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The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges

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1. Introduction

The fiftieth anniversary of the European Court of Human Rights this year is an occasion for both celebration and apprehension. The Court started functioning in 1959 at the heart of the Council of Europe, an organisation set up after World War II to protect democracy against dictatorship and thereby to avoid the recurrence of the massive human rights violations of the war. From a timid beginning the Court has grown into a full-time institution successfully dealing with thousands of cases each year. Its case law is generally perceived to be among the most developed and extensive of all international human rights institutions and most of its judgments are routinely implemented by the state parties to the European Convention on Human Rights (ECHR).

However, for over a decade dark clouds have been gathering over Strasbourg. The number of applications has been rising so sharply – partly due to the accession of a large number of new state parties to the ECHR – that the very work and survival of the Court seems to be at risk. Or, as one scholar has put it, the Court is fighting with its back to the wall.[2] It is precisely because of these high numbers that the Court has started to deal creatively with large-scale violations of human rights by way of so-called pilot judgments. This article will assess this new phenomenon which holds the promise of being the most creative tool the Court has developed in its first fifty years of its existence. First, it will look at what pilot judgments are and in which cases the Court has applied the pilot methodology. Secondly, the main reasons for setting up the pilot judgment procedure will be considered. Finally, this article will analyse the challenges the pilot judgment procedure faces, such as its legal basis and the position of applicants in comparable cases.

2. Pilot Judgments: Combining Individual and General Redress

A pilot judgment could be said to address a general problem by adjudicating a specific case. This is done by going beyond the mere determination that the ECHR has been violated: in a pilot judgment the Court also gives general indications on how a state

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[2] Stéphanie Lagoutte, 'The Future of the European Human Rights Control System: Fighting with Its Back to the Wall', in: Lagoutte a.o. (eds.), *Human Rights in Turmoil. Facing Threats, Consolidating Achievements* (Leiden: Martinus Nijhoff Publishers 2007).

should remedy the underlying problem. Often this will involve legislative changes, for example when a national remedy is non-existent or insufficient. In doing so, the state concerned is called upon to resolve comparable cases. The Court's former President, Luzis Wildhaber, has identified up to eight different features of a pilot judgment.[3] I will enumerate them here, since they provide an overview of what a pilot judgment includes in its full-fledged form: (1) the finding of a violation by the Grand Chamber which reveals that within the state concerned there is a problem which affects an entire group of individuals; (2) a connected conclusion that that problem has caused or may cause many other applications to be lodged in Strasbourg with the European Court; (3) giving guidance to the state on the general measures that need to be taken to solve the problem; (4) indicating that such domestic measures work retroactively in order to deal with existing comparable cases; (5) adjourning by the Court of all pending cases on the same issue; (6) using the operative part of the pilot judgment to "reinforce the obligation to take legal and administrative measures", as Wildhaber phrased it; (7) deferring any decision on the issue of just satisfaction until the state undertakes action; (8) informing the main Council of Europe organs concerned of progress in the pilot case. The latter would include the Committee of Ministers, as the responsible organ for the Supervision on the execution of the Court's judgments, the Parliamentary Assembly, and the Human Rights Commissioner.

The first time the Court tested the pilot judgment procedure was the Polish case of Broniowski – which is the judgment on which Wildhaber based his enumeration of characteristics.[4] The case had its origins in one of the legacies of World War II, when the Polish state was moved westwards. Large parts of the east of Poland were incorporated into the Soviet Union, in what today are the states of Ukraine, Belarus, and Lithuania. The Polish inhabitants of those areas were forced to move westwards and under so-called "Republican Agreements" between the Polish authorities and the Soviet republics, Poland undertook to compensate the more than one million displaced persons. This was mostly done by giving them land in the newly acquired western parts of Poland. However, a group of around 100,000 people did not receive any compensation. Since they came from the territories beyond Poland's new eastern border, the Bug River, their claims for compensation were called the Bug River claims. Broniowski was the heir of one of those people. Although, as a lawful heir, he had a right to compensation, he did not receive it. Polish Court's, including the Supreme Court and the Constitutional Court found the state's actions and regulatory framework, which heavily reduced the possiblity to receive any compensation, contrary to the constitution. These judicial findings did not improve Broniowski's situation. Therefore, he brought his case to Strasbourg, where the European Court of Human Rights found a violation of the right to peaceful enjoyment of one's possessions.

Broniowski's case could simply have ended up on the long list of property restitution cases which the Court has been dealing with over the past decade. The Grand

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[3] Luzius Wildhaber, 'Pilot Judgments in Cases of Structural or Systemic Problems on the National Level', in: Rüdiger Wolfrum & Ulrike Deutsch (eds.), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Berlin: Springer Verlag 2009) pp. 69-75, at p. 71.

[4] ECtHR, *Broniowski v. Poland*, 19 December 2002 (admissibility), Appl.no. 31443/96. The decisions on the merits and on the friendly settlement reached were decided on 22 June 2004 and 28 September 2005 respectively. The facts described here are taken from the Court's decisions and judgments in this case.

