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Article

Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be Drawn

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ABSTRACT

Since the end of the 1990s, the procedural practice of the European Court of Human Rights has changed as a result of formal reform measures and developments in the Court's case law. This change is mainly manifest in the fact that the Court is now moving in two directions, which are neither inherently connected nor mutually exclusive. First, the Court appears to be distancing itself from certain categories of applications in order to protect the efficient working of the system and, secondly, it seems to be gaining increasing influence over the execution of its judgments. This article discusses the reforms and case law developments which have shaped these two directions and contextualises the directions by outlining factors which help to explain why the reforms and developments have come about. It is then possible to answer the central question in this article, namely what impact the two directions in which the Court is travelling have on the position of the applicant and on how the Court, the states parties and the Committee of Ministers fulfil their tasks in the Convention system. After evaluating the changes per actor, the article characterises the nature of this change more generally. Additionally, the article points out which lessons can be drawn from the changes and their characterisation.

KEYWORDS: Execution of judgments, procedural reform, European Court of Human Rights, Committee of Ministers, European Convention on Human Rights.

1. INTRODUCTION

The design of the European Convention on Human Rights[1] (ECHR or 'the Convention') system not only 'looks pretty good' on paper,[2] but has also proved to be effective and influential in practice.[3] The need to reform the system nevertheless became 'increasingly urgent' in the beginning of the 1990s.[4] The urgency was the result of the growing number of applications finding their way to Strasbourg and of the accession of new states parties to the Convention.[5] The system was not only confronted with a steep increase in the caseload, but also with large numbers of repetitive cases, deficient national implementation of the Convention and partial and delayed execution of the judgments of the guardian of the Convention, the European Court of Human Rights (ECtHR or 'the Court').[6]

Protocol No 11[7] was the earliest reaction to these problematic developments. It reformed the Convention system fundamentally by, most notably, abolishing the part-time Court and the European Commission of Human Rights ('the Commission') and establishing a new full-time Court. Protocol No 14[8] and the just adopted Protocol No 15[9] respond to the same developments, mainly by offering procedural changes and refinements. In 2010, the Interlaken Declaration and Action Plan[10] set in motion an 'intense programme of reform',[11] which was consolidated and further developed in the Izmir Declaration and Follow-up Plan[12] and the Brighton Declaration.[13] Protocol

1 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5 (as amended).

2 Wildhaber, 'Rethinking the European Court of Human Rights', in Christoffersen and Madsen (eds), *The European Court of Human Rights between Law and Politics* (New York: Oxford University Press, 2011) 204 at 208.

3 For more information, see Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273; O'Boyle, 'On Reforming the Operation of the European Court of Human Rights' (2008) 13 *European Human Rights Law Review* 1 at 1–5; and Lawson, 'The Achievements of the Strasbourg Court', in Myjer et al. (eds), *The Conscience of Europe: 50 Years of the European Court of Human Rights* (London: Third Millennium Publishing Limited, 2010) 162.

4 Explanatory Report to Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established 1994, ETS 155 at para 19.

5 Between 1992 and 2005, 24 states ratified the ECHR. There are 47 states parties; for ratification details, see Council of Europe Treaty Office, ECHR, status as of 11 December 2013, available at: www.conventions.coe.int [last accessed 29 July 2014].

6 See Section 3 below for more information.

7 Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established 1994, ETS 155, entry into force 1998.

8 Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention 2004, CETS 194 with Explanatory Report, entry into force 2010.

9 Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms 2013, CETS 213 with Explanatory Report. Protocol No 15 has yet to enter into force.

10 19 February 2010, available at: www.coe.int/t/dghl/cooperation/capacitybuilding/Source/interlaken_declaration_en.pdf [last accessed 29 July 2014].

11 Steering Committee for Human Rights (CDDH), The Interlaken Process and the Court, 26 October 2012, DH-GDR(2012)018 at 3.

12 27 April 2011, available at: www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf [last accessed 29 July 2014].

13 20 April 2012, available at: hub.coe.int/20120419-brighton-declaration [last accessed 29 July 2014].

