240/07), final resolution 17 December 2014.
[205] *Manushaqe Puto and others v. Albania* (604/07 *et al.*), judgment of 31 July 2012, ECtHR.
[206] *Ibid.*, para. 99.
[207] *Ibid.*, paras. 119-121.
[208] *Ibid.*, para. 120.
[209] *Gazsó v. Hungary* (48322/12), judgment of 16 July 2015, ECtHR, operative provisions.

Ivanov v. Ukraine. The Court found violations of articles 6(1) and 13 of the Convention in each case.[210]

The problem with non-enforcement of judgments resembles that of excessive length of proceedings; when a domestic court judgment is not enforced, the individual is similarly left to await the fulfilment of justice. In the *Olaru and others* case, the Court expressly stated that

> […] it would be unfair if the applicants in such cases, who have allegedly been suffering continuing violations of their right to a court for years and have sought relief in this Court, were compelled yet again to resubmit their grievances to the domestic authorities, be it on the grounds of a new remedy or otherwise.[211]

The Court argued that one of the aims of the pilot-judgment procedure was to allow speedy redress at the domestic level to the large numbers of people affected by the structural problem.[212] It therefore not only drew attention to the burden of its own caseload, but also to the rights of the individual applicants and their interests. It adjourned the adjudication of repetitive applications, but continued to communicate them to the respondent state. By communicating all applications concerning the issue and letting the government process them instead of the Court, the result could, in the best case, be favourable both to the applicants and the Court. The applicants would be afforded redress, and the Court would not have to deliver separate judgments for each of them.

In each case, the Court relied on the respondent states to execute the measures it indicated in the pilot judgment, and decided to adjourn the adjudication of all repetitive applications, only communicating them to the respondent state.[213] Proceedings concerning potential new applications were to be adjourned in their entirety.[214]

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[210] *Yuriy Nikolayevich Ivanov v. Ukraine* (40450/04), judgment of 15 October 2009, and *Burdov v. Russia (no. 2)* (33509/04) [GC], judgment of 15 January 2009, ECtHR. In the case of *Burdov (no. 2)*, the Court also found a violation of article 1 of Protocol 1.
[211] *Olaru and others v. Moldova* (476/07 *et al.*), judgment of 28 July 2009, ECtHR, para. 61.
[212] *Ibid.*, para. 59.
[213] *Yuriy Nikolayevich Ivanov v. Ukraine* (40450/04), judgment of 15 October 2009, ECtHR, para. 96.
[214] *Ibid.*, para. 97.

In the cases of *Burdov* and *Olaru and others*, the approach yielded results, even though it was a slow and not entirely efficient process. The Russian and Moldovan governments introduced new remedies within the time limits set by the Court.[215]

At first, however, the new remedies in Russia proved to be insufficient; the Court adopted another pilot judgment on the same issue in 2014, *Gerasimov and others*.[216] The Court continuously referred to *Burdov (no. 2),* and, while recognising the developments that had taken place, indicated how the new remedies were not sufficiently comprehensive, for example not encompassing the situations of the applicants in *Gerasimov and others*.[217] Regarding the adjournment of repetitive applications, it took an identical approach to that of *Burdov* – the positive developments experienced as a response to the judgment seem to have influenced this decision.[218]

Unfortunately, *Yuriy Nikolayevich Ivanov v. Ukraine*, however, is arguably the worst example of non-execution of a pilot judgment.[219] The Ukrainian government failed to execute the general measures within the one-year time limit it had been afforded, and requested for an extension of the time limit, which the Court granted.[220] The Court denied the government's second request for an extension, and in 2012, resumed the examination of some 2,000 applications that had initially been adjourned.[221]

In his article, Zsolt Bobis notes that the pilot judgment in *Ümmühan Kaplan* (discussed above) was adopted just three weeks after the Court was obliged to resume the examination of the adjourned applications in *Ivanov*.[222] He argues that the new approach – to continue processing the applications already communicated to the government but adjourn the rest – could have been influenced by the shortcomings experienced in *Ivanov*.[223] By choosing to continue processing only the communicated

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[215] The Court noted the remedies introduced by Russia in *Gerasimov and others* (29920/05 *et al.*), judgment of 1 July 2014, ECtHR, para. 221. Regarding *Olaru and others,* the Court noted the effectiveness of the new domestic remedy in its inadmissibility decision *Balan v. Moldova* (44746/08), decision of 24 January 2012, para. 19.
[216] *Gerasimov and others v. Russia* (29920/05 *et al.*), judgment of 1 July 2014, ECtHR.
[217] *Ibid.*, para. 137.
[218] *Gerasimov and others v. Russia* (29920/05 *et al.*), judgment of 1 July 2014, ECtHR, paras. 228-232.
[219] See, for example, Committee of Ministers Interim Resolution CM/ResDH(2017)184: *Yuriy Nikolayevich Ivanov* and *Zhovner* group against Ukraine concerning the non-enforcement or delayed enforcement of domestic judicial decisions and the lack of an effective remedy in respect thereof, adopted by the Committee of Ministers on 7 June 2017 at the 1288th meeting of the Ministers' Deputies.
[220] Secretariat of the Committee of Ministers, 1108th DH meeting (March 2011) - Communication from the Registry of the European Court concerning the pilot judgment delivered in the case of *Yuriy Nikolayevich Ivanov* against Ukraine (Application No. 40450/04).
[221] *Ibid.*
[222] Bobis, Zsolt, "Case Watch: Political Will and the Pilot Judgment Procedure", published on 9 April 2012 on the Open Society Justice Initiative website. Accessed at https://www.justiceinitiative.org/voices/case-watch-political-will-and-pilot-judgment-procedure on 19 January 2021.
[223] *Ibid.*

applications in *Ümmühan Kaplan*, the Court could significantly ease its caseload (by almost 2,400 applications), while at the same time constantly pressuring the respondent state into compliance by continuing to process and adopt judgments on the remaining 330 cases that had already been communicated. It also better balanced the situation for the applicants, since the pilot judgment in *Ümmühan Kaplan* did not entail further delays for the applicants of the communicated cases – unlike in *Ivanov,* where the adjournment eventually only led to longer delays for all applicants.[224]

However, the continued adjudication of applications in *Ivanov* might in any event have resulted in the same outcome. The continued communication of the cases to the Ukrainian government was possibly meant to pressure the state into compliance in the same way that the continued adjudication of cases would have done.[225] Considering the extensive difficulties of execution of the *Ivanov* judgment, and the overall failure by the Ukrainian government to address the widespread problem of non-execution of national judgments, it is difficult to say whether *any* approach adopted by the Court could have effectively pressured the government into compliance.[226] The previous chapter discussed the role of state cooperation regarding the application of the pilot-judgment procedure, and indeed, it might well be that lessons learned from *Ivanov* have contributed to the Court's caution in the field.

Although the approach proved to be unsuccessful in the case of *Ivanov*, the Court has utilised it again later. In two pilot judgments against Greece in 2012, the Court adjourned the adjudication of all repetitive applications, only communicating them to the government.[227] The Court drew attention to the pilot judgment *Vassilios Athanasiou*, also against Greece (discussed above), but found it unnecessary to continue the processing of applications as it had in that case, even though the number of pending applications was smaller in these latter pilot judgments combined.[228] The Court even reasoned that it was exactly because of the smaller number of applications that their adjournment was appropriate – an argument that seems a bit peculiar.[229] However, following the judgment in *Vassilios*

[224] *Ibid.*
[225] See also Gerards, 2012, p. 379 and especially footnote 30.
[226] On more information about the persisting problem, see for example Kindt, Eline, "Non-execution of a pilot judgment: ECtHR passes the buck to the Committee of Ministers in Burmych and others v. Ukraine", blog post on *Strasbourg Observers* on 26 October 2017, accessed at https://strasbourgobservers.com/2017/10/26/non-execution-of-a-pilot-judgment-ecthr-passes-the-buck-to-the-committee-of-ministers-in-burmych-and-others-v-ukraine/ on 20 January 2021, and Glas, Lize, "Burmych v. Ukraine two years later: What about restoral?", blog post published in *Strasbourg Observers* on 17 September 2019, accessed at https://strasbourgobservers.com/2019/09/17/burmych-v-ukraine-two-years-later-what-about-restoral/ on 20 January 2021.
[227] *Michelioudakis v. Greece* (54447/10), judgment of 3 April 2012, and *Glykantzi v. Greece* (40150/09), judgment of 30 October 2012, ECtHR.
[228] In both *Glykantzi v. Greece* (40150/09), para. 74, and *Michelioudakis v. Greece* (54447/10), para. 71, the Court stated that there were approximately 250 applications regarding the excessive length of proceedings pending against Greece.
[229] *Glykantzi v. Greece* (40150/09), para. 83, and *Michelioudakis v. Greece* (54447/10), para. 80.