Chamber decided, however, to specifically acknowledge that the applicant's case was part of a wider problem. The Chamber held that the violation "originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons"[5], namely the identifiable group of the Bug River claimants. This could lead to many new and well-founded applications by applicants placed in a similar situation as Broniowski. The Court even specifically referred to the 167 cases of Bug River claimants pending at that moment and the over 80,000 people affected by the lack of compensation. It assessed that this did not only imperil the effectiveness of the supervisory mechanism of the ECHR, but also that it was "an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs."[6] It is at that point that the Court went beyond its established case law. Until then it had always held that when it found a violation of the Convention, it was in principle upon the state party to choose the manner of remedying a situation.[7] But in *Broniowski* the Grand Chamber concluded that the state had to take general measures which would deal with the whole group of affected Bug River claimants. Thus, not only the individual case, but also the broader problem had to be tackled. The Court even specified the following about such measures:

> [T]he Court considers that the respondent State must, primarily, either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found, in respect of the applicant, to have been in breach of the Convention, or provide equivalent redress in lieu. As to the former option, the respondent State should, therefore, through appropriate legal and administrative measures, secure the effective and expeditious realisation of the entitlement in question in respect of the remaining Bug River claimants, in accordance with the principles for the protection of property rights laid down in Article 1 of Protocol No. 1, having particular regard to the principles relating to compensation.[8]

The duty to take general measures then innovatively reappeared in the operative part of the judgment which summarizes the holdings and decisions the Court takes in a particular judgment. This reappearance truly shows that the Court broke new ground in *Broniowski*. Of course, in earlier cases the Court also regularly had to acknowledge that a violation did not follow just from an act or omission by a state party, but was a result of national legislation. The early *Marckx* judgment (1979)[9] on inheritance discrimination is a case in point in which the Court indicated such an underlying problem. Sometimes, the Court even made suggestions for actions to be undertaken by the state[10] – but never in the operative part of the judgment until *Broniowski*.

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[5] *Broniowski* (merits) para. 189.
[6] Ibid., para. 193.
[7] See for a fuller overview of the Court's case-law on this issue, my 'Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* vol. 1 (2008) pp. 129-153.
[8] *Broniowski* (merits) para. 194.
[9] ECtHR, *Marckx v. Belgium*, 13 June 1979 (Appl.no. 6833/74).
[10] E.g. ECtHR, *Scozzari and Giunta*, 13 July 2000 (Appl.nos. 39221/98 & 41963/98). For these and other cases, see: Lech Garlicki, 'Broniowski and After: On the Dual Nature of "Pilot Judgments"', in: Lucius

In *Broniowski,* the Court relegated the matter back to the Polish authorities in order to take such general measures and to reach a friendly settlement with the applicant on just satisfaction. In addition, the Court decided to adjourn consideration of other Bug River cases. A friendly settlement between Broniowski and Poland was indeed reached on his particular case in September 2005. More importantly changes happened on the domestic level. Just a few months after the Grand Chamber's judgment, the Polish Constitutional Court declared the newest version of the Bug River compensation law unconstitutional. Early in 2005 the government then drafted a new bill, which *inter alia* made pecuniary compensation possible for all remaining claimants, up to a maximum of 15% of the original value of their property. Following debate in parliament, the ceiling was raised to 20% and the law was approved in the summer of the same year. In September, the Court then decided to strike Broniowski's case out of the list.

In this friendly settlement judgment the Court itself first used the wording "pilot judgment" to refer to the judgment on the merits. The Court stressed that it was important "to have regard not only to the applicant's individual situation but also to measures aimed at resolving the underlying general defect in the Polish legal order identified in the principal judgment as the source of the violation found."[11] The Court accepted that the new 2005 law was designed to take away practical and legal obstacles for the Bug River claimants and that it addressed both the situations of existing claimants and of the future functioning of compensation for this group. The Government had indicated that the Polish system also offered possibilities for people whose cases were pending before the European Court to seek compensation as a result of the damage flowing from the systemic violation as established by the Court in its judgment on the merits. The Court thus concluded that there was an "active commitment"[12] by Poland to remedy the systemic problem. Interestingly, it commented that it was eventually for the Committee of Ministers to evaluate the Polish measures and their actual implementation, but for its own decision-making evaluated the measures as a "positive factor".[13] One may note at this point that the division of tasks between the Court (adjudication) and the Committee of Ministers (supervision of implementation) thus slightly shifted towards the Court. The Court seems to make a *prima facie* assessment based on national reforms undertaken and a positive commitment by the state concerned, without testing in detail how this works out in practice. That latter and essential task still remains for the Committee of Ministers.

The *Broniowski* saga does not end here, however. On 4 December 2007 the Court decided in the *Wolkenberg and others*[14] decision to strike out of its list a number of the cases of Bug River claimants whose applications it had adjourned during the pilot procedure. A large group of these applicants had been offered compensation by Poland under an accelerated procedure in 2006. But many of them were not satisfied with the amount (20% of the original value) they received[15] and indicated that they wished to pursue their application in Strasbourg. In *Wolkenberg* the Court evaluated the 20% compensation ceiling and found it not to be unreasonable. The Court also assessed, once

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Caflisch a.o. (eds.), *Human Rights – Strasbourg Views. Liber Amicorum Luzius Wildhaber* (Kehl am Rhein: Engel Verlag 2007) pp. 177-192, at pp. 182-183.

