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ARTICLE

Special Issue: The Systemic and the Particular in European Law

How "Systematic" is the European Court of Human Rights' Approach to "Systemic" Violations of the Convention?

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Abstract
In analyzing the mission of the European Court of Human Rights, it is common to distinguish between what is akin to "individual justice" and what is more akin to "constitutional justice." The way in which the Court combines the two depends on its "judicial policy." In this contribution, we will examine how the "systemic" nature of the violations complained of affects the "judicial policy."

Keywords: Judicial policy; systemic; structural

A. Introduction

According to its well-known case-law, the European Court of Human Rights's

> [R]ulings serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States.[1]

The above excerpt highlights two distinct purposes of the Strasbourg *jurisdiction*: Deciding the dispute—the short-term purpose—and elucidating the Law, in this case the European Convention of Human Rights—the long-term purpose[2]. Obviously, there is a possibility that those two goals do not always converge. The dispute may be over, for one reason or another. Its resolution may not be any more of much importance to the applicant, for one reason or another. But it may be the "right moment," the Aristotelian *kairos*, for an important legal development: It will therefore be justified to decide the case. Conversely, there will be cases where, for one reason or another, the

[1]Jeronovičs v. Latvia, App. No. 44898/10, para. 109 (July 5, 2016), https://hudoc.echr.coe.int/eng?i=001-165032.
[2]*See* Frédéric Krenc, *"Dire le droit", "Rendre la Justice." Quelle Cour Européenne des Droits de l'Homme?*, 114 R.T.D.H. 311 (2018); Janneke Gerards, General Principles of the European Convention on Human Rights 9 (2019).

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development of the Law will not be served by the resolution of each individual case, or will even be jeopardized by it, because of the "costs," —the excessive expenditure of energy and means dedicated to that resolution.

What emerges is the well–known distinction between "individual justice" and "constitutional justice."[3] The balance to be observed between these two missions is the work of a real "judicial policy," to use the expression of the Court itself in the *Burmych and others v. Ukraine*[4] judgment.

In this contribution, we will examine how the "systemic" nature of the violations complained of affects the "judicial policy." To date, the European Court itself has not provided a theoretical definition of the notion of systemic violation, although it uses it. It can therefore only be approached through a working definition. According to L. Apostol:

> The semantic meaning of the word "systemic" is always taken as opposed to the word "particular." It refers to something that is spread throughout, wide and extensive, affecting a group or a structure as a whole. It should not be confused with "systematic," the word which refers to acting according to some plan or rules of a system.[5]

The "systemic" would thus be opposed to the "accidental," the "one–off" or the "occasional." It would be the expected product, actual or potential, of a structural failure in the prevention and correction of a particular type of human rights violation, whether or not it is intrinsically serious.[6] As a first approach, we will therefore retain a rather broad conception of the notion of "systemic violation," which embraces all the phenomena analytically distinguished by Cecilia Rizcallah and Robin Gadbled in their introduction to this Special Issue : "Systemic violations" would refer, in certain cases, separately or cumulatively, to "breaches with systemic implications," "system deficiencies," "generalized deficiencies/general and persistent breaches of law," or types of violation which justify a "structural judgment/decision." In the subsequent analysis of the different cases, we will try as much as possible to identify the category or categories of systemic violations which, according to the proposed nomenclature, are more particularly at work. Because the ECtHR has no established terminology, we will use "systemic" and "structural" throughout this text as synonyms.

The case-law of the European Court of Human Rights and the explanatory guides authored by it or under its authority[7] frequently mention, and even increasingly so, references to the idea that there are situations of "systemic" violations of the European Convention on Human Rights, in the broad sense, as referred to above. These "systemic" violations would require a different treatment compared to the violations of the Convention which are not "systemic" in their nature. Without any ambition of being exhaustive, we tried, through an explorative mapping exercise, to bring daylight to some of the trends within the Strasbourg judicial practice.

Our review will be conducted on various levels. Some concern the choices made in relation to the *input* of the Court's major activity: (B) the "policy" of "prioritizing" the processing of cases (impact cases); (I) the implementation of certain admissibility criteria, (II); and the choice made in relation to Article 37, Section 1, paragraph 2, of the Convention, (III) other questions arise

[3]Markus Fyrnys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 German L. J. 1231, 1231–32 (2019).

[4]Burmych v. Ukraïne, App. No. 46852/13, para. 152 (Oct. 12, 2017), https://hudoc.echr.coe.int/eng?i=001-192193. See also, for a critical approach of this "judicial policy" in the *Burmych* case, the joint dissenting opinion of Judges Vudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc.

[5]Lilian Apostol, *Methodology for Assessment of Systemic Human Rights Violations*, 9 (Feb. 2020), https://rm.coe.int/final-method-sys-viol-of-human-rights-eng/16809e2a76 (last visited Jan. 25, 2023).

[6]*See* Caroline Boiteux-Picheral, *Quelles Garanties en Cas de Violation Massive/Systémique des Drois Fondamentaux*, 37 Revue des droits et Libertés fondamentaux (2022), http://www.revuedlf.com/droit-fondamentaux/quelles-garanties-en-cas-de-violation-massive-systemique/ (last visited Jan. 26, 2023).

[7]See the documents published on the ECHR Knowledge Sharing platform, https://ks.echr.coe.int/en/web/echr-ks/ (last visited Jan. 26, 2023).

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regarding the *throughput* of the interpretation of the Convention: to what extent has the "systemic" character of a violation an influence on the Court's "policy" with regard to the use of the techniques of "judicial minimalism;" (C) the last questions concern the *output*: the "policy" of implementing the "pilot judgment" procedure and of indicating the measures to be taken on the basis of Article 46 (D).

The objective of our Article is to examine whether there is a homogeneous understanding of the notion of "systemic violation" in these different areas, and whether the "policies" pursued by the Court in each of them appear to be coherent with each other as well as to outline a general "policy" of the Court in dealing with systematic violations of the Convention. In this way, this Article will attempt to be a useful contribution to the question "How 'systematic' is the European Court of Human Rights' approach to systemic violations of the Convention?"

B. "Systematization" of the Input

I. The "Policy" of "Prioritizing" the Processing of Cases (Impact Cases)

It may be disturbing for academics but much of the "recent" reforms of the Convention system and of the Court's functioning have not been inspired primarily by considerations of a conceptual or theoretical nature, but have mostly been motivated by a very pragmatic question. How to process cases in an effective way, given the massive influx of new applications and the existing backlog?