Athanasiou, the Court noted that new measures had been implemented in Greece. Perhaps the smaller number of applications meant instead that the Court was confident that they would be relatively easily dealt with at the domestic level, since Greece had already earlier shown its responsiveness towards the problem.[230]

In the pilot judgment *Rutkowski and others v. Poland* from 2015, also concerning the excessive length of proceedings, the Court again emphasised the flexibility allowed by the pilot-judgment procedure, deciding, again, to only communicate applications while adjourning their adjudication.[231] The Hudoc-Exec database reveals that in 2017, when the two-year time limit was running out, the Court was able to strike out some 400 repetitive cases following the *Rutkowski* judgment, where a solution had been found on the domestic level for the individual applicants to the case.[232] However, as of January 2021, the case was still pending execution, since the underlying systemic problem resulting in the continuing ineffectiveness of the judicial system persisted in Poland.[233]

The previous sections have explored the approaches regarding adjournment of repetitive applications in pilot judgments concerning the excessive length of judicial proceedings or the non-enforcement of national judgments. The approaches have varied extensively; in some of the cases, even if the Court did not adjudicate them, they were communicated to the respondent state to encourage speedy redress at the domestic level. In others, the Court continued to process repetitive applications, either all or in part. The number of repetitive applications appears to influence the decision regarding the approach to take; where there have been large numbers of applications, the Court has been reluctant to process them all in a regular manner. In fact, the Court has not continued the processing of all applications in any excessive length of proceedings pilot judgment since 2011 – in the more recent cases, it has instead always opted for other 'hybrid' approaches, but never adjourning all proceedings in their entirety. For a visualised overview over the adjournment of applications in all pilot judgments concerning either the excessive length of judicial proceedings or the non-enforcement of domestic judicial decisions, see Annex I.

[230] *Glykantzi v. Greece* (40150/09), para. 70, and *Michelioudakis v. Greece* (54447/10), para. 67.
[231] *Rutkowski and others v. Poland* (72287/10 *et al.*), judgment of 7 July 2015, ECtHR, para. 226-228.
[232] Department for the Execution of Judgments, *Rutkowski and others v. Poland* (72287/10 *et al.),* accessed at http://hudoc.exec.coe.int/eng?i=004-26436 on 18 January 2021. The government reached a friendly settlement in 270 cases, while the remaining 130 cases were struck out on the basis of a unilateral declaration from the government, acknowledging the violation.
[233] *Ibid*.

Continuing to adopt judgments or continuing to communicate applications to the respondent state are useful tools to put pressure on the state. It also serves the interests of the applicants; their grievances are not put on hold again, after already having suffered excessively lengthy proceedings. When a systemic problem has concerned a violation of article 3, or another matter of exceptional urgency, the Court has in general adopted a similar approach, taking into account the vulnerable situation of the applicants and hence continuing to process all applications. The following section will examine such cases in more detail.

4.2. Pilot Judgments Concerning Urgent Situations

Ananyev and others v. Russia, the first pilot judgment concerning a violation of the prohibition of inhuman or degrading treatment, was adopted in 2012, that is, after the pilot-judgment procedure was incorporated into the Rules of Court.[234] The Court refrained from adjourning similar applications, drawing attention to Rule 61(6) of the Rules of Court, which indeed provides that the examination of all similar applications may be adjourned "as appropriate".[235] The *Ananyev and others* case concerned overcrowded cells in remand prisons, and the Court found violations of articles 3 and 13.[236] It identified the urgency and importance of complaints concerning inhuman and degrading treatment, and therefore chose to continue processing applications complaining of the same issue.[237]

The Court has later applied the same reasoning in other pilot judgments concerning inhuman or degrading treatment in detention. It did not adjourn repetitive applications in the pilot judgments *Varga and others v. Hungary* (2015), *Neshkov and others v. Bulgaria* (2015), or *Sukachov v. Ukraine* (2020), referring to *Ananyev* in each case.[238] The Court has not been thoroughly consistent in this practice – in the pilot judgment *Rezmives and others v. Romania*, the Court also found a violation of article 3 regarding conditions of detention, and although it continued to process all communicated applications, it adjourned those that had not yet been communicated to the state.[239]

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[234] In the cases of *Orchowski v. Poland* (17885/04) and *Norbert Sikorski v. Poland* (17599/05), judgments of 22 October 2009, the Court identified the overcrowding of Polish detention facilities to be systemic and widespread, but general measures were only indicated in the reasoning of the judgment and similar applications were not adjourned, and so, for the purposes of this study, they are not considered full pilot judgments.
[235] *Ananyev and others v. Russia* (42525/07), judgment of 10 January 2012, ECtHR, para. 235.
[236] *Ananyev and others v. Russia* (42525/07), judgment of 10 January 2012, ECtHR.
[237] *Ibid.*, para. 236
[238] *Varga and others v. Hungary* (14097/12 *et al.*), judgment of 10 March 2015, *Neshkov and others v. Bulgaria* (36925/10 *et al.*), judgment of 27 January 2015, and *Sukachov v. Ukraine* (14057/17), judgment of 30 January 2020, ECtHR.
[239] *Rezmives and others v. Romania* (616467/12 *et al.*), judgment of 25 April 2017, ECtHR.

Similarly, in the case of *M.C. and others v. Italy,* the Court continued to process all communicated applications.[240] The applicants had accidentally been infected with either HIV, hepatitis B, or hepatitis C following a blood transfusion or the administration of blood derivatives.[241] They all received compensation for the permanent damage sustained, but in 2010, a legislative decree that resulted in the drastic reduction of the amount of compensation was adopted in Italy.[242] Even though the Italian Constitutional Court held that the relevant provisions of the legislative decree were unconstitutional, the applicants' situations were not reassessed.[243]

The Court found violations of article 6(1) and article 1 of Protocol 1, since the legislative decree pursued only the state's financial interests, had specifically denied the applicants reassessment of their compensation, and had denied the applicants compensation which they had earlier obtained through final domestic judgments.[244] The Court also found a violation of article 14 taken in conjunction with article 1 of Protocol 1.[245]

The case did not concern 'core rights' (articles 2, 3, 4, or 5(1) of the Convention) as the other judgments under this section did, but the urgency of the situation was apparent. Many of the applicants' health deteriorated during the proceedings due to the infections, and one applicant suffered from nervous breakdowns and attempted suicide several times.[246] Six of the applicants died before the judgment was delivered.[247] The decision to continue the processing of all communicated cases was consistent with earlier practice, taking into account the vulnerable and urgent situation of the applicants.[248]

In the pilot judgment *W.D. v. Belgium* from 2016, the Court found violations of both article 3 and 5 concerning the lack of appropriate treatment of prisoners with mental disorders.[249] Still, the Court decided to adjourn all similar applications for two years, giving the respondent state time to remedy the situation. The Court took a similar approach in *Tomov and others v. Russia* in 2019, where it recognised that the substantive issue was similar to that of *Ananyev* from six years earlier but

[240] *M.C. and others v. Italy* (5376/11), judgment of 3 September 2013, ECtHR, para. 122.
[241] *M.C. and others v. Italy* (5376/11), judgment of 3 September 2013, ECtHR.
[242] *Ibid.,* paras. 21-22.
[243] *M.C. and others v. Italy* (5376/11), judgment of 3 September 2013, ECtHR.
[244] *Ibid.*, paras. 64 and 81.
[245] *Ibid.*, paras. 101-103.
[246] *Ibid.*, para. 32.
[247] *Ibid.*, para. 31.
[248] *Ibid.*, para. 122.
[249] *W.D. v. Belgium* (73548/13), judgment of 6 September 2016, ECtHR.

adjourned all repetitive applications nonetheless.[250] The judgments offer no explanation why the Court decided to adjourn the applications – it is certainly a deviation from all previous practice in pilot judgments concerning 'core rights'.

In the judgment *Torreggiani v. Italy*, concerning overcrowded prisons which the Court found to amount to a violation of article 3, all similar applications not yet communicated to the respondent state were adjourned.[251] In an interview conducted by Kindt, one respondent from the Court said that the Italian government had already taken steps to remedy the situation, and so the applicants would find redress quicker at the national level than if the Court had examined the cases separately.[252] The respondent also stated that the Registry of the Court simply would not have had enough Italian lawyers to be able to effectively examine all repetitive applications.[253] Such information cannot be found in judgments, meaning that one cannot know for certain whether similar factors played a part in the cases of *W.D.* and *Tomov.*

Based on interviews conducted by Kindt, it seems that there is disagreement within the Court on the suitability to adjourn cases when the violations concern article 3 of the Convention. One interviewee was of the view that in cases where the applicants are still in the violating conditions, the case cannot be bargained, while another stated that the adjournment or non-adjournment is not determined by the underlying issue.[254] *If,* however, the substance of the violation is not decisive, it seems odd that the only pilot judgments where the Court refrained from adjourning repetitive applications all concern either problems arising from urgent situations or issues of excessively lengthy proceedings or non-enforcement. If, on the other hand, cases under article 3 "cannot be bargained" when the applicants are still in the violating conditions, applications should not have been adjourned in the case of *W.D.,* where the applicants were still in the violating conditions (in *Tomov,* the applicants themselves were not in the violating conditions anymore, but the systemic problem still persisted).[255] Such disagreements within the Court result in an inconsistent practice that lacks transparency. For a visualised overview over the treatment of repetitive applications in all pilot judgments concerning 'urgent' issues, see Annex II.

[250] *Tomov and others v. Russia* (18255/10 *et al.*), judgment of 9 April 2019, ECtHR, para. 198.
[251] *Torreggiani v. Italy* (43517/09 *et al.*), judgment of 8 January 2013, ECtHR.
[252] Kindt, 2018, p. 54
[253] *Ibid.*
[254] *Ibid.*
[255] *W.D. v. Belgium* (73548/13), judgment of 6 September 2016, para. 5, *Tomov and others v. Russia* (18255/10 *et al.*), judgment of 9 April 2019, ECtHR, paras. 196-197.