[11] *Broniowski* (friendly settlement), para. 37.

[12] Ibid., para. 42.

[13] Ibid.

[14] ECtHR, *Wolkenberg and others*, 4 December 2007 (Appl.no. 50003/99).

[15] Wildhaber (2009) p. 72.

again, the broader issue: it evaluated how the compensation scheme had functioned since its introduction in 2005 and held that the system seemed to function satisfactorily, although improvements in its efficiency were still necessary. It concluded by further clarifying its own function in a pilot procedure: "the Court's role after the delivery of the pilot judgment and after the State has implemented the general measures in conformity with the Convention cannot be converted into providing individualised financial relief in repetitive cases arising from the same systemic situation."[16] The pilot procedure cycle finally ended in October 2008 when the Court struck out the last 176 Bug river claimant cases.[17]

The trickle of fresh water caused by the first pilot procedure quickly turned into a small stream when from the autumn of 2005 onwards various sections of the Court started to issue pilot judgments. In addition, the Grand Chamber also issued new pilot judgments. All of these can be characterised as variations on a theme: although they display some features of a full-fledged pilot procedure, they mostly do not reflect all eight features as identified by Wildhaber.

In *Lukenda*, a judgment concerning the length of proceedings in Slovenia, the Third Section of the Court noted that "that the violation of the applicant's right to a trial within a reasonable time is not an isolated incident, but rather a systemic problem that has resulted from inadequate legislation and inefficiency in the administration of justice. The problem continues to present a danger affecting every person seeking judicial protection of their rights."[18] The Court "encourage[d]" Slovenia to put in place effective remedies at the domestic level.[19] The other 500 pending Slovenian cases on the same issue were not adjourned, but the Court held in the operative part of the judgment that Slovenia "must, through appropriate legal measures and administrative practices, secure the right to a trial within a reasonable time." In the ensuing months the Court dealt with around 200 comparable Slovenian cases[20], perhaps as a way to keep up the pressure on Slovenia. The state party meanwhile introduced legislation to deal with the problem. Since this new national scheme for acceleration of procedures and for compensation also covered those applicants whose cases were already pending in Strasbourg, the Court declared such cases inadmissible once the domestic scheme was in place and operational.[21]

In a dissenting opinion in *Lukenda*, judge Zagrebelsky qualified the Court's call for appropriate legal measures and administrative practices" as both too far-reaching and too general. He convincingly argued that such a Court order without further specification of the context in Slovenia did not help the country itself nor the Committee of Ministers in its supervisory task. He also indicated that in his view pilot judgments should only be issued by the Grand Chamber – and there he is in line with former Court president Wildhaber. Zagrebelsky underlined that this was important for reasons of coherence of

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[16] *Wolkenberg*, para. 76.
[17] ECtHR, *Press Release First "pilot judgment" procedure brought to a successful conclusion Bug River cases closed*, 6 October 2008.
[18] ECtHR, *Lukenda v. Slovenia* , 6 October 2005 (Appl.no. 23032/02) para. 93.
[19] Ibid., para. 98.
[20] Erik Fribergh, 'Pilot Judgments from the Court's Perspective', in: Council of Europe, *Towards Stronger Implementation of the European Convention on Human Rights. Proceedings of the Colloquy organised under the Swedish Chairmanship of the Committee of Ministers of the Council of Europe* (Strasbourg: Council of Europe 2008) pp. 86-93, at p. 91.
[21] ECtHR, *Korenjak v. Slovenia*, 15 May 2007 (Appl.no. 463/03).

case-law and also because it would be the best way to discus the systemic problems. One could add that it would be wise for an additional reason: by dealing with a case through the Grand Chamber, the European Court of Human Rights gives a clear signal that it takes a systemic problem seriously, which might help the respondent state to do the same.

In spite of these doubts as to the appropriateness of having sections of the Court issue pilot judgments, it happened several times. In *Xenides-Arestis*[22], the Third Section of the Court dealt with a case of denial of access to property in northern Cyprus, occupied by Turkey, and the lack of remedies on the national level. The judgment reflected that this was a problem affecting a large number of people. The Court held in the operative part of its judgment that Turkey, as the respondent state, had to "introduce a remedy which secures the effective protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 in relation to the present applicant as well as in respect of all similar applications pending before the Court. Such a remedy should be available within three months from the date on which the present judgment is delivered and redress should be afforded three months thereafter." As in *Broniowski*, consideration of all other cases (around 1,400) was adjourned. A year later the Court decided to award the applicant a large sum in terms of just satisfaction, since the applicant and the state had failed to reach a friendly settlement. Nevertheless, on the broader problem the Court did give the state the benefit of the doubt. It took note of the fact that the new compensation and restitution mechanism set up in Northern Cyprus in the intermediate time had "in principle" lived up to the standards indicated in the Court's earlier judgments and decisions.[23] One should note, however, that in subsequent years the Court continued to find violations of the Convention in similar cases of applicants whose cases had been already lodged in Strasbourg before the judgment in *Xenides-Arestis*.[24]