In 2009 already, the Court believed that a policy of prioritizing applications could be helpful so as to allow a fair adjudication in which urgent and important cases are given due consideration. In 2017, the Court slightly adapted its policy.[8] There are seven categories of cases, composed as follows:[9]

I.	**Urgent** applications (in particular risk to life or health of the applicant, the applicant deprived of liberty as a direct consequence of the alleged violation of his or her Convention rights, other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue, application of Rule 39 of the Rule of Court)
II.	Applications raising questions capable of having an **impact on the effectiveness of the Convention system** (in particular a structural or that the Court has not yet examined, pilot-judgment procedure) or applications raising **an important question of general interest** (in particular a serious question capable of having major implications for domestic legal systems or for the European system)
III.	Applications which on their face raise as main complaints issues under **Articles 2, 3, 4 or 5 §1** of the Convention ("core right"), irrespective of whether they are respective, and which have given rise to direct threats to the physical integrity and dignity of human beings
IV.	potentially well-founded applications based on other Articles
V.	Applications raising issues already dealt with in a pilot/leading judgment ("well-established case-law cases")
VI.	Applications identified as giving rise to a problem of admissibility
VII.	Applications which are manifestly inadmissible

On a side note, there is no longer a reference to interstate cases. Indeed, it has been decided that given their specific nature, these cases should not be included in the general scheme—and should be tackled in a separate way.[10]

[8] Eur. Ct. H. R., The Court's Priority Policy, https://www.echr.coe.int/documents/priority_policy_eng.pdf (June 2009).

[9] *Id.*

[10] *Id.* This choice makes sense, of course. Although we are aware that inter-State cases are highly sensitive, and most probably more time-consuming than regular cases, there were over the last decades such a low number of cases, that it is justified to exclude them from the general case-processing mechanisms.

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What is striking about the schedule is not so much that it operates a distinction between various kinds of cases, but rather the criteria the Court uses to distinguish one category from another. Admittedly, the last four categories do not raise that many questions in this respect because they are based on an "obvious" feature, if one takes the text of the Convention and the very process of deciding a case into consideration. Separating issues of admissibility from debates on the merits is quite obvious in view of the Article 35 of the Convention. Similarly, distinguishing cases that have already been decided by a well–established case–law from those where judges may want to take some more time to come up with a solution in an area without many precedents perfectly makes sense. It is clear that cases belonging to categories V, VI and VII can be processed through the mechanism that have been put in place to swiftly deal with "easy" cases, such as single judges or Committees of three judges.[11]

What begs the question are the first three categories. Do not let us be misunderstood: We agree that the distinction the Court operates does make sense, especially from a pragmatic point of view. However, from a more theoretical point of view, it is not evident to defend all of them.

The first group of cases, category I, poses little to no problems. It can be easily understood that where the right to life is at stake, where serious menaces to health are present, or direct deprivation of liberty is at the core of the debate, urgent action is required. The connection with Rule 39 of the Rules of Court is obvious.[12] We would think that these cases are closely related to doing individual justice. The Court's role here could be compared, to some extent and not without some reservation, to that of a *juge des référés/ summary procedure court*. Obviously, the Court can identify serious structural or systemic problems while dealing with such applications, but this is not the main focus of the case itself.

This is different for the second type of cases, category II. The focus here is clearly on "systemic" issues, hence the reference to the pilot judgements. However, it is clear that this category englobes more than the pilot-cases only.

The reference to pilot-judgements is of course a very relevant one. Pilot judgements can be defined indeed as "judgments that the Court qualifies as such, in which the Court identifies the problem that has been given or may give rise to similar applications; and in which the Court orders the remedial measures in the operative provisions of the judgment."[13] Article 61 of the Rules of Court indicates 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." Again, the *rules* make reference to a structural or systemic problem, yet is it not defined what precisely is meant by that. The case–law of the Court gives some illustrations though of what the Court considers to be systemic issues: Excessive length of proceedings,[14] the lack of adequate treatment of imprisoned people of unsound mind having committed unlawful acts,[15] and complaints about compensation in case of mass–scale expropriations.[16] It is far less clear what the precise methodology is that the Court uses to decide whether a complained problem is so systemic that it warrants a pilot procedure.

[11]Eur. Ct. H.R., A Court That Matters/Une Cour qui Compte: A Strategy for More Targeted and Effective Case-Processing (Mar. 17, 2021), https://www.echr.coe.int/Documents/Court_that_matters_ENG.pdf.

[12]Article 39 of the Rules of Court concern interim measures, that is "[A]ny interim measure which they (Chamber, President of the Section or appointed duty judge) consider should be adopted in the interests of the parties or of the proper conduct of the proceedings." The idea is that, while the procedure is pending before the Court, no situation would be created that would have such a negative impact (*de lege* or *de facto*) on the victim, that the outcome of the case would be irrelevant.

[13]Lize Glas, *The Execution Process of Pilot Judgments Before the Committee of Ministers*, 13 Hum. Rts. & Int'l Legal Discourse 73, 80 (2019).

[14]*E.g.,* Rumpf v. Germany, App. No. 46344/06, (Sept. 2, 2010), https://hudoc.echr.coe.int/eng?i=001-139471.

[15]*E.g.,* W.D. v. Belgium, App. No. 73548/13, (Sept. 6, 2016), https://hudoc.echr.coe.int/eng?i=001-166702.

[16]*E.g.*, Broniowski v. Poland, App. No. 31443/96, (June 22, 2004), https://hudoc.echr.coe.int/eng?i=001-70326.

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From the perspective of processing cases, it makes sense that the Court gives priority to issues that affect either the domestic level on a wide scale or that affect the functioning of the Convention system. Here, we can draw some parallels with the competence of the Grand Chamber. Further to Article 43, Section 2 cases, which raise a serious question about the interpretation or application of the Convention or the Protocols or that concern a serious issue of general importance, can be reheard by the Grand Chamber. The structural, abstract dimension prevails here over the importance of the case for the individual applicant.

In any event, it is clear that compared to the first category of cases, the second category is less concerned with individual justice and more with the institutional dimensions at stake. In a way, one could argue that categories I and II taken together cover the two dimensions of doing justice under the Convention.

More difficult to grasp is the scenario mentioned in category III. It is said that Articles 2, 3, 4, and 5 are the core Articles in the Convention. It is already difficult to argue that there is a "hierarchy" of human rights, but if we leave aside doctrinal discussions,[17] it could be argued that the Convention itself singles out some rights that deserve a special status—meaning the rights that do not allow any derogation in times of war or emergency. Further to Article 15 ECHR, these rights are Articles 2, 3, 4, Paragraph 1, and 7. Article 5, Section 1 is not in that list. Yet, when it comes to priority policy, the Court adds it to the list, whereas it leaves Article 7 aside.

We wonder on which grounds the Court operated this choice. Moreover, and no matter how much one can understand the choice that is made, we should not forget that it comes at a cost. Cases on other articles, take Article 6 to name but one, can have serious consequences for the applicants. We could easily think of applicants having been sentenced to long lasting imprisonment. If they complain of fair trial violations, their claims cannot qualify as an issue of a core Article. Yet, on an individual basis, the effect could be considerable.[18] It is perhaps not a surprise, therefore, that in 2021 the Strasbourg Court admitted that there was a problem with category IV-cases. Indeed, one can easily imagine that cases that do not involve the "core articles," yet still "may raise very important issues of relevance for the State in question and/or the Convention system as a whole and justify more expeditious case-processing."[19] These cases will be known as "impact" cases and would be considered "Category IV-High" cases.