4.3. Adjourning Repetitive Applications Outside the Pilot-Judgment Procedure

Clearly, the adjournment of similar cases is not what makes a pilot judgment a pilot judgment. The previous sections discussed pilot judgments where the Court refrained from adjourning repetitive applications. The case-law is further complicated when examining quasi-pilot judgments: In *Xenides-Arestis v. Turkey* from 2005 and *Zorica Jovanovic v. Serbia* from 2013, the Court never explicitly invoked the pilot-judgment procedure but adjourned similar cases nonetheless.

After Turkish military forces had occupied Cyprus in 1974, Mrs Xenides-Arestis had been forced to abandon her home. Turkey failed to provide any sort of compensation for the continuing occupation of her home, leading the Court to find violations of article 8 and article 1 of Protocol 1. The Court ordered the respondent state to remedy the situation, not only in respect of the applicant but also in respect of all similar applications pending before the Court.[256] The measures were imposed in the operative part of the judgment, which would be typical for pilot judgments. The Court even set a time frame; the remedy for everyone affected should be available within three months from the judgment, and redress should be ordered within three months after that.[257]

The Court noted that there were approximately 1,400 similar applications pending before it, and decided to adjourn them pending the implementation of the general measures indicated in the judgment.[258]

It is, admittedly, difficult to classify whether the pilot-judgment procedure was applied in *Xenides-Arestis,* since it does have almost all elements of a pilot judgment; a widespread systemic problem, a large number of similar pending applications, and the Court adjourning all similar applications as well as imposing general measures in the operative part of the judgment.

In his study, Leach considers *Xenides-Arestis* to be a quasi-pilot judgment, not only because the pilot-judgment procedure was never expressly applied, but also because the Turkish government never accepted any responsibility for any violation of the Convention.[259] What all 'full' pilot judgments

[256] *Xenides-Arestis v. Turkey* (46347/99), judgment of 22 December 2005, ECtHR, para. 40, and also para. 5 in the operative provisions.
[257] *Xenides-Arestis v. Turkey* (46347/99), judgment of 22 December 2005, ECtHR, operative provisions of the judgment, paras. 5-6
[258] *Ibid.*, para. 50.
[259] Leach, 2010, pp. 156-160. See also Kurban, 2016, p. 739, and *Demopoulos and others v. Turkey* (46113/99 *et al.*), decision of 1 March 2010, ECtHR, para. 58.

seem to have in common is some level of cooperation from the side of the state party.[260] In its Annual Report of 2005, the Court itself recognised that "although the [*Xenides-Arestis*] judgment is not a 'pilot judgment' in the strict sense, it forms part of a group of judgments in which the Court has significantly developed its role in relation to the execution of judgments."[261] So, at the time when the judgment was adopted, it was certainly not categorised as a pilot judgment. Interestingly, in the admissibility decision *Demopoulos and others v. Turkey* from 2010, the Court itself, the Turkish government and the applicants continuously refer to the *Xenides-Arestis* case as a pilot.[262] Perhaps the judgment was later marked a pilot, but since there seems to be no public information about it, it is impossible to know. Information *within* the Court seems limited as well, since Judge Sicilianos, as late as in 2014, referred to *Xenides-Arestis* as a quasi-pilot.[263]

Since *Xenides-Arestis* is from 2005, the pilot-judgment procedure was relatively new and had not yet been codified in the Rules of Court. A more recent example of a case with similar elements is *Zorica Jovanovic v. Serbia* from 2013.[264]

The case concerned the fate of the applicant's new-born son, who had allegedly deceased in the maternity ward at the hospital in 1983. The applicant and her family were never let to see the body and were not informed where he was buried, leading her to suspect that he had, in fact, not died but been abducted. The authorities failed to provide any credible explanation and refused to investigate the issue further. In the early 2000's, Serbian media began reporting of numerous similar cases.

The Court found a violation of the applicants' right to respect for family life under article 8 of the Convention, and ordered in the operative provisions of the judgment the respondent state to secure a mechanism to provide individual redress not only to the applicant, but to all parents in a similar situation.[265] The mechanism was to be instituted within one year from the date when the judgment became final. The Court also adjourned all similar pending applications for one year, presumably so that the respondent state would be given a chance to execute the general measures within the time limit.[266]

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[260] See section 3.1.
[261] European Court of Human Rights *Annual Report* 2005, accessed at https://www.echr.coe.int/Documents/Annual_report_2005_ENG.pdf on 28 December 2020, p. 89.
[262] *Demopoulos and others v. Turkey* (46113/99 *et al.*), decision of 1 March 2010, ECtHR, paras. 50, 57, 61, 73, 82.
[263] Sicilianos, 2014, p. 240 and especially footnote 22.
[264] *Zorica Jovanovic v. Serbia* (21794/08), judgment of 26 March 2013, ECtHR.
[265] *Ibid*., operative provisions.
[266] *Ibid.*

In *Zorica Jovanovic*, the existence of a systemic problem was never established by the Court.[267] In *Xenides-Arestis*, the Court at least explicitly identified "[…] a widespread problem affecting large numbers of people […]".[268]

In the *Zorica Jovanovic* judgment, references are made to various reports concerning the issue of 'missing babies' in Serbia.[269] For example, a parliamentary report from 2006 stated that "hundreds" of parents in similar situations had applied to the Serbian Parliament to ask for redress.[270] The reports are cited in the judgment, but without any assessments or comments by the Court.

The acts complained of happened between the years 1970 and 2000, before Serbia ratified the Convention (in 2004), so the Court understandably did not find it relevant to examine the lawfulness of the practice at the time; it could not have found a violation on this matter in any case, since it did not have jurisdiction *ratione temporis*.[271] Instead, it focused on the ongoing nature of the violation, namely that the applicant still had no possibility of redress.

The Court did observe that the respondent state's response had still been inadequate between 2006 and 2010, when some efforts had been made to offer redress, but eventually no amendments to existing legislation were made. It also observed that there was "a significant number of potential applicants".[272] Yet, the Court made no further assessment to establish the existence of a systemic problem.[273]

The judgment does not reveal whether the parties to the case were asked to submit any information on the issue.[274] The Court also did not provide any estimation about the number of people affected, or the number of repetitive pending applications, which it usually does in pilot judgments. Considering that the Court adjourned all repetitive applications, the case of *Zorica Jovanovic* cannot have been the only one.

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[267] Such an assessment is inherent in pilot judgments, as provided for by Rule 61(1) of the Rules of Court.
[268] *Xenides-Arestis v. Turkey* (46347/99), judgment of 22 December 2005, ECtHR, para. 38.
[269] *Zorica Jovanovic v. Serbia* (21794/08), judgment of 26 March 2013, ECtHR, paras. 26-31.
[270] *Ibid.*, para. 26.
[271] *Ibid.*, paras. 46-49
[272] *Ibid.,* para. 92.
[273] As provided for by Resolution Res2004(3) of the Committee of Ministers, where the CM invited the Court to identify "[…] what it considers to be an underlying systemic problem and the source of this problem […]".
[274] *Zorica Jovanovic v. Serbia* (21794/08), judgment of 26 March 2013, ECtHR, para. 72.

Many elements in the *Zorica Jovanovic* judgment indicate the application of the pilot-judgment procedure, especially the adjourning of repetitive pending applications and ordering general measures in the operative provisions of the judgment. However, it seems to lack one of the most essential elements: the identification by the Court of a systemic problem and the underlying cause to that problem. Moreover, in its Annual Report from 2013, the Committee of Ministers did not list the *Zorica Jovanovic* case under pilot judgments, but instead under "[j]udgments with indications of relevance for the execution (under Article 46)".[275]

This chapter has discussed the practice of adjourning repetitive applications as a mechanism to respond to systemic problems, and especially with a focus on exceptions to that approach. Usually, repetitive applications are adjourned in pilot judgments to make the procedure more efficient for the Court and grant redress to the applicants at the domestic level rather than through numerous separate judgments by the Court. Exceptions to the general rule have been made in pilot judgments raising issues of excessively lengthy judicial proceedings and prolonged non-enforcement of domestic judgments (so as not to put the applicants' complaints on hold yet again), as well as in cases that raise exceptionally urgent issues. Still, even under these categories of pilot judgments, the case-law has proven to be complex.

What is even more surprising are the two examples in the case-law of the Court where it adjourned repetitive applications without applying the pilot-judgment procedure. There is no explicit basis for doing so, since the Rules of Court only provide for the adjournment of applications under the pilot-judgment procedure. Besides, the exceptions are so rare that they might be regarded as deviations from established case-law rather than precedents. Nonetheless, they have added even more complexity to an already complex practice.

[275] *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, 7th Annual Report of the Committee of Ministers, 2013, p. 71.

5. The Court's Role in the Execution of Pilot and Quasi-Pilot Judgments: A Closer Look

5.1. Competence of the Court to Indicate or Impose Remedial Measures

Article 46(1) of the Convention, which the Court relies on when it indicates remedial measures, simply reads that "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." It does not explicitly confer any power to the Court regarding the indication of remedial measures. Article 46(2) only goes on to provide that "[t]he final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution", thus creating a division between the competence of the Court *vis-à-vis* the CM.