The Court even started to label judgments retroactively as pilot judgments. In the January 2006 decision in the case of *İçyer*[25] it declared a petition in one of the many cases of internally displaced persons in Eastern Turkey inadmissible, because of failure to exhaust a new domestic remedy: a compensation mechanism. In that decision the Court referred back to its judgment in the comparable case of *Doğan and others*[26] of 29 June 2004 – that is exactly a week after the *Broniowski* judgment on the merits. That judgment had been the incentive for Turkey to set up the new mechanism. Consequently, approximately 1,500 cases were dismissed in Strasbourg for failure to exhaust this domestic remedy.[27]

Then there are cases which started at the Chamber level, but at the request of one of the parties were referred to the Grand Chamber. In the Polish case of *Hutten-Czapska*[28]

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[22] ECtHR, *Xenides-Arestis v. Turkey* (merits), 22 December 2005 (Appl.no. 46347/99).

[23] ECtHR, *Xenides-Arestis v. Turkey* (just satisfaction), 7 December 2006 (Appl.no. 46347/99) para. 37.

[24] See e.g. *Kyriakou v. Turkey* (merits), 27 January 2009 (Appl.no. 18407/91). Note specifically the dissenting opinions of the Turkish judge Karakaş in this and similar judgments on the particular issue of the newly created domestic remedy.

[25] ECtHR, *İçyer v. Turkey*, 12 January 2006 (Appl.no. 18888/02).

[26] ECtHR, *Doğan and others v. Turkey*, 29 June 2004 (Appl.nos. 8803-8811/02 a.o.)

[27] Costas Paraskeva, 'Human Rights Protection Begins and Ends at Home: The "Pilot Judgment Procedure" Developed by the European Court of Human Rights', *Human Rights Law Commentary* vol. 3 (2007).

[28] ECtHR, *Hutten-Czapska v. Poland* (Grand Chamber), 19 June 2006 (Appl.no. 35014/97). The Chamber judgment of the Fourth Section was delivered on 22 February 2005. For a detailed analysis of the inteprlay between the European Court and the domestic courts in this case, see: Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and

the Grand Chamber did follow the Chamber's lead in holding that a full pilot procedure was the appropriate way to deal with the issue – contrary to what the Polish government had contended. The case concerned the system of rent restrictions which were meant to protect tenants against extreme rent increases. These restrictions were so tight that landlords could not increase the rent on their property sufficiently and were in effect making losses. The issue affected around 100,000 landlords and even more tenants. Although only eighteen comparable cases were pending when the Grand Chamber dealt with the case, it held that

> [T]he identification of a "systemic situation" justifying the application of the pilot-judgment procedure does not necessarily have to be linked to, or based on, a given number of similar applications already pending. In the context of systemic or structural violations the potential inflow of future cases is also an important consideration in terms of preventing the accumulation of repetitive cases on the Court's docket, which hinders the effective processing of other cases giving rise to violations, sometimes serious, of the rights it is responsible for safeguarding.[29]

In the operative part of the judgment, the Grand Chamber ordered to put and end to the systemic violation and to establish and guarantee a fair balance between "the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention". Two years later, in 2008, the Grand Chamber struck the case of the list, after the applicant and the government had reached a friendly settlement and after Poland had shown an "active commitment" by taking various steps to reform the rent control system.[30] Again, specific supervision was left to the Committee of Ministers.

In the Italian case of *Sejdovic*[31] the Court found a violation of the right to a fair trial in the context of *in absentia* convictions. In the operative part of the judgment, the Court found that this violation originated in systemic problems in domestic law and practice and that the state party thus had to take general measures, going beyond the facts of the particular case. After the Chamber's judgment, Italy did initiate legal reforms in order to bring its practice in line with the European Convention. The new laws did not have retroactive effect on the case of Mr Sejdovic, however. This Italian willingness to undertake action led to an interesting reaction by the Grand Chamber. Although it acknowledged the systemic nature of the problem, it did not call for general measures, but only noted the reforms. In the operative part of the judgment it limited itself to the finding of a violation in the specific case.[32]

In a similar vein, the Grand Chamber in *Scordino v Italy*[33] found a double systemic problem. This concerned on the one hand systemic failures in the system of compensation after expropriation and on the other hand in the operation of the so-called *Pinto Act* which offered a remedy for excessively long judicial proceedings. Although

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Eastern European States to the Council of Europe, and the Idea of Pilot Judgments', *Sydney Law School Legal Studies Research Paper* No. 08/135 (2008). At: ssrn.com/abstract=1295652.

[29] Ibid., para. 236.

[30] ECtHR, *Hutten-Czapska v. Poland* (friendly settlement), 28 April 2008 (Aappl.no. 35014/97) para. 43.

[31] ECtHR, *Sejdovic v. Italy* (Chamber judgment), 10 November 2004 (Appl.no. 56581/00).

[32] The Grand Chamber judgment was rendered on 1 March 2006.

[33] ECtHR, *Scordino v. Italy* (Grand Chamber), 29 March 2006 (Appl.no. 36813/97).