What would then be the criteria for an application to be considered "Category IV-High"? In the press release, the following explanation is given. Cases will be classified as such if:

(a) the conclusion of the case might lead to a change or clarification of international or domestic legislation or practice;
(b) the case touches upon moral or social issues;
(c) the case deals with an emerging or otherwise significant human rights issue.[20]

It is clear that these criteria remain rather vague and open.[21] Moreover, the Court also added to the previous criteria, that "if any of these criteria are met, the Court may take into account whether the case has had significant media coverage domestically and/or is politically sensitive."[22]

[17]*See* Mustapha Afroukh, *La Hiérarchie des Droits et Libertés dans la Jurisprudence de la Cour Européenne des Droits de l'Homme,* 6 Bruxelles, Bruylant (2011).

[18]*See* Clottemans v. Belgium, App. No. 69591/11, (May 17, 2022), http://hudoc.echr.coe.int/. The applicant, sentenced to 30 years of imprisonment, filed an application in 2011, arguing that she was not guaranteed the right to a fair trial. Only eleven years later, the Court dismissed her application.

[19]Eur. Ct. H.R., *supra* note 11.

[20]*Id.*

[21]*See* Anna Kohte, *Procedural Reforms in Strasbourg: From Individual to Systemic Justice?*, Jean-Monnet-Saar (Apr. 26, 2021), https://jean-monnet-saar.eu/?page_id=48957.

[22]Eur. Ct. H.R., *supra* note 11.

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Apart from considerations pertaining to the vagueness of the criteria, we cannot but stress to what extent these criteria are closely related to the "institutional" dimension of the case–law, and less to the importance of the case for the individual applicant. Prioritization of cases therefore should be understood, so it seems, as being a priority *to the human rights system in general* and far less as being a priority for the interests of the individual applicant(s).

II. The "Policy" of Implementing Certain Inadmissibility Criterion

The admissibility of the application depends on various conditions, some of which are "sensitive," in their interpretation or scope, to the "systemic" nature of the violation of the Convention complained of. This is the case, first, for the rule of exhaustion of domestic remedies, as in subsection 1, and second, for the inadmissibility of the so-called "requêtes-bagatelles," as in subsection 2.

1. Exhaustion of Domestic Remedies and Systemic Violations

According to the well-established case-law:

> Determining whether a domestic procedure constitutes an 'effective remedy' within the meaning of Article 35 § 1, which an applicant must exhaust and which should therefore be taken into account for the purposes of (the four-month time-limit), depends on a number of factors, notably the applicant's complaint, the scope of the obligations of the State under that particular Convention provision, the available remedies in the respondent State and the specific circumstances of the case.[23]

Although the term itself has never been used by the Court, the "systemic" nature of the violation complained of may, in certain circumstances and under certain conditions, justify that the applicant does not exhaust a remedy normally available in theory. The *Aksoy* judgment recalls in this sense that:

> The (obligation to exhaust the domestic remedies at disposal) is inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective.[24]

As to "repetition of acts", the Court describes these as "an accumulation of identical or analogous breaches which are sufficiently numerous and inter–connected not to amount to merely isolated incidents or exceptions but to a pattern or system."[25] By "official tolerance" it is meant that "illegal acts are tolerated in that the superiors of those immediately responsible, though cognizant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied."[26] In its decision *Ukraine v. Russia (Re Crimea)* of December 16, 2020, the Court added:

[23]*E.g.*, Lopes de Sousa Fernandes v. Portugal, App. No. 56080/13, para. 134 (Dec. 19, 2017), https://hudoc.echr.coe.int/eng?i=001-179556.

[24]Aksoy v. Turkey, App. No. 21987/93, para. 52 (Dec. 18, 1996), https://hudoc.echr.coe.int/eng?i=001-58003.

[25]Georgia v. Russia, App. No. 38263/08, para. 123 (July 24, 2014), https://hudoc.echr.coe.int/eng?i=001-224629.

[26]*Id.* at para. 124.

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> Only if both component elements of the alleged 'administrative practice' (the "repetition of acts" and 'official tolerance' . . . are sufficiently substantiated by *prima facie evidence* does the exhaustion rule under Article 35 § 1 of the Convention not apply.[27]

In the nomenclature proposed by Cecilia Rizcallah and Robin Gadbled, the pattern described could be translated as a combination of "generalized deficiencies or general and persistent breaches of law" (repetition of acts) and a "*system deficiency*" due to official tolerance.

Recently,[28] some applicants have tried to establish another type of connection between the exhaustion of remedies rule, on the one hand, and the systemic nature of a Convention violation, on the other hand. In this new perspective, the situation of systemic violation would no longer be the direct object of the application, but rather an institutional element that could lead to the incapacity of a domestic body to provide an effective remedy, regardless of the object of the complaint.

In *Advance Pharma v. Poland,*[29] the applicant company pointed out that the Court had previously concluded, in *Xero Flor w Polsce v. Poland,*[30] that the Constitutional Court had not been a "tribunal established by law." Consequently, a complaint to the Constitutional Court could not be regarded as an adequate and effective remedy offering reasonable prospects of success and capable of providing redress in respect of the applicant company's complaints.

According to the applicant:

> The current crisis in Poland was one of a systemic nature and . . . there was a real risk that proceedings before the Constitutional Court would have been incompatible with the Convention standards and basic principles of the rule of law. It also argued that it should not be required to use remedies which were contrary to Convention standards.[31]

The judgment did not, however, decide the question as such, and thus did not validate—or invalidate—the idea that a systemic failure to comply with the guarantees of Article 6 renders a court structurally incapable of providing the "effective" remedy, of which the prior exhaustion is required. The objection of inadmissibility was in fact joined to the examination of the merits.[32] This is undoubtedly a manifestation of the "judicial minimalism" discussed below. The question is not settled either by the *Juszczyszyn v. Poland* judgment of October 6, 2022.[33]

2. "Requêtes-Bagatelles" and Systemic Violations

According to Article 35 Section 3 (b) of the Convention:

> 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: . . . (b) the applicant has not suffered a significant disadvantage, unless

[27]Ukraine v. Russia (Re Crimea), App. No. 20958/14, para. 366 (Dec. 16, 2020), https://hudoc.echr.coe.int/eng?i=001-207622.

[28]*See* Mathieu Leloup, *The Duty to Exhaust Remedies with Systemic Deficiencies*, VERFASSUNGSBLOG (Feb. 8, 2022), https://verfassungsblog.de/the-duty-to-exhaust-remedies-with-systemic-deficiencies/.

[29]Advance Pharma v. Poland, App. No. 1469/20, (Feb. 3, 2022), https://hudoc.echr.coe.int/eng?i=001-215388.

[30]Xero Flor w Polsce v. Poland, App. No. 4907/18, (May 7, 2021), https://hudoc.echr.coe.int/eng?i=001-195994.

[31]Advance Pharma v. Poland, App. No. 1469/20, para. 236 (Feb. 3, 2022), https://hudoc.echr.coe.int/eng?i=001-215388.

[32]*See* Leloup, *supra* note 28.

[33]Juszczyszyn v. Poland, App. No. 35599/20, para. 153 (Oct. 23, 2022), https://hudoc.echr.coe.int/eng?i=001-219563:

> The applicant also submitted that he was not required to lodge a constitutional complaint since, following personal and legal changes which had been introduced since the autumn of 2015, the Constitutional Court could no longer be regarded as an independent and impartial judicial body able to fulfil its constitutional functions. Having regard to its conclusion above (see paragraph 151), the Court does not consider it necessary to examine in the instant case the applicant's arguments relating to the current status of the Constitutional Court.