No 15 has been adopted together with Protocol No 16[14] in the course of this process. These reform measures have changed the Court's procedural practice. Further, such changes have resulted from developments in the Court's case law. Consequently, it can be said that reform is currently a 'quasi-permanent' process.[15]

None of the reforms in Protocol No 14, the reforms resulting from the Interlaken Process, or the case law developments are part of an overarching, well thought out vision with a clearly described destination for the Convention system in the long term. The absence of such a vision can be illustrated by the Brighton Declaration, which acknowledges that it does not develop a vision for the system's future; it only 'addresses the immediate issues faced by the Court'.[16] Apparently, thus, the various reforms of the Convention system do not head in a certain, well defined direction. Nevertheless, if the reform measures and case law developments are disentangled, it is arguably possible to observe that the Court is travelling in two directions as a result of them. On the one hand, it appears that the Court is distancing itself from repetitive applications in particular by, for example, returning them to the national level undecided, in order to maintain the efficient working of the system. On the other hand, the Court seems to be gaining increasing influence over the execution of its judgments. It appears that the Court travels in both directions simultaneously, without choosing between them or aligning the directions to one another. Indeed, it seems that it can do so because the directions are neither inherently connected nor mutually exclusive.

The Court's movement in these two directions evidently changes the way in which it fulfils the tasks it is assigned by the Convention. This change presumably affects the other players in the system, namely the states parties, the Committee of Ministers ('CM') and the applicants. This article aims to answer the question: what impact does the two directions in which the Court is travelling have on the position of the applicant and on how the Court, the states parties and the CM fulfil their tasks in the system. It also delves into a second question, namely what lessons can be drawn from the directions in which the Court is going.

In order to answer these two questions, it is necessary to gain insight into the reforms and case law developments which have shaped the two directions. Section 2 outlines relevant reform measures and developments in the Court's case law with a view to providing such insight. Section 3 sketches the background to the two directions by clarifying why the measures and the developments have come into existence. Section 4 answers the first question by describing the changes which the two directions have brought. As an overall conclusion, Section 5 explains the lessons which could be drawn from the findings in the preceding Sections.

14 Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2013, CETS 214 with Explanatory Report. Protocol No 16 has yet to enter into force; for more information, see Section 4.B.ii below.

15 Costa, 'Comments on the Wise Persons, Report from the Perspective of the European Court of Human Rights', in Council of Europe, *Future developments of the European Court of Human Rights in the light of the Wise Persons' Report* 34 at 38, available at: www.coe.int/t/dghl/standardsetting/cddh/Publications/SanMarino_en.pdf [last accessed 29 July 2014].

16 Brighton Declaration, supra n 13 at para 30.

2. THE TWO DIRECTIONS THE COURT IS MOVING IN

A. Direction 1: The Court's Distancing Itself from Certain Applications

While the Court used to decide virtually all applications individually and considered the merits of each meritorious application for many years, it seems that the Court is now increasingly concerned with handling applications efficiently. It now no longer decides all applications individually, but, for example, returns them undecided to the national authorities for further consideration. It thus can be seen that it increasingly distances itself from certain applications, which arguably is the first direction the Court is moving in. In support of this argument, a number of reforms and case law developments can be outlined which have helped to shape this movement.

(i) The significant disadvantage admissibility criterion

Protocol No 14 created a new admissibility criterion, allowing the Court to declare an application inadmissible if the applicant has not suffered a significant disadvantage.[17] Protocol No 15 will amend the new criterion by deleting the safeguard clause 'provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal'.[18] The new criterion and its amendment aim to enable the Court 'to devote more time to cases which warrant examination on the merits',[19] either 'from the perspective of the legal interest of the individual applicant or … from the broader perspective of the law of the Convention and the European public order'.[20] In the Izmir Declaration and Follow-up Plan, which were adopted less than a year after Protocol No 14 entered into force, the states parties invited the Court to '[g]ive full effect to the new admissibility criterion in accordance with the principle, according to which the Court is not concerned by trivial matters'.[21] The Court was thus invited to refuse to deal with complaints brought by applicants who had not suffered a significant disadvantage. Due to this reform of Protocol No 14, the Court can now declare such complaints inadmissible, whereas it could have found a violation previously. When Protocol No 15 enters into force, this will also apply to applicants whose complaint was not duly considered by a domestic tribunal, a circumstance which warranted an examination of the merits of the complaint by the Court according to the drafters of Protocol No 14.[22] As a result, a relatively important category of individual complaints will not be decided in substance any longer. The Court, however, has shown itself unwilling to apply the new criterion to all applications, regardless of the right that has allegedly been violated. For example, it appears to consider an alleged violation of Article 3 of the ECHR (prohibition of

17 Article 35(3)(b) ECHR.

18 Article 5 Protocol No 15.

19 Explanatory Report to Protocol No 14, supra n 8 at para 77; see also Explanatory Report to Protocol No 15, supra n 9 at para 24.