Italy was requested to address the broader problem within a fixed time limit of six months, the Court did not mention this in the operative part of the judgment nor did it adjourn similar cases. This seemed to be part of a wider pattern of caution by the Grand Chamber. In all its cases concerning Italy in the spring of 2006, the Grand Chamber discussed systematic problems in the merits and not in the operative part of its judgments.[34]

All of the above shows that a variety of pilot or quasi-pilot judgments has evolved over the years. How does this variety reflect the eight features of the pilot procedure identified by Wildhaber? The clearest way to establish a typology is to think of the range of pilot-like judgments as a continuum. At the most traditional end of the continuum are those judgments which like *Marcxk* point to a broader issue underlying a particular violation, for example domestic laws. At the other extreme is *Broniowski* which reflects all eight features. In some judgments the Court has only pointed at broader or systemic problems, in others it has taken a further step by indicating – in varying degrees of precision – what kind of action a state party to the European Convention needs to take. These two elements are indeed the core of a pilot judgment: (1) the identification of a systemic problem[35] and (2) explicit guidance given by the Court to the state concerned.[36] This implies that a situation could lead to many applications in Strasbourg. Whether such a judgment is pronounced by a Grand Chamber or not does not alter, in my view, the qualification as a pilot judgment. Of course, as indicated above, it would be very commendable if only the Grand Chamber would deliver pilot judgments. It adds to the authority of the procedure. The same goes for the choice between including the indications for state action only in the merits of the judgment or also in its operative provisions. This choice does not influence the character of the judgment as a pilot judgment, but of course inclusion in the operative provisions does increase its legal authority and persuasive effect.[37] A final way to put pressure on the respondent state is to include a time limit within which the state has to effect domestic changes.[38] This is to a certain extent a risky step that could backfire, since the authority of the Court is explicitly challenged if the state does not comply with such a time limit.

Interestingly, the pilot judgment procedure is both looking forward and backward. On the one hand it requests state parties to remedy past injustice to the person affected in the particular case and to those in a similar situation. On the other hand it is also future-oriented by indicating, albeit often in broad strokes of the legal brush, the actions a state should pursue in order to take away the underlying cause of the violation.[39] This Janus-faced feature of a pilot procedure fits in well with general public international law. When an international obligation has been violated by a state, there is not only a duty to repair,

[34] Garlicki (2007) p. 187.
[35] The existence of which can often be assumed if a large group of people is affected, which can – but not necessarily so – be reflected in the number of applications pending in Strasbourg.
[36] Fribergh (2008) p. 91.
[37] Garlicki (2007) p. 190.
[38] See e.g. ECtHR, *Burdov v. Russia* (No. 2), 15 January 2009 (Appl.no. 33509/04).
[39] Paul Mahoney in the discussion following the Presentation by Luzius Wildhaber, in: Wolfrum & Deutsch (2009) pp. 77-92, at p. 84.

but also a duty of non-repetition. The future-oriented aspect of the general measures ordered in pilot judgments relate to this latter duty.[40]

3. Underlying reasons for the creation of the pilot judgment procedure

The pilot procedure originated in the discussions on the drafting of Protocol 14 of the ECHR which was meant to reform the supervisory mechanisms of the Convention.[41] The procedure was the result of discussions and cooperation between the Court, the state parties to the Convention, and the Steering Committee on Human Rights of the Committee of Ministers. In spite of the Court's urging, the Steering Committee decided not to include the pilot judgment procedure in the Protocol. It was of the opinion that pilot judgments could be issued even within the existing legal framework.[42] The Committee of Ministers, at the moment of adopting Protocol 14 in May 2004[43], urged the Court to start using the pilot procedure – without using the word "pilot" as such. It invited the Court to:

> I. as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments;
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> II. to specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the Court.[44]

In the resolution, two underlying reasons for this are mentioned. The first is to safeguard the effectiveness in the long run of the Convention's supervisory mechanism – a clear reference to the Court's overwhelming workload. The Court has not been able to keep pace with the influx of new cases. This has led to an increasing backlog and eventually will indeed threaten its entire supervisory function. The number of pending cases was almost a 100,000 at the end of 2008.[45] Since many of the cases which are declared admissible – in themselves a small minority of the total amount of applications – are

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[40] Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures', *Human Rights Law Review* vol. 7 (2007) pp. 396-411, at pp. 408-410.

[41] At the moment of writing this Protocol has still not entered into force

[42] Costas Paraskeva, 'Returning the Protection of Human Rights to Where They Belong, At home', *The International Journal of Human Rights* vol. 12 (2008) pp. 415-448, at p. 434, including references to the relevant Council of Europe documents.

[43] Of course Protocol 14 itself and the later Protocol 14-bis were both meant to increase the Court's efficiency as well. Among other matters, they enable three-judge panels – instead of seven judges – to deal with repetitive cases.

[44] Committee of Ministers, resolution Res(2004)3 on judgments revealing an underlying systemic problem, 12 May 2004.

[45] ECtHR, *Annual Report 2008*, to be found on www.echr.coe.int.

cases concerning comparable situations, there seemed to room for improvements in efficiency. Undoubtedly the pilot judgment procedure can serve as part of the solution to deal with states which are "repeat offenders".[46] It is obvious, that if the Court could help to solve a large-scale or systemic problem, this may prevent numerous new applications and even make it possible for the Court to strike a large number of comparable cases out of its list.