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> respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits.[34]

The explanatory report of Protocol 14,[35] which introduced the first version of[36] this new admissibility criterion, indicates that the wording of the so–called "safeguard clause"—"unless respect for human rights . . . requires an examination of the application on the merits"—is drawn from the second sentence of Article 37, Paragraph 1, of the Convention where it fulfils a similar function in the context of decisions to strike applications out of the Court's list of cases." (See below for a further discussion of this topic).

The Court's practice shows that this "safeguard clause" may be invoked because of the presence of a systemic violation of the Convention. According to a decision *Andrey Nikolayevich Savelyev* of May 21, 2019:

> The second element contained in Article 35 § 3 (b) of the Convention obliges the Court to examine the case in any event if respect for human rights so requires. This would apply where a case raises questions of a general character affecting the observance of the Convention, for instance whether there is a need to clarify the States' obligation under the Convention or to induce the respondent State to resolve a structural deficiency.[37]

No less significant[38] is the approach followed by the Court in *Finger v. Bulgaria*, concerning the unreasonableness of the length of proceedings, in rejecting the Government's objection to admissibility:

> [T]he Court observes that when giving notice of the application to the Government, it gave consideration to applying the pilot judgment procedure to the case with a view to addressing the potential systemic problem of unreasonable length of civil proceedings in Bulgaria and the alleged lack of effective remedies in that regard. In their observations, the Government stated that they would welcome any recommendations made by the Court with a view to overcoming the issues raised by the case . . . The Court is therefore satisfied—without prejudice to its ruling on the question whether the present case is or is not suitable for a pilot judgment procedure—that respect for human rights, as defined in the Convention and the Protocols thereto, requires an examination of the application on the merits.[39]

As can be seen, it is here explicitly the potentially systemic nature of the problem raised that justifies further examination of the case.

III. The "Policy" of Implementing Articles 39 and 37, Section 1, Paragraph 2 of the Convention: Systemic Violations and the "Human Rights Requirement"[40]

Article 39, Section 1 of the Convention states that "at any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of

[34]European Convention on Human Rights, Council of Europe, Nov. 4, 1950, E.T.S. No. 005.

[35]Council of Europe, *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* Doc. No. 194 (2004). https://rm.coe.int/16800d380f.

[36]Article 35, Section 3 (b) of the Convention has been amended by Protocol 15.

[37]Savelyev v. Russia, App. No. 42982/08, para. 33 (May 21, 2019), https://hudoc.echr.coe.int/eng?i=001-193987.

[38]Strezovski v. North Macedonia, App. No. 14460/16, para. 49 (Feb. 27, 2020), https://hudoc.echr.coe.int/eng?i=001-201341.

[39]Finger v. Bulgaria, App. No. 37346/05, (May 10, 2011), https://hudoc.echr.coe.int/eng?i=001-104698.

[40]Lize Glas, *Unilateral Declarations and the European Court of Human Rights: Between Efficiency and the Interests of the Applicant*, 25(5) MAASTRICHT J. EUR. & COMPAR. L. 612 (2018).

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the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto." According to Section 3 of the same provision, "[i]f a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached."

Article 37, Section 1 of the Convention also lists a series of hypothesis where the Court can decide to strike an application out of its list. This can be the case if the applicant does not intend to pursue his application—addressed by Section 1, a—or, if the matter has been resolved—addressed by Section 1, b—or, if for any other reason established by the Court, it is no longer justified to continue the examination of the application—addressed by Section 1, c.

These two provisions provide the Court with important resources to alleviate its backlog, when, considered in its "short–term finality," the resolution of the litigation brought before it is of little or no interest. Each of the two provisions, however, maintains the possibility—better still, the *obligation*—for the Court to continue its office when the long-term purpose of the latter requires so. Thus Article 37, Section 1, *in fine*, of the Convention provides that "the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."[41]

This reservation will apply, for example,[42] when the Court is faced with a "question of principle," important for the development of the Convention's interpretation,[43] which it has not yet had the opportunity to decide. This was the case, for example, in *Konstantin Markin v. Russia*:

> Before taking a decision to strike out a particular case, the Court must verify whether respect for human rights as defined in the Convention requires it to continue the examination of the case. The Court reiterates in this respect that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties ... Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States ...
>
> 90. The Court considers that the subject matter of the present application—the difference in treatment under Russian law between servicemen and servicewomen as regards entitlement to parental leave—involves an important question of general interest not only for Russia but also for other States Parties to the Convention. It refers in this connection to the comparative law material showing that a similar difference in treatment exists in at least five of the States Parties ... and to the submissions of the third party stressing the importance of the issues raised by the present case ... Thus, further examination of the present application would contribute to elucidating, safeguarding and developing the standards of protection under the Convention.
>
> 91. Accordingly, there are special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the further examination of the application on its merits.[44]

[41]Council of Europe, European Convention on Human Rights, U.N.T.S. 213 (Sept. 3, 1953).

[42]For other criteria, see Glas, *supra* note 40, at 612.

[43]Karner v. Austria, App. No. 40016/98, para. 27 (July 27, 2003), https://hudoc.echr.coe.int/eng?i=001-61263; Rantsev v. Cyprus, App. No. 25965/04, paras. 199–200 (Jan. 7, 2010), https://hudoc.echr.coe.int/eng?i=001-96549; Gozum v. Turkey, App. No. 4789/10, para. 41 (Jan. 20, 2015), https://hudoc.echr.coe.int/eng?i=001-150800.

[44]Konstantin Markin v. Russia, App. No. 30078/06, paras. 90–91 (Mar. 22, 2012), https://hudoc.echr.coe.int/eng?i=001-109868.

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The "systemic" nature of the violation thus denounced is not specifically emphasized here. This contrasts with the reasoning of the Court in *Petrescu v. Portugal*.[45]

The case concerned several violations of Article 3, the prohibition of inhuman or degrading treatment, of the Convention on account of the applicant's conditions of detention in two prisons in Portugal between 2012 and 2016.

By a declaration of April 17, 2019, the Portuguese Government proposed to the applicant that the case be settled out of court in return for payment of compensation for the material and non–material damage suffered and for the reimbursement of costs and expenses. The applicant accepted the Government's proposal.