20 ECtHR, *Research Report: The New Admissibility Criterion under Article 35§3(b) of the Convention: Case-law Principles Two Years On*, June 2012, at para 4, available at: www.echr.coe.int/Documents/Research_report_admissibility_criterion_ENG.pdf [last accessed 29 July 2014].

21 Izmir Declaration and Follow-up Plan, supra n 12 at 5.

22 Explanatory Report to Protocol No 14, supra n 8 at paras 82–83.

torture) to be always significant.[23] Indeed, such choices are possible because the 'terms contained in the new criterion are open to interpretation and … give the Court some degree of flexibility'.[24]

(ii) Expanding the competence of committees of judges

Already with the entry into force of Protocol No 11, committees of three judges ('Committees') were competent to declare inadmissible or strike out a case where such a decision could be taken without further examination. Protocol No 14 expanded their competence so they can declare an application admissible and render at the same time a judgment on the merits, if the underlying question is already the subject of well-established case law.[25] The notion of well-established case law normally refers to case law which a Chamber of seven judges has consistently applied, but exceptionally even to a single judgment on a question of principle, especially when delivered by the Grand Chamber.[26] Decisions by Committees cannot be appealed[27] and they are not succinctly reasoned, precisely because they are decided based on well-established case law.[28] This approach should 'increase substantially the Court's decision-making capacity'.[29] The new competence of Committees means the Court does not address the individual factual and legal background of applications which can be decided based on well-established case law, but relies exclusively on its findings in previous judgments.

(iii) Joining repetitive applications

The Court has always had the power to join two or more applications in one judgment,[30] but of interest for the purposes of this article is that the Court has recently started employing this power to consider jointly repetitive applications with a similar legal and factual background which can be decided based on well-established case law.[31] The Court's policy of joining large numbers of applications has resulted in a decrease in the total number of judgments issued in 2012.[32] This means the Court increasingly abstains from deciding and reasoning such cases individually. It sometimes even gives a standardised amount of just satisfaction to all applicants.[33] In this

23 Buyse, 'Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35 § 3 (b) ECHR', in Haeck, McGonigle Leyh, Burbano Herrera and Contreras Garduno (eds), *The Realization of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak* (Antwerp: Intersentia, 2014) at 8, available at: ssrn.com/abstract=2244283 [last accessed 29 July 2014].

24 Supra n 20 at para 3.

25 Article 28(1) ECHR.

26 Explanatory Report to Protocol No 14, supra n 8 at para 68.

27 Article 28(2) ECHR.

28 Rule 53(5) Rules of Court, 1 July 2014; see also Leach, *Taking a Case to the European Court of Human Rights*, 3rd edn (New York/Oxford: Oxford University Press, 2011) at 41.

29 Explanatory Report to Protocol No 14, supra n 8 at para 70.

30 See Rule 42(1) Rules of Court.

31 ECtHR, Overview 1959–2012, June 2013, at 4, available at: www.echr.coe.int/Documents/Overview_19592012_ENG.pdf [last accessed 29 July 2014].

32 ECtHR, Analysis of Statistics 2012, January 2013 at 5, available at: www.echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf [last accessed 29 July 2014].

33 See, for example, *Şenyürek and Others v Turkey* Application No 34986/05 et al., Merits and Just Satisfaction, 21 September 2010 at para 31.

manner, it has enhanced its decision-making capacity in respect of repetitive applications, yet it also clearly has distanced itself from considering the individual merits of joined repetitive cases.

(iv) The pilot judgment procedure

In a pilot judgment the Court identifies a structural dysfunction in the national legal system that has given or may give rise to similar applications. Further, the Court orders general execution measures in the operative provisions of the judgment which it considers may help to solve the dysfunction.[34] The Court's first pilot judgment, *Broniowski v Poland,*[35] dates from 2004. If the state executes the measures ordered in the pilot judgment, the Court deems that it is not its role to provide individualised just satisfaction under Article 41 of the ECHR.[36] In this context, the Court has remarked that its 'principal task', as defined by Article 19 of the ECHR, is '"to ensure the observance of the engagement undertaken by the High Contracting Parties…", the adjudication on awards under Article 41 being only secondary'.[37] If new domestic remedies have been created as part of the execution of the pilot judgment, the Court strikes similar applications off its list, thus requiring the applicants to use the newly created domestic remedy. Another noteworthy feature is that the Court 'may adjourn the examination of all similar applications pending the adoption of the remedial measures required' in the pilot judgment.[38] Considering the foregoing, the Court can be seen to distance itself from applicants whose case is similar to the one in the pilot judgment, by possibly adjourning the examination of their application. Furthermore, it is evident that it may strike out their cases without deciding their merits or awarding just satisfaction, provided that the measures ordered in the pilot judgment have been implemented. The Court's attention is instead focused on solving the domestic dysfunction underlying the applications.