The vast majority of the Court's judgments include no indications of remedial measures for the state, but are instead declaratory in nature. The absence of such indications in a judgment does, however, not imply that merely the payment of damages would suffice to execute the judgment. The Court has repeatedly held that in addition to paying just satisfaction, the respondent state must choose, under the supervision of the CM, the appropriate remedial measures to put an end to the violation.[276]

Simply paying just satisfaction is inadequate, because when the Court has found a breach of the Convention, it imposes on the respondent state a legal obligation to "[…] restore as far as possible the situation existing before the breach".[277] If such restoration is in practice impossible, the state must choose the means of remedy that are most compatible with the conclusions of the judgment.[278] Therefore, when the Court orders remedial measures, it does not impose any new obligations on the state, but instead, simply clarifies already existing obligations.[279]

The declaratory nature of judgments has traditionally been thought to reflect the subsidiarity principle; the state must achieve a specific result, but the Court does not dictate the means by which to do so.[280] Additionally, the declaratory nature of judgments was viewed as essential to reflect the division of powers between the Court and the CM.[281] Against this background it is easier to

[276] See, for example, *Scozzari and Giunta v. Italy* (39221/98 and 41963/98), judgment of 13 July 2000, ECtHR, para. 249.
[277] *Papamichalopoulos and others v. Greece (Article 50)* (14556/89), judgment (just satisfaction) of 31 October 1995, ECtHR, para. 34.
[278] See, for example, *Selçuk and Asker v. Turkey* (23184/94 and 23185/94), judgment of 24 April 1998, ECtHR, para. 125.
[279] Keller and Marti, 2015, p. 841.
[280] Leach, 2013, p. 145.
[281] For a thorough recount of the earlier denial of competences of the Court to indicate remedial measures in its judgments, expressed both by the Court and legal doctrine, see Haider, 2013, pp. 145-162.

understand why the issuing of judgments containing individual or general measures raised plenty of critical voices when the practice first started.[282] Such voices have since subsided, and the competence of the Court to indicate remedial measures also outside the explicit pilot-judgment procedure is broadly accepted in legal doctrine today.[283] This shift in perspective is supported by the generally welcoming attitude of state parties, who find remedial indications helpful so as to execute sufficiently without going overboard.[284] Even within reluctant states, there are also conscientious domestic actors who find financial or technical excuses for non-compliance frustrating; if the Court then spells out what it would like to see, such excuses are more difficult to maintain.[285]

Similarly, the Execution Department of the Court seems to encourage judges to indicate as clearly as possible the desired remedies in the judgment since it "simply helps them in their work".[286] However, neither the Execution Department nor the CM will advise the Court in a specific case at the judgment stage.[287] Such interference at the judgment stage, especially by a political body such as the CM, could jeopardise the Court's judicial independence.

However, as recently as in 2017, Judge Raimondi, joined by six other judges, stated that "the Court is invested with no competence, of any kind, in the field of the execution of judgments".[288] Befittingly described by Donald and Speck as a "throwback to the traditionalist view of the Court's role", the statement is quite misleading.[289] Case-law under article 46 today, including pilot judgments, has grown remarkably. In such judgments the Court is certainly involved in the field of execution, since it indicates measures to the respondent state regarding the execution of the judgment.[290] The following sections will further examine the evolving role of the Court in the field of execution.

[282] For some examples, see the partly dissenting opinion of Judge Zagrebelsky in *Hutten-Czapska v. Poland* (35014/97), judgment of 19 June 2006 [GC], ECtHR, Sicilianos, 2014, pp. 249-252, Fyrnys, 2011, and Yildiz, 2015.
[283] To put it shortly, confidence in the Court's competence to interpret the Convention (including article 46) has grown since. For some thorough analyses, see for example Sicilianos, 2014, pp. 253-257, Donald and Speck, 2017, pp. 101-102, and Jahn, 2014 (on individual remedial measures).
[284] Villiger, 2015, p. 36. For example, in *Guðmundur Andri Ástráðsson v. Iceland* (26374/18), judgment of 1 December 2020, the Court stated that general measures must be implemented to prevent similar violations, but that being said, the state was not obliged to reopen all previous similar cases (para. 314).
[285] Donald and Speck, 2017, p. 103.
[286] Quote from a Judge in an interview conducted by Donald and Speck, 2017, p. 102.
[287] Donald and Speck, 2017, p. 99.
[288] *Moreira Ferreira v. Portugal (no. 2)* (19867/12), judgment of 11 July 2017, ECtHR, Dissenting opinion of Judges Raimondi, Nußberger, De Gaetano, Keller, Mahoney, Kjølbro, and O'Leary, para. 4.
[289] Donald and Speck, 2017, p. 102.
[290] See for example Keller and Marti, 2015, Sicilianos, 2014, Donald and Speck, 2017, and Mowbray, 2017.

5.2. Imposing Remedial Measures in the Operative Provisions

Neither the Convention nor the Rules of Court contain any specifications regarding statements which should be reserved for the operative provisions, other than Rule 61(3) concerning the pilot-judgment procedure.[291] According to the Court's Practice Direction on just satisfaction claims, it is only in "extremely rare" cases that the Court can impose consequential orders in the operative provisions to remedy a violation.[292] It applies to both individual and general measures.

Typically, the Court only imposes remedial measures outside the pilot-judgment procedure when there is but one form of action to take to end or redress the violation. Cremer therefore argues that here, again, the Court does not impose any new obligations on the respondent state, and similarly, does not encroach on the competence of the CM, since presumably, the CM would have had to point out the exact same measures.[293]

In the 'infant' years of the pilot-judgment procedure, the Court did in some quasi-pilot judgments order general measures in the operative provisions of the judgment.[294] Since 2013, the Court has been increasingly wary of ordering general measures in the operative provisions of the judgment, and has ordered specific general measures in pilot judgments only.[295] Perhaps this development is a response to the calls for consistency in the application of the pilot-judgment procedure and the difficulties to distinguish between pilot judgments and quasi-pilot judgments.[296] Be that as it may, the development

[291] Rule 61(3) provides that "[t]he Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment".

[292] *Practice direction: Just Satisfaction Claims,* issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007.

[293] Cremer, 2015, p. 54.

[294] See for example *Lukenda v. Slovenia* (23032/02), judgment of 6 October 2005 and *Xenides-Arestis v. Turkey* (46347/99), judgment of 22 December 2005, ECtHR.

[295] Donald and Speck, 2017, p. 91 (statistics 2013-2016). By examining judgments identified as "having indications of relevance for the execution" in the Annual Reports of the CM published since then, 2017-2020, as well as filtering the HUDOC database for Article 46 judgments in the past 12 months, one can conclude that specific general measures have been provided in the operative provisions in pilot judgments only. The last quasi-pilot judgment with specific imperative general measures in the operative provisions was *Zorica Jovanovic v. Serbia* (21794/08), judgment of 26 March 2013, ECtHR. In the quasi-pilot judgments *McCaughey and others v. the United Kingdom* (43098/09), judgment of 16 July 2013, ECtHR, and *Ali Riza and others v. Turkey* (30226/10 and 5506/16), judgment of 28 January 2020, ECtHR, the Court did impose a general obligation to remedy the systemic problem in the operative provisions, which is regrettably an exceptional inconsistency. However, since Rule 61(3) on the pilot-judgment procedure provides that the *type* of general measures must be imposed in the operative provisions, these two cases can still be clearly distinguished from 'full' pilot judgments.

[296] Even the Ministerial Conference at Interlaken drew attention to the problem in 2010, stressing "[…] the need for the Court to develop clear and predictable standards for the 'pilot judgment' procedure as regards selection of applications, the procedure to be followed and the treatment of adjourned cases, and to evaluate the effects of applying such and similar

is certainly welcomed as it has clarified the differentiation between pilot judgments and quasi-pilot judgments.

In pilot judgments, the type of general measures which will be required are always imposed in the operative provisions.[297] More and more frequently however, the Court only imposes on the state an obligation to make available a domestic remedy or remedies – either compensatory, preventive, or both.[298] The obligation remains quite general, without specifying the content or details of said remedy.[299]

More thorough assessments and elaborations on the measures to introduce are found in the reasoning of pilot judgments.[300] By doing so, the Court signals that general measures beyond the payment of just satisfaction are imperative, but the choice of such measures is left to the respondent state. In the reasoning of the judgment, the respondent state can find guidance on the type of measures to choose from, without being bound by one. This creates an 'obligation of result' in the operative provisions – to introduce a domestic remedy or remedies – but does not dictate imperatively the means to achieve it.[301] The Court performs a balancing act between its own competences, those of the state, and those of the CM; a primary example of taking the principle of subsidiarity into consideration.[302]

In addition to imposing general measures, the Court may set a time frame for the measures in question to be adopted.[303] Such time frames are included in the operative provisions as well, making them legally binding, and signifying that the Court is further reaching into the sphere of supervising the execution of judgments.[304] On the one hand, the Court foresees and sets the groundwork for the execution process. On the other hand, time frames might be viewed as a tool for the Court itself to set

procedures", para. 7(b) of the Action Plan in the *High Level Conference on the Future of the European Court of Human Rights Interlaken Declaration*, adopted on 19 February 2010, accessed at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593073 on 12 April 2021.

[297] Rule 61(3) of the Rules of Court.

[298] See, for example, *Sukachov v. Ukraine* (14057/17), judgment of 30 January 2020, operative provisions and *Tomov and others v. Russia* (18255/10 *et al.*), judgment of 9 April 2019, ECtHR, operative provisions. Compare to operative provisions in *Broniowski v. Poland* (31443/96) [GC], judgment of 22 June 2004, ECtHR, *Greens and M.T. v. the United Kingdom* (60041/08 *et al.*), judgment of 23 November 2010, ECtHR, and *Hutten-Czapska v. Poland* (35014/97), judgment of 19 June 2006 [GC], ECtHR.