However, the Court refused to act this friendly settlement and to strike the application out of its list. The Court motivated this refusal as follows:

> 62 . . . . [T]he notion of 'respect for human rights' requires the Court to consider not only the individual situation of the applicant, but also the wider situation, especially where there may be systemic or structural problems . . . .
>
> 65 . . . . [T]here is a structural problem of overcrowding which, as national and international reports on the subject show, . . . still affects more than half of the prisons in Portugal.
>
> 66. Consequently, the impact of the present case is such that it goes beyond the applicant's individual situation. The Government had not made any commitment beyond the individual situation of the applicant.[46]

It is therefore neither the intrinsic interest of the question for the development of the Convention's interpretation in general—the questions are not unprecedented, unfortunately—nor the particular gravity of the violations denounced[47]—at least explicitly—that justify the pursuit of examination of the case, but rather the *systemic* and *structural* nature of the violations at stake, together with the absence of a previous "judgement" dealing with the substance of these violations.[48] "Systemic" seems here to refer to "generalized deficiencies/general and persistent breaches of law," in the nomenclature of Cecilia Rizcallah and Robin Gadbled. Logically, the judgment closes with a general recommendation:

> [T]he Court recommends that the respondent State consider adopting general measures. On the one hand, measures should be taken to ensure that the conditions of detention of the detainees are in conformity with Article 3 of the Convention. On the other hand, a remedy

[45]Petrescu v. Portugal, App. No. 23190/17 (Dec. 3, 2019), https://hudoc.echr.coe.int/eng?i=001-199148. The original French text of the judgment reads as follows:

> 62. (L)a notion de 'respect des droits de l'homme' commande à la Cour d'envisager non seulement la situation individuelle du requérant, mais également la situation à une échelle plus étendue, surtout quand il pourrait y avoir des problèmes systémiques ou structurels . . . 65 . . . il existe un problème structurel de surpeuplement qui, comme le montrent les rapports nationaux et internationaux en la matière . . . , touche encore à ce jour plus de la moitié des établissements pénitentiaires au Portugal. 66. Par conséquent, l'impact de la présente affaire est tel qu'il dépasse la situation individuelle du requérant. Or, le Gouvernement n'a pris aucun engagement au-delà de la situation individuelle de l'intéressé.

[46]*Id.* at paras. 62–66.

[47]*Compare to* M.S. v. Italy, App. No. 32715/19, paras. 91–93 (July 7, 2022), https://hudoc.echr.coe.int/eng?i=001-218511.

[48]If there is indeed a previous judgment dealing with the same violation(s), subsequent cases will be considered "repetitive" and will in essence lend themselves to the mechanisms of striking out and friendly settlement.

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should be available to the detainees to prevent the continuation of an alleged violation or to enable the detainee to obtain an improvement in the conditions of detention.[49]

C. "Systematization" of the Throughputs

According to the American constitutionalist Cass R. Sunstein,[50] "judicial minimalism" is a pragmatic approach that essentially consists of interpreting and elaborating the Law no more than what is strictly necessary to decide the particular dispute at hand. "One case at a time," "leaving things undecided" if a solution is not absolutely required to decide the present case: these are the maxims of the minimalist. The "short–term purpose" of the dispute becomes the exclusive or at least the main objective, and its "long–term purpose" completely fades into the background.

The case law of the European Court of Human Rights is, as a general rule, adept at this minimalism and gives it various concrete translations in its reasoning:[51] Refrain from examining additional grievance when it is possible to base the condemnation of the defendant State on one of them; not examine the "necessity in a democratic society" of a measure when it can be concluded beforehand that it is not "prescribed by law,"[52] or again, favor a condemnation *in concreto* of the application of a general measure, without pronouncing on the question of whether the general measure itself is not, *in abstracto*, contrary to the Convention.

This "minimalism" has sometimes been severely criticized even within the Court.[53] With regard to the use of the first technique, Judge Ravanari wrote in the margin of the *Lacatus v. Switzerland*[54] judgment, on the potential basis of the "right to beg" in the Convention:

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[49]Petrescu v. Portugal, App. No. 23190/17, para. 117 (Dec. 3, 2019), https://hudoc.echr.coe.int/eng?i=001-199148. The original French text of the judgment reads as follows:

> Dans ce contexte, la Cour recommande à l'État défendeur d'envisager l'adoption de mesures générales. D'une part, des mesures devraient être prises afin de garantir aux détenus des conditions de détention conformes à l'article 3 de la Convention. D'autre part, un recours devrait être ouvert aux détenus aux fins d'empêcher la continuation d'une violation alléguée ou de permettre à l'intéressé d'obtenir une amélioration de ses conditions de détention.

[50]Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 3–24 (1995). *See also* Cass R. Sunstein, *The Supreme Court 1995 Term Foreward: Leaving Things Undecided*, 110 Harv. L.R. 6, 14 (1996) (explaining the definition and main characteristics of "Judicial Minimalism").

[51]See, about the techniques of "judicial minimalism" used by the European Court of Human Rights, Sébastien Van Drooghenbroeck, La proportionnalité dans le droit de la Convention Européenne des droits de l'Homme. Prendre l'idée Simple au Sérieux, Bruxelles, Bruylant/FUSL 572 (2001).

[52]*See, e.g.*, RTBF v Belgium, App. No. 50084/06, para. 117 (Mar. 29, 2011), https://hudoc.echr.coe.int/eng?i=001-104265.

[53]*See also* Basu v. Germany, App. No. 215/19 (Oct. 6, 2022), https://hudoc.echr.coe.int/eng?i=001-220007 (Pavli, J., dissenting); Mazurek v. France, App. No. 34406/97 (Feb. 1, 2000), https://hudoc.echr.coe.int/eng?i=001-58456 (Loucaides & Tulkens, JJ., dissenting); Centre for Legal Resources *ex rel.* Valentin Câmpeanu v. Romani, App. No. 47848/08 (July 17, 2014), https://hudoc.echr.coe.int/eng?i=001-145577 (Pinto de Albuquerque, J., concurring); Myasnik Malkhasyan v. Armenia, App. No. 49020/08 (Oct. 15, 2020), https://hudoc.echr.coe.int/eng?i=001-208775 (Linos-Alexandre Sicilianos, J., dissenting); Popov v. Russia, App. No. 26853/04 (Nov. 27, 2018), https://hudoc.echr.coe.int/eng?i=001-76341 (Pastor, J., dissenting); Petukhov v. Ukraine (no. 2), App. No. 41216/13 (Mar. 12, 2019), https://hudoc.echr.coe.int/eng?i=001-198296 (Bošnjak, J., dissenting); Petukhov v. Ukraine (no. 2), App. No. 41216/13 (Mar. 12, 2019), https://hudoc.echr.coe.int/eng?i=001-198296 (Kuris, J., dissenting); Fedotova v. Russia, App. No. 40792/10 (Jan. 17, 2023), https://hudoc.echr.coe.int/eng?i=001-222750 (Pavli & Motoc, JJ., dissenting).

[54]Lacatus v. Switzerland, App. No. 14065/15 (Jan. 19, 2021), https://hudoc.echr.coe.int/eng?i=001-207695 (own translation). The original French text of Judge Ravanari' opinion reads as follows:

> Comme mon collègue Paul Lemmens, je me suis senti obligé de voter contre le refus d'examiner séparément le grief fondé sur l'article 10 de la Convention, tiré de ce que ce grief ne soulevait aucune question distincte essentielle, et celui fondé sur l'article 14 combiné avec l'article 8, tiré de ce qu'ayant conclu à la violation de l'article 8, la Cour n'avait pas besoin de statuer séparément sur ce grief.
>
> 16. Cette technique est bien connue et largement utilisée. Elle constitue un moyen par lequel la Cour cherche à traiter le plus grand nombre possible de requêtes, à se concentrer sur les questions juridiques essentielles, à ne pas surcharger un arrêt donné et à en accentuer la clarté en évitant les demandes périphériques ou secondaires . . . . Toutefois, lorsque les demandes ne sont ni périphériques ni secondaires, l'impasse faite sur un élément essentiel et même distinct d'une demande pourrait à juste titre être perçue comme un 'déni de justice' partiel . . .