(v) Judgments of principle

In a judgment of principle the Court decides a Convention question on a level of generality that makes it possible to apply the decision to comparable pending applications. In response to such a judgment of principle, states parties from which these applications result can take domestic measures to bring their laws or policies into conformity with the Convention as interpreted in the said judgment. Based on this response, the Court can strike comparable applications off its list, thus returning them to the domestic system without deciding their merits.[39] The Court has issued judgments of principle with this outcome in refugee cases in which the general question is raised whether a particular group of refugees can be deported to a certain region or state. The Court decided this question in, for example, *M.S.S. v Belgium*

34 Rule 61(3) Rules of Court.

35 2004-V; 40 EHRR 21.

36 *Witkowska-Tobola v Poland* Application No 11208/02, Strike Out, 4 December 2007 at para 78.

37 Ibid.

38 Rule 61(6)(a) Rules of Court.

39 CDDH, Draft CDDH Report on the Advisability and Modalities of a 'Representative Application Procedure', 15 February 2013, DH-GDR(2013)R3 Addendum III at para 10.

and Greece, where it held that removing refugees from Belgium to Greece under the EU Dublin Regulation violated the Convention.[40] Subsequent to its decision the Court assumed a proactive role to ensure that states finding themselves in a comparable position to Belgium took appropriate action in response to its judgment of principle by contacting them to ask what practical steps they would take as a consequence of *M.S.S.* When the states had adapted their asylum policy in accordance with *M.S.S.*, the Court struck comparable applications of its list.[41] It thus concentrated on deciding a matter of principle and left it to the states to deal with comparable applications when they have responded adequately to the judgment of principle. Thus in such cases the Court does not itself deal any longer with the merits of a case.

(vi) Routine friendly settlements

Friendly settlements are agreements between a respondent state and an applicant containing the terms upon which they agree to end Convention proceedings. This agreement can be concluded at any stage of the proceedings. After the conclusion of such a friendly settlement, the Court approves it in a strike-out decision, on the condition that the settlement is based on respect for the Convention rights.[42] When a friendly settlement is agreed upon before the Court gives judgment, the Court does not decide the merits of an individual application and can therefore not find a violation. This procedure, which has been part of the Convention system since its establishment,[43] is currently used in a new manner. The Court's Registry sends ready-made friendly settlements, including an amount for redress, to the parties if an application raises an issue which is the subject of well-established case law. In the strike-out decision based on the settlement, the Court summarises the facts and the settlement.[44] It does not engage in any substantive reasoning regarding the condition that a friendly settlement be based on respect for the Convention rights,[45] but just 'rubber stamps' it.[46] Friendly settlements concluded in this way can be called routine friendly settlements.[47] If the applicant refuses the amount proposed by the Registry in the ready-made settlement, the Court leaves no room for negotiations because it gives judgment or, increasingly often, accepts a unilateral declaration instead.[48] Routine settlements therefore make it practically impossible for the applicant to undertake settlement negotiations or to have his case decided on its merits in areas

40 ECHR Reports 2011; 53 EHRR 2 at paras 338–68; see also *N.A. v United Kingdom* 48 EHRR 15; and *Sufi and Elmi v United Kingdom* 54 EHRR 9.

41 See, for example, *Shakor and Others v Finland* Application No 10941/10 et al., Strike Out, 28 June 2011; *Ali Gedi and Others v Austria* Application No 61567/10 et al., Strike out, 4 October 2011; and *Ahmed Ali v The Netherlands and Greece* Application No 26494/09, Admissibility, 24 January 2012 at para 8.

42 Article 39(1) ECHR.

43 Article 28(b) ECHR (1950 version).

44 Leach, supra n 28 at 63.

45 Weber, 'Who Killed the Friendly Settlement? The Decline of Negotiated Resolutions at the European Court of Human Rights' (2007) 7 *Pepperdine Dispute Resolution Law Journal* 215 at 234–5.

46 Keller, Forowicz and Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice* (New York: Oxford University Press, 2010) at 70.