[299] See also Glas, 2016, p. 52 and Gerards, 2012, p. 384.

[300] See, for example, *Ananyev and others v. Russia* (42525/07), judgment of 10 January 2012, ECtHR, paras. 210-231.

[301] See also Donald and Speck, 2017, p. 104.

[302] Kindt, 2018, p. 85.

[303] Rule 61(4) of the Rules of Court.

[304] See also *Seminar background paper: Implementation of the Judgments of the European Court of Human Rights: A Shared Judicial Responsibility?* at para. 9.

a deadline when it is appropriate for it to review the repetitive cases and check up on the domestic situation.[305]

The CM, as a political body, is reluctant to set deadlines that must be met by the respondent state, and hence, execution processes might become lengthy.[306] If a time frame is determined by the Court in imperative terms, the execution process will typically be facilitated. Especially in lengthy, drawn-out situations a fixed time limit can be helpful.[307] Still, it is not without risk; the Court is not as experienced as the CM in matters of execution and might unknowingly expect results beyond reach of the domestic authorities. Such drawbacks could be foreseen by allowing the parties to comment beforehand on not only the remedies, but also the time frame envisaged by the Court.[308]

Recently, the Court has in several cases taken a more cautious and perhaps complementary approach by requiring an action plan to be produced in cooperation with the CM within a binding time frame.[309] In such cases, the Court does not call for the substantive problem to be remedied within a certain time frame, but simply that the State must have a plan concerning the steps it will take to solve the problem within the specified time. Although this approach would seem to catch the optimal balance of powers, it was for some reason not applied in the two most recent pilot judgments from 2019 and 2020.[310]

5.3. Indicating Remedial Measures in the Reasoning of the Judgment

In general, remedial measures in the reasoning of the judgment are not considered legally binding, while remedial measures in the operative provisions of the judgment have binding force.[311] The Court has held that concerning judgments where it has merely *indicated* individual or general remedial measures, ultimately, the choice of measures to implement remains with the respondent state, under

[305] Kindt, 2018, p. 102.
[306] Pavlo Pushkar, in "The Evolving Remedial Practice of the European Court of Human Rights" Report, p. 5.
[307] *Ibid.*
[308] See also Keller and Marti, 2015, p. 840.
[309] This solution was applied for example in *Rezmives and others v. Romania* (616467/12 *et al.*), judgment of 25 April 2017, ECtHR, para. 4 of the operative provisions, *Varga and others v. Hungary* (14097/12 *et al.*), judgment of 10 March 2015, ECtHR, para. 9 of the operative provisions, and *Ananyev and others v. Russia* (42525/07), judgment of 10 January 2012, ECtHR, para. 7 of the operative provisions.
[310] The cases are *Sukachov v. Ukraine* (14057/17), judgment of 30 January 2020, ECtHR, and *Tomov and others v. Russia* (18255/10 *et al.*), judgment of 9 April 2019, ECtHR, in both of which the Court took the more 'traditional' approach and ordered domestic remedies to be made available within eighteen months.
[311] For example Cremer, 2015, p. 40, Kindt, 2018, p. 198, Judge Robert Spano, in "The Evolving Remedial Practice of the European Court of Human Rights" – report, p. 3, and Judge Serghides in para. 73 of his partly dissenting opinion in *Khlaifia and others v. Italy* (16483/12), all consider remedial measures in the reasoning only as simply non-binding without further discussion.

the supervision of the CM.[312] It further held that such flexibility is necessary, taking into account, *inter alia,* the applicant's evolving situation.[313] Nevertheless, execution measures eventually adopted by the respondent state must be compatible with the "conclusions and spirit" of the Court's judgment.[314]

However, judges of the Court do not entirely agree on the legal nature of remedial measures appearing only in the reasoning of the judgment. *Moreira Ferreira v. Portugal (no. 2)* is a so-called "follow-up" to the earlier case *Moreira Ferreira v. Portugal,* where the applicant had been convicted without being heard in person, resulting in a violation of article 6(1).[315] The Court had reiterated the *Öcalan* clause in the reasoning of the judgment by stating that "a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation".[316]

The respondent state did not, however, follow the recommendation and instead, refused to reopen the proceedings, and so the applicant lodged the follow-up.[317] In the follow-up, the Grand Chamber concluded, by a majority vote of 9-8, that the refusal to reopen proceedings could not constitute a violation, since in the view of the majority, the Court had no jurisdiction to order the reopening of proceedings.[318]

Judge Pinto de Albuquerque, joined by Judges Karakaş, Sajó, Lazarova Trajkovska, Tsotsoria, Vehabović, and Kūris expressed in a dissenting opinion to *Moreira Ferreira v. Portugal (no. 2)* that remedial measures in the reasoning part of the judgment have the same legal force as those in the operative provisions, and hence, the Court should have again found a violation.[319] The statement contradicts views of other judges within the Court as well as most academics.[320]

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[312] *Ilgar Mammadov v. Azerbaijan* (15172/13), judgment (Article 46 §4) of 29 May 2019 [GC], ECtHR, para. 182.
[313] *Ibid.,* para. 184.
[314] This has been repeated by the Court in numerous judgments. See for example *Scozzari and Giunta v. Italy* (39221/98 *et al.*), judgment of 13 July 2000 [GC], ECtHR, para. 249.
[315] *Moreira Ferreira v. Portugal (no. 2)* (19867/12), judgment of 11 July 2017, ECtHR.
[316] *Moreira Ferreira v. Portugal* (19808/08), judgment of 5 July 2011, ECtHR, para. 41, referring to *Öcalan v. Turkey* (46221/99), judgment of 12 May 2005 [GC], ECtHR, para. 210.
[317] *Moreira Ferreira v. Portugal (no. 2)* (19867/12), judgment of 11 July 2017, ECtHR, para. 26.
[318] *Moreira Ferreira v. Portugal (no. 2)* (19867/12), judgment of 11 July 2017, ECtHR, para. 48. The statement moreover contradicts two judgments where the Court did *exactly* that: *Lungoci v. Romania* (67210/00), judgment of 26 January 2006, ECtHR, and *Maksimov v. Azerbaijan,* (38228/05), judgment of 8 October 2009, ECtHR.
[319] *Moreira Ferreira v. Portugal (no. 2)* (19867/12), judgment of 11 July 2017, ECtHR, dissenting opinion of Judge Pinto de Albuquerque, para. 17.
[320] *Moreira Ferreira v. Portugal (no. 2)* (19867/12), judgment of 11 July 2017, ECtHR, para. 92, Donald, Alice, and Speck, Anne-Katrin, "Judges at odds over Court's authority to order remedies", blog post published on *Strasbourg Observers*, 28 July 2017, accessed on 19 March 2021 at https://strasbourgobservers.com/2017/07/28/judges-at-odds-over-courts-authority-to-order-remedies/#more-3854, and Kindt, 2018, p. 198.

In a more nuanced way, Judge Kūris explains how, in this particular case, a retrial would have been the only true redress of the violation.[321] This is, perhaps, a better suited argument in this case; the Court could have found a violation again in *Moreira Ferreira (no. 2)*, not because the respondent state had failed to implement a measure merely indicated in the reasoning, but because it was the only measure that would have truly restored the situation.[322] Judge Kūris goes on to state that the message of the first *Moreira Ferreira* judgment was "*Very, very* clear", but that in hindsight, it might have been more appropriate to impose the remedial measure in the operative provisions.[323]

In conclusion, it is difficult to find support to the statement of Judge Pinto de Albuquerque that remedial measures in the reasoning part of the judgment have the same legal force as those in the operative part; generally, the reasoning is regarded as *obiter dicta* and therefore not legally binding. However, in some cases, such as in *Moreira Ferreira,* the finding of a violation leaves no real choice as to the measures required to remedy it, and the absence of an explicit order to implement the specific measure should not discharge the state of its obligation.

Indeed, general measure indications in the judgment are better described as guidance for the execution stage, instead of imperative orders. The state cannot excuse non-execution by claiming that it does not know what is expected of it if the Court has thoroughly clarified certain general measures.[324] They are still just that; clarifications that cannot be enforced, but instead are meant to be persuasive.

However, such indications vary in form and in some judgments, the Court merely implies that general measures will be required. For example, in the recent judgment *Shlykov and others v. Russia,* the Court indicated under article 46 only that

> It will be for the respondent State to implement, under the supervision of the Committee of Ministers, such measures as it considers appropriate to secure the rights of the applicants and other persons in their position, in order to discharge its legal obligation under Article 46 of the Convention. It is thus inevitable that the Court's judgment will have effects extending beyond the confines of these particular cases.[325]

[321] *Moreira Ferreira v. Portugal (no. 2)* (19867/12), judgment of 11 July 2017, ECtHR, dissenting opinion of Judge Kūris, joined by Judges Sajó, Tsotsoria, and Vehabović.
[322] *Moreira Ferreira v. Portugal (no. 2)* (19867/12), judgment of 11 July 2017, ECtHR, para. 3 in the dissenting opinion of Judge Kūris, joined by Judges Sajó, Tsotsoria, and Vehabović.
[323] *Moreira Ferreira v. Portugal (no. 2)* (19867/12), judgment of 11 July 2017, ECtHR, para. 4, and quote from para. 5 in the dissenting opinion of Judge Kūris, joined by Judges Sajó, Tsotsoria, and Vehabović.
[324] Fikfak, 2018, p. 1101.
[325] *Shlykov and others v. Russia* (78638/11 *et al.*), judgment of 19 January 2021, ECtHR, para. 110.