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> Like my colleague Paul Lemmens, I felt obliged to vote against the refusal to examine separately the complaint under Article 10 of the Convention, on the ground that it raised no essential separate issue, and the complaint under Article 14 in conjunction with Article 8, on the ground that, having found a violation of Article 8, the Court did not need to give a separate ruling on that complaint.
>
> This technique is well known and widely used. It is a means by which the Court seeks to deal with as many applications as possible, to concentrate on the essential legal issues, to avoid overloading a given judgment and to enhance its clarity by avoiding peripheral or secondary applications . . . However, where applications are neither peripheral nor secondary, failure to address an essential and even distinct element of an application could rightly be seen as a partial "denial of justice."

However, the Court sometimes departs from this pragmatism by emphasizing, more or less explicitly, the "systemic" nature of the impugned violation of the Convention.

The case *Ecodefence and Others v. Russia*[55] concerned the measures imposed by virtue of the Foreign Agents Act 2012 on the 73 applicant non-governmental organizations. These measures included their registration as "foreign agents," which entailed extraordinary auditing, reporting and labelling requirements, and heavy fines.

The Court started its examination of the compatibility of the impugned legislation with Article 10—freedom of expression—and 11—freedom of assembly and association—of the Convention by considering whether the "foreign-agent" legislation offered sufficient protection against arbitrary interpretation of its key concepts, namely "political activities" and "foreign funding." After extensive reasoning, it concluded that this was not the case: The limitation of the above–mentioned freedoms was therefore not "prescribed by law." Breaking with its minimalist habits, the Court nevertheless continued its reasoning by further examining the "necessity in a democratic society" of the measure in question. It explains this as follows:

> The Court has found above that two key concepts of the Foreign Agents Act, as formulated and interpreted in practice by the Russian authorities, fell short of the foreseeability requirement. The facts of the present cases demonstrate that judicial review failed to provide adequate and effective safeguards against the arbitrary and discriminatory exercise of the wide discretion left to the executive . . . This would be sufficient for a finding of a violation of Article 11, interpreted in the light of Article 10, on the basis that the interference was not prescribed by law. The Court notes, nevertheless, that the questions in this case are closely related to the broader issue of whether the interference was "necessary in a democratic society." In particular, the Court must verify whether the restrictions on the applicants' activities corresponded in principle to a 'pressing social need,' and whether they were proportionate to the aims sought to be achieved.[56]

The examination so conducted will not consist in "recycling" and duplicating by allusion, under the label of "necessity in a democratic society," the arguments already exposed under the label of "legality." Real considerations of substance are developed which, at the end of a detailed demonstration, lead to the supplementary conclusion of the absence of necessity:

> The Court has found above that the Government have not shown relevant and sufficient reasons for creating a special status of 'foreign agents,' imposing additional reporting and accounting requirements on organizations registered as 'foreign agents,' restricting their access to funding options, and punishing any breaches of the Foreign Agents Act in an

[55]Ecodefence v. Russia, App. No. 9988/13 (June 14, 2022), https://hudoc.echr.coe.int/eng?i=001-217751.
[56]*Id.* at para. 118.

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> unforeseeable and disproportionately severe manner. The cumulative effect of these restrictions—whether by design or effect—is a legal regime that places a significant 'chilling effect' on the choice to seek or accept any amount of foreign funding, however insignificant, in a context where opportunities for domestic funding are rather limited, especially in respect of politically or socially sensitive topics or domestically unpopular causes. The measures accordingly cannot be considered 'necessary in a democratic society.'[57]

This "non–minimalist" reasoning in *Ecodefence and others* is not justified, *expressis verbis*, by the "systemic" nature of the violation of the Convention alleged against Russia. However, this diagnosis can be seen "between the lines" when the "cumulative effect of ... restrictions" "whether by design or effect" is pointed out by the Court.

In the same vein, the "structural" or systemic nature of the violation of the Convention complained of will also motivate the Court from time to time to depart from its strictly concrete control—relating to the sole application of the law to the case at hand—to deliver an *obiter dictum*, *in abstracto*, on the possible problematic character of the law itself.

This can be seen, for instance, in a case like *Denis and Irvine v. Belgium.*[58]

According to the text of Article 66 of the Belgian Compulsory Confinement Act May 5, 2014, final release could only be granted to an interned person if two cumulative conditions are met: a three–year probationary period must have expired, and:

> [T]he mental disorder in question has stabilized sufficiently for there no longer to be reasonable grounds to fear that, whether or not on account of his or her mental disorder, possibly combined with other risk factors, the individual concerned will again commit offences that harm or threaten to harm the physical or mental integrity of another person.[59]

In its judgment of June 1, 2021, the Grand Chamber of the Court explicitly stated that the first condition laid down "thus seems in principle to thwart the right, enshrined in Article 5 Section 4, to obtain a judicial decision ordering the termination of detention if it proves unlawful."[60] The same judgment had previously recalled that "in guaranteeing to persons arrested or detained a right to institute proceedings, Article 5 Section 4 also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful."[61]

Having thus sent a warning to the Belgian Legislator, the judgment did not however conclude that there had been a violation of Article 5 Section 4 in the case. The Court recalled that its "role is not to decide *in abstracto* whether a legislative provision is compatible with the Convention" and that "[i]t must limit itself to verifying whether the manner in which the law was applied in the particular circumstances of the case complied with the Convention."[62] In the present case, the domestic courts had refused the applicants' request for permanent release on the ground that neither of the two conditions laid down in Article 66 had been met: their state of mental health had not sufficiently improved and they had not completed a three–year probationary period. The condition of having completed a three–year probationary period had therefore not been decisive because it had been only one of the reasons for the refusal of immediate and final release.

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[57]*Id.* at para. 186.

[58]Denis v. Belgium, App. No. 62819/17 (June 1, 2021), https://hudoc.echr.coe.int/eng?i=001-210363. The first author of this Article served as a counselor to the Belgian State in this case. As a matter of transparency, both authors believe the reader should be informed about this.

[59]*Id.* at para. 84 (translation of the Court).

[60]*Id.* at para. 194.

[61]*Id.* at para. 187.

[62]*Id.* at para. 195.

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The structural problem thus identified, but that could not lead to the finding of a violation in the present case, had meanwhile been solved by the domestic courts. In two judgments of 2019,[63] the Court of Cassation interpreted Article 66 in the light of Article 5 Sections 1 and 4 of the Convention, ruling that a person who is no longer mentally ill and no longer dangerous must be definitively released, even if the three–year probationary period has not yet expired. In the end, the *Denis and Irvine* judgment explicitly "welcomes" this praetorian correction,[64] albeit that this positive appreciation turned out to be of a general nature, not having a concrete impact on the case.

The "systemic" nature of a problem thus seems to prompt the Court sometimes to depart from its minimalist attitude. But practice in this area is not, *a priori*, entirely consistent. *De maximiis non curat praetor*: In one case, the Court reached the heights of pragmatic minimalism by emphasizing precisely the "ultra-systemic" nature of the problem complained of in order to justify its *non possumus*. The problem was so enormous that the Court explicitly and deliberately refused to decide it.