The second underlying problem mentioned in the Committee of Minister's resolution is the states' need to receive guidance in identifying systemic problems and in tackling them. The more clearly the Court can indicate which parts of a country's laws or practice are contrary to the Convention, the easier it becomes for a state to bring the national situation in line with ECHR standards.[47] If the Court would only find a violation, there is a risk that a reformed situation in a particular country leads to new violations of the Convention. Potentially, this would be the start of an endless and time-consuming process of trial and error, which serves neither the Strasbourg institutions nor the state concerned. In this sense, the pilot procedure includes a pedagogical element: not only indicating what is wrong, but also shedding some light on the correct path to be taken.

The Court responded very quickly to the Committee of Minister's call: the *Broniowski* judgment was issued within a few week's after the resolution. One could add that the friendly settlement decision of the Court in that case explicitly reflects the two underlying reasons for the pilot procedure.[48] The two reasons are closely connected to the third and most important underlying reason to create the pilot procedure: the presence and accession of a number of states with large-scale problems of human rights. The end of the Cold War at the start of the 1990s marked the starting point for a massive eastward expansion of the reach of the ECHR, with the number of state parties doubling in a bit more than a decade. Obviously, this in itself eventually led to a large increase in applications in Strasbourg. Most of the newly acceding countries were grappling with large-scale reforms in the transition from authoritarian communist states to free-market democracies based on the rule of law. Issues ranging from the implementation of judgments to large-scale restitution and compensation schemes for properties nationalised in the communist era all surfaced. This partially changed the role of the Strasbourg Court from fine-tuning the situation in relatively stable and functioning societies to having to deal with large-scale and systemic human rights problems.[49]

However, it would be a misunderstanding to solely ascribe the rise of the pilot procedure to the accession of these Middle and Eastern European states. The earliest example of a truly large-scale problem reaching Strasbourg was the range of Italian complaints about excessively long domestic judicial proceedings.[50] Another long-time state party to the Convention, Turkey, was equally a source of numerous repetitive applications. One the one hand this was due to problems arising from the Turkish

[46] The term is used by Philip Leach in his 'Beyond the Bug River – A New Dawn For Redress Before the European Court of Human Rights, *European Human Rights Law Review* (2005) pp. 148-164, at p. 159.
[47] The British government raised this problem in: ECtHR, *Hirst v. the United Kingdom (no.2)* (Grand Chamber), 6 October 2005 (Appl.no. 74025/01) paras. 83-84.
[48] See specifically para. 35 of *Broniowski* (friendly settlement).
[49] For more on this shift, see Sadurski (2008).
[50] See e.g. the Italian case in which the Court for the first time concluded that the extent of the issue was not a series of isolated incidents, but could be labelled as a "practice": ECtHR, *Botazzi v. Italy*, 28 July 1999 (Appl.no. 34884/97) para. 22.

occupation of Northern Cyprus, on the other hand from the internal armed conflict in Eastern Turkey between Turkish security forces and Kurdish opponents. Both situations led to larger-scale displacement and loss of housing and property. Since Turkey accepted the Court's jurisdiction only from 1990 onwards, cases related to these issues started reaching the Court in the same decade as the Eastern European ones. In addition, violent conflicts broke out or endured not only in Eastern Turkey, but also in the Balkans and the Caucasus. The legacy of those wars, among many other sad effects, has compounded Strasbourg's caseload problem.

The pilot procedure has thus arisen out of necessity. From the side of the Court this necessity was the incoming flow of applications that became too large to handle efficiently. For the states parties, united in the Committee of Ministers, this was a call for more clarity on how to bring their laws and policies in line with the European Convention of Human Rights. Both problems arose from three kinds of large-scale human rights violations: systemic problems with the rule of law and/or the functioning of the judiciary (Italy), problems of transition (most of Middle and Eastern Europe), and legacies of recent armed conflict (Turkey, Russia, states of the former Yugoslavia) and combinations of these.

4. Challenges for the Pilot Procedure

The pilot procedure has now been tested in a number of different situations. This has occurred under rather widespread enthusiasm. Both Lord Woolfe (2005) and the Committee of Wise Persons (2006) have in their respective reports on reforming the Court, recommended that the Court continue to use the procedure.[51] Nevertheless, this testing period has led to a number of doubts and concerns about the procedure. The first is of a legal character: the legal basis of the pilot judgments is contested and has been called "fragile" by one of the current judges.[52] As we have seen above, the Committee of Ministers – and one may thus assume most member states – did not in principle consider that any treaty change was needed to start using the pilot judgment procedure. Indeed, from the beginning the Court has based its pilot judgments on an existing ECHR provision: Article 46. This Article provides that state parties are legally bound "to abide by the final judgment of the Court in any case to which they are parties." Traditionally, the Court had restricted itself to finding violations and sometimes ordering just satisfaction under Article 41 ECHR in the form of monetary compensation to be paid by the state to the victim. This was in line with the intention of the drafters of the ECHR who purposefully left out of the Convention's text any powers for the Court to order broader measures such as the annulment or amendment of national legislation.[53] In *Broniowski* the Court summarised its interpretation of Article 46 by holding that it included the obligation:

[51] Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, December 2005, p. 6 and p. 40; *Report of the Group of Wise Persons to the Committee of Ministers*, 15 November 2006, CM(2006)203, para. 105.
[52] Garlicki (2007) p. 191.
[53] Buyse (2008) p. 144.