In other cases, the Court has made a more thorough assessment of the systemic nature of the problem, and again, merely indicated that general measures will be required without specifying the matter further.[326]

Such open-ended article 46 indications in judgments have raised both praise and critique. On the one hand, one CM official argued that just the identification of a problem is helpful in guiding the execution proceedings, expressly spelling out that remedial measures beyond the payment of just satisfaction is required.[327] On the other hand, Judge Kūris suggested that the language used by the Court has "often been too tentative and therefore somewhat uneven, confusing and inconsistent", implying that in his view, the Court is being excessively cautious, causing confusion.[328]

Although 'tentative', such cautious, indicative wordings can act as the first step to nudge the respondent state to act beyond the single case. It might be another mechanism for the Court to assess the receptiveness of the domestic authorities, before considering heavier measures.[329]

Surprisingly, not only non-monetary remedial indications affect the execution of the measures, but even monetary remedies awarded to the individual applicants might influence the execution of the broader systemic problem. The following section will further discuss the Court's practice regarding just satisfaction awards in multiple applicant cases and how they might influence the state's willingness to solve the underlying problem.

5.4. 'Quantity Discount' on Monetary Remedies and its Effect on State Reluctance to Solve the Underlying Problem

Since the aim of this thesis is to study how the Court addresses systemic human rights violations, it would not serve the purpose to conduct an elaborate study concerning the awards of just satisfaction granted to the individual applicants of the cases. However, in some situations, just satisfaction awards might lead to poor execution of general measures, an outcome which is of interest for this study. The

[326] See for example *Kauczor v. Poland* (45219/06), judgment of 3 February 2009, ECtHR, paras. 56-62, and *Kharchenko v. Ukraine* (40107/02), judgment of 10 February 2011, ECtHR, paras. 97-101.
[327] Interview conducted by Donald and Speck, 2017, p. 104.
[328] *Moreira Ferreira v. Portugal (no. 2)* (19867/12), judgment of 11 July 2017, ECtHR, dissenting opinion of Judge Kūris, joined by Judges Sajó, Tsotsoria, and Vehabović, para. 2.
[329] See also Buyse, 2016, p. 112.

state might remain reluctant to address the underlying problem, simply being content with paying the compensation but taking no further measures.

An interesting aspect is that just satisfaction awards are lower in multiple applicant cases than when the violation concerns a single individual.[330] In interviews with judges conducted by Veronica Fikfak, the judges admitted that they were concerned about compliance if the accumulated just satisfaction awards were too high.[331] For example, for the victims of non-enforced judicial decisions in Ukraine, a persisting problem, the amounts awarded for non-pecuniary damages decreased significantly over time.[332] Fikfak further argues that this approach by the Court is counter-intuitive from a behavioural economic viewpoint.[333] Instead of being concerned of the ability of the state to pay adequate compensation, the Court should be more concerned about the message it is sending: the failure to properly address a systemic violation will not become more expensive, but instead *cheaper* over time and with each applicant. The approach certainly does not encourage states to change their conduct, particularly since the thorough execution of general measures required to solve an underlying systemic problem are often extensive.[334] The payment of just satisfaction awards, especially if they are reduced over time and with each applicant, might just seem like the easier option.

For the Court, it is a difficult line to walk. Judges wish to ensure that the victims get "at least something", especially if the respondent state is going through an economic crisis.[335] Similarly, Gerards argues that the execution of pilot judgments might be facilitated by a display of understanding from the Court, instead of mere authority and might.[336] However, such an approach does not consider the deterrent effect on the state's willingness to actually solve the underlying problem if just satisfaction awards are fixed at an affordable rate. Nevertheless, the Court evidently is concerned with issues arising at the execution stage when it affords monetary awards, since it seeks to award redress that it can expect the state to pay. Perhaps it just has not considered the effect such an approach might have on the execution of general measures.

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[330] Fikfak, 2018, p. 1110. See, for example, *Broniowski v. Poland* (31443/96) [GC], judgment of 22 June 2004, ECtHR, para. 182, and *Maria Atanasiu and others v. Romania* (30767/05 *et al.*), judgment of 12 October 2010, ECtHR, para. 175.
[331] *Ibid.*
[332] In *Yuriy Nikolayevich Ivanov v. Ukraine* (40450/04), judgment of 15 October 2009, the amount awarded for non-pecuniary damage was 2,500 euros, while in *Burmych and others v. Ukraine* (46852/13 *et al*.), judgment (striking out) of 12 October 2017 [GC], paras. 40-41 the Court accepted awards of 1,000 euros in respect of non-pecuniary damages.
[333] Fikfak, 2018, p. 1112.
[334] For example, as the Court has emphasised since *Scordino v. Italy* (36813/97) (para. 183) in the numerous excessive length of judicial proceedings cases, a domestic compensatory remedy is in principle not adequate; states must organise their judicial systems so that they can meet their caseload. Such reforms are undeniably immense.
[335] Fikfak, 2018, p. 1111, based on an interview with one of the Judges.
[336] Gerards, 2012, p. 384.

So far, this chapter has discussed how the Court influences the execution of judgments in advance, before the judgment has been issued and transferred to be supervised by the CM. Although the CM supervises the execution of judgments, the following section will argue that the Court does have a complementary role also in the supervision of execution of judgments.

5.5. A Complementary Role in the Supervision of the Principal Judgment

5.5.1. Follow-up Cases as a Mechanism to Supervise Execution

As a rule, although the Court is becoming more involved in the field of execution, it does not have jurisdiction to supervise the execution of judgments.[337] For example, the Court does not examine follow-up applications complaining solely of a failure by the respondent state to execute a previous judgment obtained by the applicant. In such cases, the applicant typically attempts to rely on article 46 by complaining that the respondent state has not fulfilled its obligation to abide by the earlier judgment of the Court. Since article 46(2) provides that the CM is responsible for supervising the execution of judgments, the Court has generally ruled that it does not have jurisdiction *ratione materiae* to examine whether a state has complied with a specific judgment.[338]

The Court is therefore concerned of encroachment upon the competence of the CM. However, the concern only seems to cover the supervision of execution when the *same* applicant lodges the follow-up complaint.

For example, in the case of *Sidabras and others* the applicants complained that the respondent state had not amended legislation which the Court had found to have given rise to a violation in its earlier judgment. The Court did note, again, that the abrogation of the domestic law in question would be the most appropriate general measure to redress the violation, but that the supervision of such general measures fell within the competence of the CM and not the Court.[339] The Court therefore considered

[337] Article 46(2) of the Convention confers such competence to the CM.
[338] See, for example, *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* (32772/02), judgment of 30 June 2009, ECtHR, paras. 61-63, *The United Macedonian Organisation Ilinden PIRIN and Others v. Bulgaria (No. 2)* (41561/07 and 20972/08), judgment of 18 October 2011, ECtHR, para. 56, *Egmez v. Cyprus* (12214/07), ECtHR, decision of 18 September 2012, para. 50, and *Kudeshkina v. Russia* (28727/11), decision of 17 February 2015, ECtHR, para. 53. To date, the only exception to the rule is *Emre v. Switzerland (no. 2)* (5056/10), judgment of 11 October 2011, ECtHR, where the Court declared admissible *and* found a violation of article 46.
[339] *Sidabras and others v. Lithuania* (50421/08 and 56213/08), judgment of 23 June 201, ECtHR, para. 104.

that the failure by the respondent state to implement general measures did not, in itself, amount to a new violation.

However, the case was lodged by three applicants who had all received a judgment by the Court on the same issue earlier. The Court did find a new violation in respect of one of the applicants, since he had lodged new domestic proceedings since obtaining the first judgment by the Court, and had received a new unfavourable domestic decision, again explicitly relying on the unamended legislation.[340] Therefore, although the Court could not examine the non-execution of general measures *in abstracto,* the judgment very clearly indicated both to the state and the CM that the abrogation of the law in question was necessary to fully comply with the Convention requirements.

Subsequently, the Court has indirectly supervised the execution of previous judgments by adopting judgments in respect of *new* applicants who are complaining of the *same* issue, or even specifically complaining of general measures implemented at the domestic level in response to a judgment by the Court. Cases concerning the excessive length of proceedings in Italy were some of the earliest cases where the Court identified systemic issues.[341] The pilot-judgment procedure had not been introduced at the time, and the Court did not indicate remedial measures in the early cases. Nonetheless, Italy introduced the so-called Pinto Act, a domestic remedy which offered redress also to those applicants who had already lodged a complaint with the Strasbourg Court.[342]

Unfortunately, in the view of the Court, the Pinto Act did not resolve the systemic issue.[343] It was a purely compensatory remedy, not resolving the ineffectiveness of the Italian judicial system.[344] As such, it transferred the burden of applications from the Strasbourg Court to the domestic courts, which themselves had also been overburdened already.[345] Furthermore, the calculation of just satisfaction awards diverged between the Italian domestic courts *vis-à-vis* the Strasbourg Court.[346] The Court was compelled to continue the examination of follow-up cases a number of times, and recognising developments made since the earliest judgments (such as the introduction of the Pinto Act), it