Turan and others v. Turkey[65] concerned the arrest and pre-trial detention of 427 Turkish magistrates in the aftermath of the military coup attempt of July 15, 2016.

Relying on Article 5 Section 1—right to liberty and security—the 427 applicants complained that they were placed in pre–trial detention in breach of the domestic law governing the arrest and pre–trial detention of the members of the judiciary. They contested the allegation that the facts of the case precluded them from the procedural safeguards afforded to all judges and prosecutors and complained that the magistrates' courts did not have the competence and territorial jurisdiction to detain them. In its judgment of November 23, 2021, the Court concluded on this point to the "unlawfulness" of the deprivation of liberty.

Further, some of the applicants complained under Article 5 Sections 1(c) and 3 that they were placed in pre–trial detention without relevant and sufficient reasons, and that the length of that detention was excessive. Some applicants also complained under Article 5 Section 4 that the reviews conducted by the domestic courts into their detention did not comply with certain procedural safeguards, and/or under Article 5 Section 5 that there were no effective domestic remedies to allow them to obtain compensation for the alleged breaches of their rights.

However, these additional complaints will not be examined by the Court. The motives of this "non–examination" are the following:

> The Court has found above that the applicants' detention was not prescribed by law, which runs counter to the fundamental principle of the rule of law and to the purpose of Article 5 to protect every individual from arbitrariness. Having regard to the significance and implications of this finding, which goes to the heart of the protection afforded under Article 5 and entails a violation of one of the core rights guaranteed by the Convention, and to the accumulation of thousands of similar applications on its docket concerning detentions in the aftermath of the attempted coup d'état in Turkey, which puts a considerable strain on its limited resources, the Court considers—as a matter of judicial policy—that it is justified in these compelling circumstances to dispense with the separate examination of the admissibility and merits of each remaining complaint raised by each individual applicant under Article 5. The Court also points out in this connection that an individualized examination of the remaining complaints brought by each applicant would significantly delay the processing of these cases, without a commensurate benefit to the applicants or contribution to the development of the case-law. It notes furthermore that it has already addressed the legal issues raised by these complaints for the most part . . . It is precisely

[63] *Id.* at para. 86.

[64] *Id.* para. 197.

[65] Turan v. Turkey, App. No. 75805/16 (Nov. 23, 2021), https://hudoc.echr.coe.int/eng?i=001-213369.

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> within this exceptional context that the Court, guided by the overriding interest to ensure the long-term effectiveness of the Convention system, which is under threat by the constantly growing inflow of applications … decides not to examine the applicants' remaining complaints under Article 5.[66]

This *dictum*, and the now-final[67] judgment containing it, have been the subject of comments[68] and criticism.[69] We will not repeat them here. For the purposes of this contribution, we will only highlight an astonishing paradox: the potentially "systemic" nature of the violation complained of is, for reasons of "judicial policy," not a reason to depart from ordinary "minimalism," but on the contrary to push it to limits never before reached. Because the problem is huge, it will not be judged in the end. Judge Kuris, in the margin of the judgment, makes this frightening observation:

> There is a risk that some may read this judgment, by which so many complaints of so many applicants have been denied examination, as a signal that a member State can escape responsibility for violating the Convention en masse, since the Court may be flooded with complaints against that State to such an extent that it becomes unable to cope with them and decides not to examine them.
>
> To be frank: if a regime decides to go rogue, it should do it in a big way. And if responsibility can be escaped by 'doing it big,' why not give it a try?[70]

D. "Systematization" of the Outputs

Previously we indicated how pilot-cases are given priority in the processing of cases. The idea behind this is clearly to do away with a great number of similar applications in the most efficient manner possible. It presupposes, as has been pointed out in literature, that some criteria have to be met. They imply that the Court, as Fyrnys indicated:

a. Identifies a systemic problem
b. Expects this problem to give rise to an important number of well-founded applications
c. Identifies the general measures that could be taken to solve the underlying systemic problem
d. Adjourns all other pending cases related to the issue at stake
e. Indicates in the operative part of the judgment what general measures ought to be taken.[71]

[66]*Id.* at para. 98.

[67]A request to referral had been introduced on basis of Article 43 of the Convention. However, it has been rejected by a decision of the Grand Chamber Panel of April 4, 2022. For a critique of this decision, see *Statement on the Rejection by the ECtHR of the Referral to the Grand Chamber of Turan and Others v. Turkey*, Magistrats européens pour la Démocratie et la Liberté (Apr. 12, 2022), https://medelnet.eu/statement-on-the-rejection-by-the-ecthr-of-the-referral-to-the-grand-chamber-of-turan-and-others-v-turkey-2/.

[68]*See* Toby Collis, *Turan and Others v Turkey and the Limits of Judicial Policy to Address Judicial Overload*, Strasbourg Observers (Jan. 18, 2022), https://strasbourgobservers.com/2022/01/18/turan-and-others-v-turkey-and-the-limits-of-judicial-policy-to-address-judicial-overload/.

[69]*See* Baçak Cali, *No Rule of Law?*, Verfassungsblog (Dec. 8, 2021), https://verfassungsblog.de/no-rule-of-law/.

[70]Turan v. Turkey, App. No. 75805/16, (Nov. 23, 2021), https://hudoc.echr.coe.int/eng?i=001-213369 (Kuris, J., dissenting).

[71]Fyrnys, *supra* note 3, at 1232–33; *See also* Eur. Ct. H.R. Registar, The Pilot-Judgment Procedure (2009). Nevertheless, we have to highlight that there was—is?—a living discussion on how many criteria exactly were at stake. Some former judges advocated no less than eight, others came up with three. An overview can be found in Dilek Kurban, *Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations*, 16(4) Hum. Rts. L. Rev. 731, 737 (2016). She quite rightly describes the search for the exact number of criteria and the elaboration of typologies as "futile." *Id.* at 739.

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From the perspective of the individual, step *d* is the most critical one. There is little doubt that pilot judgments can be of great *systemic/structural* value. If the necessary follow-up is given by the States, the advantages are both for the Court in processing cases) and the States in increasing compliance with the Convention. These advantages are typically obtained through a collaborative process between the Court and the States, thereby strengthening the ideas of subsidiarity and cooperation between the two essential actors in the system.[72] However, as recent research has shown, the compliance should not be overstated. Almost half of the pilot-judgements—about 40% —were not executed within two years or more.[73] The success rate of the pilot procedure should, therefore, not be exaggerated. Moreover, as the dissenting judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc highlighted in their dissenting opinion in *Burmych*, the implication of the pilot proceeding is that "judicial responsibility" is shifted from the Court to the Committee of Ministers,[74] a political body, with a mitigated track record when it comes to ensuring that pilot judgments are executed. But, as Glas observes, the Committee is perhaps not to be blamed for that, as it "upholds the Convention standards."[75] However, the Committee is not always well–informed by States. The process of executing may be moreover lengthy, and there seem to be some way for bargaining.[76] That last point is of course not surprising because the Committee by its very nature is a political body.