> [N]ot just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment.[54]

Arguably, the latter enables the Court to give indications to the state concerned. As judge Zupančič argued in a concurring opinion to *Broniowski* this should be justified not so much by pragmatism and efficiency, but rather by logic and justice.[55] He contended that it logically follows from the system of the Convention that in some situations it does not make sense to afford only monetary compensation. If for example a violation is ongoing, any compensation can only remedy the violation up to that point, but does not change the future. Likewise, he argued, in cases of structural violations, individual compensation does not solve the problems of people in comparable situations. Whereas the first example indeed represents strong legal logic to make the Convention effective, the second example (which reflects the situation in *Broniowski*) is more of a moral justification. The strongest *legal* justification is indeed that of making the Convention practical and effective in the state parties on the domestic level. This can only be done if the state party indeed accepts guidance from the Court on how to make its laws and policies more "ECHR-proof". Judge Zagrebelsky, in a partly dissenting opinion in *Hutten-Czapska*, argued against the use of ordering general measures in the operative part of the Court's judgments. He took the position that the Court went "outside its own sphere of competence" and entered "the realm of politics". He pointed to the fact that the pilot procedure was not included in Protocol 14. As a counter-argument one may argue that the state parties themselves, through the Committee of Ministers, have asked the Court for clearer directions. Thus the consent of states with the Court's functioning seems to be there. This does not rule out that practical problems may arise if a state, more specifically the executive, in a *particular* case – such as *Hutten-Czapska* – is not keen to cooperate. I will return to that issue below.

The Court as a whole has now taken a pragmatic approach in the controversy about the legal basis. In reaction to the *Report of the Group of Wise Persons*, the Court has stated that more experience is needed in practice before undertaking any new treaty changes.[56] This would also entail, in the Court's view, evaluating how efficient the pilot procedure is in helping state parties to deal with systemic problems.[57] Put differently, the Court wants to test whether the key fits the lock before asking for a brand new door. It is also in this sense that the wording 'pilot' in 'pilot procedure' is probably best

[54] *Broniowski* (merits), para. 192. This in itself was a quotation from an earlier case: ECtHR, *Scozzari and Giunta v. Italy*, 13 July 2000 (Appl.nos. 39221/98 and 41963/98) para. 249.

[55] It should be noted that later on, in a partly dissenting opinion in the case of Hutten-Czapska (merits), he argued almost the exact opposite, by holding that *Broniowksi, Hutten-Czapska* and *Lukenda* are "pragmatic decisions that avert an increase in the quantity of cases."

[56] One may note that this is a completely opposite position from the stance taken years earlier by the Court when Protocol 14 was discussed. See section 3 above.

[57] *Opinion of the Court on the Wise Persons' Report*, 2 April 2007, p. 5.

understood.[58] As the difficulties with the ratification of reform Protocol 14 have shown, this seems wise.

A second concern about the pilot judgment procedure is the situation of applicants in comparable situations whose cases are already pending in Strasbourg. If, as in some pilot judgments, a large number of parallel applications is frozen, this obviously affects the interests of those applicants. Especially when it concerns complaints about trials that have taken too long, freezing an application at the international level would be ironic, to say the least. Such a measure seems only to benefit the Court itself, as the defendant state will in all probability not feel the "freeze" as pressure. Thus, caution is called for: such decision requires a careful balancing between the interests of such parallel applicants and the efficiency of the Court. This is indeed the path that the Court generally seems to take: only in some pilot judgments has it frozen pending cases. As to the referral of cases back to the domestic level in case of the creation of a new remedial mechanism, the Court has declined to do that for those applications where it has already decided on the merits, but not yet on just satisfaction.[59] One could add, that – in the best interest of the parallel applicants and to put sufficient pressure on the state – freezing of cases should only be done if the request to take general measures is accompanied by a specific time-limit.[60]

Another concern is whether the consideration of a particular case enables the Court to address the underlying general or systemic problem to a sufficient extent. Each application has its particularities and some applications will only address one or a few aspects of a larger issue. For example, one application may be a complaint about the excessive time a national restitution mechanism takes to handle cases, whereas a second one may only concern the height of the compensation. Ideally, the Court would in such a case choose an application as a pilot case which concerns both issues. This requires particular care by the Court's registry in the selection process of a "suitable" application.

Crucially, the whole pilot judgment procedure depends to a large extent on the defendant state's willingness to cooperate. Since a pilot judgment by its very character addresses a broader situation than only the predicament of an individual applicant, state cooperation could be called its Achilles' heel. The first two full pilot procedures, *Broniowksi* and *Hutten-Czapska*, show how different a state's attitude can be. Whereas in *Broniowski* the Polish government was fully willing to cooperate, in *Hutten-Czapska* the same state contested that a pilot procedure should be used at all. This can be explained by the fact that in *Hutten-Czapska* the underlying issue led to a wide divergence of views between the highest Polish courts on the one hand and the executive and the legislative on the other hand. The European Court in this case operated in alignment with the Polish judiciary, both of which defended the rule of law.[61] Eventually, the pilot procedure in the case did lead to reforms. One may question, however, how willing a state is to cooperate when it concerns issues with even higher state interests at stake, such as large scale violations of the right to life in the context of an armed conflict.