[340] *Ibid.*, paras. 115-116.
[341] Kindt, 2018, p. 63, and *Bottazzi v. Italy* (34884/97), judgment of 28 July 1999 [GC], ECtHR, para. 22.
[342] See, for example, *Scordino v. Italy (no. 1)* (36813/97), judgment of 29 March 2006, ECtHR, para. 62.
[343] *Scordino v. Italy (no. 1)* (36813/97), judgment of 29 March 2006, ECtHR, para. 223.
[344] *Ibid.*, para. 143.
[345] *Ibid.*
[346] *Ibid.*, para. 223.

indicated general measures that were still required by the respondent state to comply with its obligations under the Convention.[347]

By examining new cases complaining of the same systemic problem as previous applicants, the Court may seek to address the issue once again and review the measures adopted following its previous judgments.[348] This practice culminates in the follow-up cases examined by the Court following a pilot judgment. In such follow-up cases, the Court examines the remedies introduced at the domestic level following the pilot judgment; if the domestic remedy appears effective, the application will be declared inadmissible for non-exhaustion of domestic remedies, but exceptionally, if the domestic remedy is *not* effective, the Court will declare the application admissible and, once again, seek to address the systemic problem in question.[349] Admittedly, the assessment made by the Court remains somewhat superficial, and most commonly, the mere establishment of a new remedy will suffice, even when no stable practice has emerged.[350] Although the Court is aware that the supervision of the execution of judgments falls within the competence of the CM, it does not seem too bothered about this aspect of supervising execution.[351]

Follow-up cases may serve as a method for the Court to continue the examination of general measures implemented by domestic authorities and their capability to tackle the systemic issue in question. Declaring inadmissible such complaints under article 46(2) would be quite the strict self-imposed interpretation of the Convention; after all, the applicants in such cases are relying on substantive provisions of the Convention and are victims of human rights violations. The Court is only indirectly ruling on matters of execution. Where the CM has declared a previous judgment executed, the Court will approve the remedies adopted since as well, careful not to encroach upon the competence of the

[347] *Scordino v. Italy (no. 1)* (36813/97), judgment of 29 March 2006, ECtHR, paras. 182-189, and *Gaglione and others v. Italy* (45867/07 *et al.*), judgment of 21 December 2010, ECtHR, paras. 59-60.
[348] For more examples, see *Kauczor v. Poland* (45219/06), judgment of 3 February 2009, ECtHR, paras. 55-62, *Ümmühan Kaplan v. Turkey* (24240/07), judgment of 20 March 2012, ECtHR, paras. 73-75, and *Gerasimov and others v. Russia* (29920/05 *et al.*), judgment of 1 July 2014, ECtHR, para. 137.
[349] For example, in *Zadrić v. Bosnia and Herzegovina* (18804/04), decision of 16 November 2010, in response to general measures adopted since the pilot judgment *Suljagic* (27912/02), the Court found the new remedy to be effective, while in the cases *Ilyushkin and others v. Russia* (5734/08 *et al.*) and *Kalinkin and others v. Russia* (16967/10 *et al.*), judgments of 17 April 2012, follow-ups to the *Burdov (no. 2)* (33509/04) pilot judgment, the Court exceptionally could not fully endorse the newly created domestic remedy and was compelled to issue new judgments concerning the same issue.
[350] For a recent example, see *Domján v. Hungary* (5433/17), decision of 14 November 2017, ECtHR, (follow-up to the pilot judgment *Varga and others v. Hungary* (14097/12 *et al.*), judgment of 10 March 2015, ECtHR) para. 30, where the Court stated that the new remedies guarantee "in principle" genuine redress, declaring the application inadmissible. See also Gerards, 2012, pp. 20-21 and Glas, 2019, p. 241.
[351] In at least two cases, the Court mentioned this concern; *Sidabras and others v. Lithuania* (50421/08 and 56213/08), judgment of 23 June 201, ECtHR, para. 104, and *Von Hannover v. Germany (no. 2)* (40660/08 and 60641/08), judgment of 7 February 2012, ECtHR, paras. 94 and 116. See also Glas, 2019, pp. 238-240.

CM.[352] Only in cases where the previous judgment has still been under the supervision of the CM and no final resolution adopted, has the Court indicated further general measures to bring the situation up to Convention standards.[353]

5.5.2. … Until the Court has had Enough?

Section 4.1.3. discussed the continuing over-all failure by the Ukrainian government to execute the *Ivanov* pilot judgment. For years, the Court had been going back and forth adjourning and then continuing to examine repetitive cases, as well as attempting to find new solutions to the problem.[354]

Eventually, in *Burmych and others*, which joined together over 12,000 follow-up applications in the aftermath of *Ivanov* in 2017, the Grand Chamber remarked that it was for the CM to supervise the execution of obligations arising from pilot judgments, and that the Court's role was "essentially limited to its identification of a systemic problem and, if appropriate, indication of general remedial measures to be taken in execution".[355] The statement is at odds with earlier follow-up cases where the Court, in fact, reviewed the execution of general measures.[356] The Court itself even proceeded to list earlier follow-up cases where it had done exactly that.[357]

The Court then went on to argue why a new approach was needed, and with a majority vote of ten to seven, struck all 12,148 applications out of its list, to instead be processed by the CM under the execution proceedings following the *Ivanov* pilot judgment.[358]

According to article 37 of the Convention, the Court may strike an application out of its list of cases if the applicant does not intend to pursue his application, the matter has been resolved, or for any other reason established by the Court. Rule 43(3) of the Rules of Court provides that when an application has been struck out, it will be transmitted to the CM, which will supervise "the execution of any undertakings which may have been attached to the discontinuance or solution of the matter." In this case, the CM would therefore supervise the Ukrainian government's undertakings to

[352] Glas, 2019, p. 241.
[353] See for example *Scordino v. Italy (no. 1)* (36813/97), judgment of 29 March 2006, ECtHR, paras. 218 and 223.
[354] The various turns of events since the *Ivanov* judgment are recalled in *Burmych and others v. Ukraine* (46852/13 *et al.*), judgment (striking out) of 12 October 2017 [GC], ECtHR, paras. 16-44.
[355] *Burmych and others v. Ukraine* (46852/13 *et al.*), judgment (striking out) of 12 October 2017 [GC], ECtHR, para. 159.
[356] See the section above.
[357] *Ibid.,* paras. 163-164.
[358] *Ibid.*, paras. 167-175 as well as the operative provisions.

implement the general measures which the Court had imposed already in the *Ivanov* judgment, ensuring relief for all applicants whose complaints arose from the same systemic problem.[359]

The Court came to this conclusion after the Ukrainian government presented data according to which there were still some 120,000 potential applicants with an unenforced judicial decision in Ukraine, capable of continuing the massive influx of applications and further compromising the effectiveness of the Convention system.[360] The Court noted that although it had created an accelerated summary procedure for follow-up cases to *Ivanov,* no meaningful impact had been made, and the number of applicants seeking redress from the Court (unable to do so at the domestic level) had instead only grown by each year.[361] If continued, the Court saw no other prospect than the growing number of applicants substituting the Court for the domestic authorities, who should be offering redress in the individual cases, as the *Ivanov* pilot judgment provided in imperative terms.[362]

Therefore, the Court finally concluded that "[…] nothing is to be gained, nor will justice be best served, by the repetition of its findings in a lengthy series of comparable cases, which would place a significant burden on its own resources […]".[363]

The case originally encompassed only five applications, but in the judgment, the Court joined the 12,143 remaining pending applications to it as well.[364] Only the five original applicants' claims had been examined by the Grand Chamber; the remaining 12,143 applications, annexed to the judgment, had not been subject to judicial review.[365] Considering that Ukraine had failed to introduce any general measures since *Ivanov,* meaning that there was no domestic remedy for the applicants to rely on, the ensuing situation must have induced uncertainty.[366]According to the joint dissenting opinion by the seven judges who voted in the minority, no case, including strike-out decisions, should be decided without judicial consideration.[367]

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[359] *Ibid., para. 222.*
[360] *Ibid.*, paras. 149-150.
[361] *Ibid.,* para. 152.
[362] *Ibid.,* para. 155.
[363] *Ibid.,* para. 174.
[364] *Ibid.*, paras. 2 and 3 of the operative provisions.
[365] *Burmych and others v. Ukraine* (46852/13 *et al.*), judgment (striking out) of 12 October 2017 [GC], ECtHR, para. 3 of the dissenting opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc.
[366] *Burmych and others v. Ukraine* (46852/13 *et al.*), judgment (striking out) of 12 October 2017 [GC], ECtHR, para. 146.
[367] *Burmych and others v. Ukraine* (46852/13 *et al.*), judgment (striking out) of 12 October 2017 [GC], ECtHR, para. 4 of the dissenting opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc. For further analysis on the implications that ensued for the applicants, see, for example, Kindt, Eline, "Non-execution of a pilot judgment: ECtHR passes the buck to the Committee of Ministers in *Burmych and others v. Ukraine*", blog post on

In the dissenting opinion, the judges note that the CM as a political body does not have the competence to examine the individual cases, especially since it will entail non-enforceable political decisions – achieved together with the Ukrainian government, the 'wrongdoer' itself – instead of being achieved through judgments by a judicial body.[368] The judges in the minority further claimed that the CM was not at all consulted about the decision to transfer thousands of cases to them and was not given the chance to comment their view about this new interpretation of the division of competences.[369]

The decision to strike these applications out is, in theory, in line with article 46 providing the CM the competence to supervise the execution of judgments.[370] However, in practice, it is a deviation from the Court's earlier interpretation of article 46; when faced with a sufficiently massive influx of applications, it chose to simply pass on the burden and change its interpretation. It comes without saying that the shift in institutional balance is substantial; as the dissenting judges noted, 12,143 of the applications had not been subject to any form of judicial review, and would instead be examined by the respondent state, under supervision of the CM, through a political process.[371] In practice, the legal obligations imposed by judgments was now off the shoulders for Ukraine in thousands of cases.