In view of these facts, it is indeed important to keep an eye on the flip side of the procedure. For there is a cost in terms of individual justice. In his already mentioned partly dissenting opinion in *Turan and others v. Türkye*, Judge Kuris nailed the problem. The judge is harsh and crystal clear. A lengthy quote is appropriate here:

> 5 . . . . The so–called pilot–judgment procedure. It is undertaken when the Court finds a systemic (or structural) problem raised by the applicant's individual case and underlying the violation found in it. In view of the growing number of similar applications and of the potential finding of an analogous violation in the respective cases, the examination of those similar applications which have not yet been communicated to the respondent Government is adjourned until that State adopts the general measures aimed at resolving that systemic (structural) problem which gave rise to the violation found in the pilot judgment, and only those applications which have already been communicated continue to be examined under the normal procedure . . . After the successful implementation of the general measures required by the pilot judgment, ***the adjourned applications are struck out of the Court's list of cases***, and the pilot-judgment procedure is closed. This procedure is therefore designed to assist the member States in resolving, at national level, the systemic (structural) problems found by the Court, securing to all actual and potential victims of the respective deficiencies the rights and freedoms guaranteed by the Convention, offering to them more rapid redress and easing the burden on the Court, which would otherwise have to take to judgment large numbers of applications which are similar in substance, as a rule, at the expense of other meritorious cases. The pilot-judgment procedure was conceived as a response to the growth in the Court's caseload, caused by a series of cases deriving from the same systemic (structural) dysfunction, and to ensure the long-term effectiveness of the Convention machinery.
>
> 6. Alas, it does happen that the State fails to execute the pilot judgment. This may generate large numbers of follow-up applications which raise issues that are identical in substance to

[72]Varga v. Hungary, App. No. 14097/12, para. 96 (Mar. 10, 2015), https://hudoc.echr.coe.int/eng?i=001-152784.

[73]Glas, *supra* note 13, at 81.

[74]Burmych v. Ukraine, App. No. 46852/13, sec. 13 (Oct. 12, 2017), https://hudoc.echr.coe.int/eng?i=001-178082 (Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque, & Motoc, JJ., dissenting).

[75]Glas, *supra* note 13, at 97.

[76]*Id.*

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> those raised in the case in which the pilot judgment was adopted. Perhaps the most well–known example of a pilot judgment which the respondent State failed to execute would be the one adopted in the case of *Yuriy Nikolayevich Ivanov v. Ukraine* . . . which otherwise would have been an inconspicuous case. That failure led the Court to adopt what it called a 'new approach' in dealing with the massive influx of as many as 12,143 Ivanov–type follow–up applications, plus those of the five applicants specifically in the case *of Burmych and Others v. Ukraine* . . . In *Burmych and Others* the Court proceeded in a thitherto unheard of and most extraordinary way. It concluded that the said Ivanov–type applications had to be dealt with in compliance with the respondent State's obligation deriving from the pilot judgment adopted in *Yuriy Nikolayevich Ivano*v, struck them out of its list of cases, considering that the circumstances justified such a course, and transmitted them to the Committee of Ministers of the Council of Europe in order for them to be dealt with in the framework of the general measures of execution of the above-mentioned pilot judgment. At the same time the Court underlined that this strike-out decision was without prejudice to its power to restore to the list of its cases, pursuant to Article 37 § 2, the respective applications "or any other similar future applications, if the circumstances justify such a course." The Court also envisaged that it might be appropriate to reassess the situation within two years from the delivery of the Burmych and Others judgment 'with a view to considering whether in the meantime there have occurred circumstances such as to justify its exercising this power' (§ 223).
>
> 7. The Burmych and Others precedent was indeed instrumental for the purposes of substantially unclogging the Court's docket. Whether it was in any way instrumental also to the applicants, who sought justice in Strasbourg, but were sent back to their domestic authorities against whose (in)action they had complained, and thus whether it fulfilled its purpose, is yet to be seen. ***It will have successfully served its purpose if those applicants, whose applications the Court resolved not to examine, have received any tangible satisfaction at the domestic level.*** It is reported that today, with four years having passed since the adoption of the judgment in *Burmych and Others*, there are more indications to the contrary. Be that as it may, the above-mentioned 'reassessment of the situation' by the Court has not yet taken place.[77]

This comment is grim, and it lays bare the problem with pilot judgments. They solve perhaps the Court's problem with the massive influx of similar cases, but they do so at the expense of the individual applicants. Their complaints are adjourned, sometimes sent back to the domestic level, and it remains to be seen whether the local authorities do treat them with due care. The possibility exists that, in case of persisting non–compliance with the Convention, the Court reassesses the situation and reconsiders the cases,[78] but, as Judge Kuris observed, that possibility should not be given more weight than it deserves. In fact, although it is the ultimate guarantee for the right of individual applications, it would run counter to the underlying logic: If the idea is to quickly process a massive lot of applications, then it is clear that bringing them again to the table after some time does not contribute to reaching the goal.

One can, therefore, reasonably fear that pilot judgements on the one hand do not contribute as much to the solution of systemic shortcomings as was hoped, whereas, on the other hand, in practice, by focusing on subsidiarity and the cooperation of the states, risk to leave individual applicants without effective remedies.[79]

[77]Turan v. Turkey, App. No. 75805/16 (Nov. 23, 2021), https://hudoc.echr.coe.int/eng?i=001-213369, (Kūris, J., dissenting) (emphasis added).

[78]Rezmiveș v. Romenia, App. No. 61467/12, para. 105 (Apr. 25, 2017), https://hudoc.echr.coe.int/eng?i=001-173351.

[79]Kurban, *supra* note 71, at 768–69.

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E. Conclusion

The debate on the real role of the European Court of Human Rights, to which we referred in the Introduction and that concerns the question whether it should have constitutional jurisdiction or rather individual jurisdiction, has never received a clear answer, nor by the Court, nor by the Masters of the Treaties. The debate became all the more relevant against the backdrop of the unclogging of the Court's docket.

Within that framework of processing cases and doing away with the huge backlog, various choices of "judicial policy" have been chosen by the Court. In this we discussed some of them.

What is striking is that often "systemic" or "structural" deficiencies within the High Contracting Sates often underpin those choices. It is remarkable though that no clear definition is given of what is meant by "systemic" or "structural." As a result, we cannot see a specific methodology that the Court would use to conclude that deficiencies are systemic. As has been observed with regards to the pilot-judgment approach, which brings about similar problems of identifying structural problems, there is much adhockery.[80]

The phenomenon of the "systemic" thus runs through the Court's jurisprudence in an intuitive manner. Without following clear and pre-drawn theoretical lines, it takes on a series of distinct faces: "generalized deficiency," linked or not to a "system deficiency"; "structural" cases being important from the point of view of the interpretation, and general application, of the Convention.

If one takes a closer look on how this works out in practice, we observe that the way the Courts addresses the issues, through a lens of remediating structural problems in states and giving priority to its own proper functioning, comes at the cost of downplaying the aspect of doing individual justice. This is not to say that in all cases individual justice is sacrificed on the altar of constitutional justice, but we nevertheless observe a hidden preference. We tend to conclude that, by doing so implicitly, an answer is given to the question what kind of role the Court should play in the Conventional system.

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[80] *Id.* at 739.

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