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[58] Another explanation is that the single case serves as a test case or 'pilot' to try and solve the broader issue. However, such an interpretation does not set pilot cases apart from other many other cases involving larger problems. See also Sadurski (2008) p. 16, on a short discussion on the opaqueness of the word 'pilot' in this context.

[59] E.g. ECtHR, *Demades v. Turkey* (just satisfaction), 22 April 2008 (Appl.no. 16219/90) para. 23; *Xenides-Arestis* (just satisfaction) para. 37.

[60] For the most refined time-limit indications to date, see *Burdov (No.2).*

[61] For a full account, see Sadurski (2008).

State cooperation is linked to a final concern about pilot judgments: enforcement and implementation. The execution of a pilot judgment requires much more from a state than simply paying compensation in an individual case: very often domestic legal changes are necessary and in all cases changes in policy and practice. This means that it becomes more complex to assess state progress.[62] Traditionally, the Committee of Ministers of the Council of Europe performs this task. Nevertheless, as described above, the Court in its judgments on just satisfaction sometimes assesses whether the state has *prima* facie shown willingness to undertake reforms. In their dissenting opinion in *Hutten-Czapska* (friendly settlement), judges Jaeger and – once again – Zagrebelsky – argue that the Court is hardly equipped to "express a view in the abstract and in advance on the consequences of the reforms already introduced in Poland and to give a vague positive assessment of a legislative development whose practical application might subsequently be challenged by new applicants." In addition, they point to the need to exercise caution in order not to prejudice future proceedings concerning applications by people who are not satisfied with any newly created domestic remedy. Finally, they refer to the danger of disturbing the balance between the roles of the Court and of the Committee of Ministers. They have a point: domestic reforms could stagnate and then parallel applications which have been sent back to the national level are to a certain extent left out in the cold. On the other hand, large-scale reforms necessarily always require time. In any event, it is clear that strong and efficient supervision by the Committee of Ministers becomes crucial in the case of a pilot judgment procedure.[63]

5. Conclusion

The pilot judgment procedure is a legal novelty which builds on an older trend to look beyond the facts of a particular case and into the underlying systemic problems. What used to be a question of mere rigorous analysis, has now become a necessity for the Court. The rising number of applications concerning systemic or large-scale violations of human rights and the states' call for guidance by the Court have led to experiments with pilot judgments. The pilot judgment can be perceived as part of three larger processes. First, efforts at increasing the efficiency of dealing with applications within the Court itself – the most important part of which are the reforms of Protocol 14 and 14-bis.[64] Secondly, pilot judgments reflect a wider trend of constitutionalization of the Court's work. Through a pilot judgment the Court to a certain extent reviews whether laws and policies conform with the ECHR instead of just assessing whether national authorities have or have not violated human rights in an individual case.[65] Finally, it fits in the broader development of increasing the Convention's effectiveness on the national level.

[62] Michael O'Boyle, 'On Reforming the operation of the European Court of Human Rights', *European Human Rights Law Review* (2008) pp. 1-1, at p. 7.
[63] See also: Amnesty International and others, 'Council of Europe: Comments on Reflection Group Discussions on Enhancing the Long-term Effectiveness of the Convention System', IOR 61/002/2009 (2009) paras. 27-37.
[64] For further suggestions on efficiency reforms, see also: ECtHR, *Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference*, 3 July 2009.
[65] For a more extensive analysis of this issue, see Sadurski (2008).

As seen in the Polish cases, the Court can help to get situations to a tipping point of conformity with the ECHR. The pilot procedure is a promising way to channel the cooperation between national and Strasbourg institutions to improve compliance with the ECHR. Obviously, this depends on a more active role by the primary organ supervising the implementation of the Court's judgments. It is a welcome step that the Committee of Ministers decided in May 2006 to "give priority to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem".[66] In addition, the Parliamentary Assembly has started to prioritize the examination of major structural problems concerning cases in which unacceptable delays of implementation have arisen. This is done *inter alia* by way of visits by Assembly rapporteurs to the countries concerned. All of this shows a commitment by the Council of Europe's institutions to take the issue of structural problems seriously. This support will be crucial for the Court in the years to come.

The pilot judgment procedure is still in its early years and more experience is necessary. Nevertheless – and bearing in mind the concerns about legal basis, the interests of applicants in parallel cases, the choice of the right case as a pilot and other matters – it would be commendable if the Court would devise clear guidelines for itself on how it will deal with the whole process of a pilot judgment from beginning to end, including the selection of pilot cases and the possible freezing of comparable applications. This would serve both the interests of potential applicants and of the state parties to the Convention. If this "pilot" keeps flying, the Court at the very respectable age of fifty will be able to continue to function as the ultimate guardian of human rights throughout Europe.

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[66] Committee of Ministers, *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*, adopted 10 May 2006, CM(2006)90.