It should be clear that all applicants have the right to have the facts of their case examined individually by the Court, otherwise the right to individual application is in practice denied.[372] It is already questionable for the Court to adopt a new approach, not for a "legal interpretation of human rights", but solely because in this case it suited the Court best.[373] However, even this could possibly be justified had the Court actually examined the facts of each individual case, an exclusive competence of the Court that should not be open to interpretation.

Strasbourg Observers from 26 October 2017, accessed at https://strasbourgobservers.com/2017/10/26/non-execution-of-a-pilot-judgment-ecthr-passes-the-buck-to-the-committee-of-ministers-in-burmych-and-others-v-ukraine/ on 26 March 2021.

[368] *Burmych and others v. Ukraine* (46852/13 *et al.*), judgment (striking out) of 12 October 2017 [GC], ECtHR, para. 15 of the dissenting opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc.

[369] *Ibid.*

[370] See the previous section.

[371] *Burmych and others v. Ukraine* (46852/13 *et al.*), judgment (striking out) of 12 October 2017 [GC], ECtHR, para. 13 of the dissenting opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc.

[372] Article 34 of the Convention. See also paras. 7-9 of the dissenting opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc *Burmych and others v. Ukraine* (46852/13 *et al.*), judgment (striking out) of 12 October 2017 [GC], ECtHR.

[373] Quote from para. 1 of the dissenting opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc *Burmych and others v. Ukraine* (46852/13 *et al.*), judgment (striking out) of 12 October 2017 [GC], ECtHR.

6. Conclusion

Since 2004, the Court has sought to address systemic human rights violations by identifying the underlying causes and indicating general measures going beyond the single applicant of the case. Now that the practice has evolved and matured, some distinct patterns can be identified, although many aspects remain inconsistent – or flexible, depending on the perspective.

The most prominent approach of the Court is the pilot-judgment procedure, but throughout the years, the Court has issued more quasi-pilot judgments than 'full' pilot judgments. The characteristics of both pilot and quasi-pilot judgments vary extensively, and definite demarcations are difficult to make.

Rule 61 of the Rules of Court on the pilot-judgment procedure has set the framework for the pilot-judgment procedure, but at the same time, left plenty open for interpretation. By its very nature, the procedure allows flexibility, which has let the Court accommodate it to various situations.[374]

In several cases, it remains unclear whether the Court applied the 'full' pilot-judgment procedure or issued a quasi-pilot judgment. Since pilot judgments have been issued since 2004, but the procedure was not codified until 2011, some early inconsistencies may be excused considering its infancy. However, as late as in 2013, the Court issued a judgment in the case of *Zorica Jovanovic v. Serbia*, which heavily resembles a pilot judgment, but was not identified as such by the Court nor the CM. General measures were imposed in the operative provisions and similar applications were adjourned, but the Court made no assessment on the systemic nature of the problem.[375]

Such a recent divergence complicates the analysis, but since then, the Court's practice has become more streamlined. Pilot judgments are now more often clearly distinguished from quasi-pilot judgments; in the last eight years, it is only in 'full' pilot judgments that the type of general measures required have been included in the operative provisions of the judgment.[376] However, although the

[374] See also Kindt, 2018, p. 26.
[375] Rule 61(3) of the Rules of Court requires such an assessment to be made, and Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session) also called the Court to identify the underlying problem.
[376] The last case to contain specific general measures in the operative provisions outside the 'full' pilot-judgment procedure was *Zorica Jovanovic v. Serbia* (21794/08), judgment of 26 March 2013, ECtHR. In the operative provisions of the quasi-pilot judgments *McCaughey and others v. the United Kingdom* (43098/09), judgment of 16 July 2013, ECtHR, and *Ali Riza and others v. Turkey* (30226/10 and 5506/16), judgment of 28 January 2020, ECtHR, the Court only imposed a general obligation to remedy the systemic problem, without specifying the type of general measures required; see also section 5.2.

distinction between 'full' pilots and quasi-pilots has been clarified, it is still difficult to predict the approach of the Court in any given case. Nevertheless, this thesis has sought to find common patterns among cases addressing systemic issues.

An overwhelmingly important consideration in the selection of the approach appears to be the level of cooperation of the state. Throughout the thesis, it has become clear that the Court is extremely reluctant to invoke the full pilot-judgment procedure in case the respondent state is uncooperative. This requirement can even implicitly be read from Rule 61(2)(a), providing that the Court must seek the views of the parties to the case before applying the pilot-judgment procedure. That being said, initial opposition does not automatically preclude the Court from applying the procedure; especially after having gathered substantial information about the systemic problem, the Court may gain credibility and persuade the state to be cooperative.

Already after the *Broniowski* judgment, Luzius Wildhaber, president of the Court at the time, considered this 'requirement' of state cooperation also to be the most fundamental problem of the procedure.[377] The over-all failure of Ukraine to execute the *Ivanov* pilot judgment, which eventually led to the decision to strike out over 12,000 applications in *Burmych and others,* further reaffirmed that the absence of state cooperation could be detrimental for the success of the pilot-judgment procedure. Since the pilot-judgment procedure shifts the responsibility of the repetitive cases from the docket of the Court to that of the domestic authorities, the Court would certainly want to be affirmed that the domestic authorities will follow through.

Further, the Court is reluctant to apply the pilot-judgment procedure or even indicate general measures when the substantive issue at hand is complex or it is difficult to pinpoint the exact causes of the underlying problem. Making an assessment based on speculations could discredit the authority of the Court. However, even in such cases execution could be facilitated by simply explaining to the domestic authorities that the problem must be addressed, spelling out that measures beyond the individual applicant are required. Further elaborations are not necessarily needed.

Additionally, the pilot-judgment procedure has only rarely been invoked as the first response when the Court has identified a systemic problem. More often, in cases caused by a systemic problem, the Court has gradually moved from declaratory judgments to quasi-pilot judgments, possibly eventually

[377] Wildhaber, 2009, p. 89.

employing the pilot-judgment procedure if the underlying issue still has not been resolved. Indeed, actors within the Court have confirmed that the optimal moment to move beyond declaratory judgments is actively discussed in situations of partial or non-execution.

Regarding the Court's practice when either adjourning or continuing to process repetitive applications, again, one of the concerns seems to be that of execution. The Court anticipates the approach which will most effectively put pressure on the respondent state. At the same time, it is still concerned of its own workload; if the number of repetitive applications is high, it will not process them all, but perhaps adjourn part of them. Furthermore, the substantive issue of the underlying problem is of importance: The Court continues to process repetitive applications only in such cases where their adjournment would be particularly disadvantageous to the applicants.

When selecting any approach to address a systemic problem, the over-arching issue for the Court seems to be concerns of compliance at the execution stage. The Court selects the approach which it can anticipate the respondent state to execute, sometimes at the expense of the individual applicant.

To make the process more consistent and transparent, the parties to all cases could be asked to submit their views regarding remedies routinely, and not just when the Court considers applying the full pilot-judgment procedure. Through this process, on the one hand, the applicant could provide the Court with valuable information. On the other hand, based on the submissions of the respondent state, the Court could perhaps also better anticipate its receptiveness to a particular approach. The process could hence gain transparency and credibility.

Annexes

Annex I. *The adjournment of applications in all pilot judgments concerning either the excessive length of judicial proceedings or the non-enforcement of domestic judicial decisions:*

	Process all appl.	Process all appl. lodged before pilot	Process all communicated appl.	Adjourn adjudication, but communicate appl. to State	Adjourn all appl.
Case name and year, in chronological order					
Olaru and others v. Moldova, 2009				**x**	
Burdov v. Russia (no. 2), 2009				**x**	
Yuriy Nikolayevich Ivanov v. Ukraine, 2009				**x**	
Rumpf v. Germany, 2010	**x**				
Athanasiou v. Greece, 2010	**x**				
Finger v. Bulgaria, 2011	**x**				
Dimitrov and Hamanov v. Bulgaria, 2011	**x**				
Ümmühan Kaplan v. Turkey, 2012			**x**		
Michelioudakis v. Greece, 2012				**x**	
Glykantzi v. Greece, 2012				**x**	
Manushaqe Puto and others v. Albania, 2012		**x**			
Gerasimov and others v. Russia, 2014				**x**	
Gazsó v. Hungary, 2015		**x**			
Rutkowski v. Poland, 2015				**x**	

Annex II. *The adjournment of applications in all pilot judgments concerning 'urgent' violations:*

	Process all appl.	Process all appl. lodged before pilot	Process all communicated appl.	Adjourn adjudication, but communicate appl. to State	Adjourn all appl.
Case name and year, in chronological order					
Ananyev and others v. Russia, 2012	**x**				
Torregiani v. Italy, 2013			**x**		
M.C. and others v. Italy, 2013			**x**		
Neshkov and others v. Bulgaria, 2015	**x**				
Varga and others v. Hungary, 2015	**x**				
W.D. v. Belgium, 2016					**x**
Rezmives and others v. Romania, 2016			**x**		
Tomov and others v. Russia, 2019					**x***
Sukachov v. Ukraine, 2020	**x**				

** in Tomov and others, the Court only mentioned that it would adjourn the adjudication, but did not specify whether applications were still communicated to the government.*

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