47 Ibid. at 66 (Keller, Forowicz and Engi introduced this term).

48 Ibid. at 68.

of well-established case law.[49] This development, as well as the Court's rubber stamping of these settlements, clearly offers the Court the possibility to deal with repetitive applications quickly and efficiently. It also has the effect, however, that individual applicants have less opportunity to have their cases or monetary claims decided in substance.

(vii) Unilateral declarations

In a unilateral declaration the respondent state requests that the Court strike an application off its list based on the acknowledgment of the alleged violation by the state and an undertaking to provide adequate redress. If the Court accepts the declaration, an application is struck out without the consent of the applicant. Turkey issued the first unilateral declaration in 2001,[50] and since then unilateral declarations have been increasingly accepted by the Court. A unilateral declaration must be made after an attempt at reaching a friendly settlement, because the Rules of Court stipulate that only where 'exceptional circumstances' so justify, a declaration may be filed in the absence of an attempt.[51] The Court's case law nevertheless shows that declarations for repetitive applications can be filed without attempting a friendly settlement.[52] The Court is thus, in particular, distancing itself from individual repetitive applications. It returns these cases undecided on the merits to the national level and does not give the applicant the possibility to reach a friendly settlement. The current use of unilateral declarations probably receives the Court's approval in particular because it enhances the Convention system's efficiency.

(viii) Priority policy

While previously the Court dealt with all applications chronologically, in 2009 it adopted a priority policy. The reason for this was that, due to the increasing caseload, 'very serious allegations of human rights violations were taking too long to be examined'.[53] The new priority policy means that in determining the order of dealing with new applications the Court has regard to the importance and urgency of an application.[54] The priority policy has caused the Court to give low priority to repetitive applications, as well as to non-repetitive medium-priority applications which do not raise serious and urgent human rights matters. Rather, the Court now focuses its attention on cases raising important and urgent issues. This policy development, which is clearly informed by efficiency considerations, has the net result that a large category of individual applications are only decided on their merits in the long term—many proceedings will take many years to be completed.

49 Ibid. at 147.

50 *Akman v Turkey* 2001-VI.

51 Rule 62A(2) Rules of Court.

52 CDDH, CDDH Report Containing Conclusions and Possible Proposals for Action on Ways to Resolve the Large Numbers of Applications Arising from Systemic Issues Identified by the Court, 28 June 2013, CDDH(2013)R78 Addendum III at para 19.

53 ECtHR, The Court's Priority Policy, available at: www.echr.coe.int/Documents/Priority_policy_ENG.pdf [last accessed 29 July 2014].

54 Rule 41 Rules of Court.

(ix) The 'Hungarian pensions cases'

When the Court was confronted with almost 8,000 new applications concerning pension rights in Hungary in one month, it decided that normal proceedings could not apply. Instead, it requested trade unions to re-submit grouped applications. After the process of re-submission, which is currently taking place, the Court will identify applications for examination 'as a priority as leading cases'.[55] It will not take any procedural steps regarding other applications, register applications not lodged through a trade union or contact individual applicants.[56] Again, this approach is clearly aimed at increasing the Court's efficiency, but it also means the Court is distancing itself from a certain group of individual repetitive applications, which in fact it does not accept at all. Instead, it will declare them *de facto* inadmissible because they are individual cases and not part of a grouped application.

(x) Default judgments and the expedited Committee procedure

Against the background of the observation that 'the Court is not in a position to deal with [repetitive] cases within a reasonable time', the Court has introduced, but not yet applied, the concept of default judgments.[57] These judgments have been proposed by the Court as

> a practice whereby in relation to clearly repetitive cases the Registry would simply refer a list of cases [together with appropriate amounts of compensation] directly to the Government to be settled in an appropriate way. In the absence of any justified objections from the Government, failure to provide redress within a fixed period of time would lead to a 'default judgment' awarding compensation to the applicant.[58]

When the respondent state takes adequate measures in reaction to the grouped communication, cases are returned to the national level without any substantial involvement of the Court. In the absence of an adequate response, the Court issues a default judgment in which it will probably not discuss the merits of any individual application. Furthermore, it can be assumed that it will simply award the compensation it proposed in the grouped communication, without scrutinising the claims for just satisfaction individually. In a manner comparable to the developments discussed previously, this new procedure results in a shift of focus from individual decision-making on the merits to increasing decision-making capacity.

The Court has, as far as the author is aware, not yet put its proposal into practice, but has used elements of the proposal in the 'expedited Committee procedure'.[59] The Court used this procedure to handle a large number of applications concerning

55 ECtHR Registrar, Press Release: European Court Registrar Calls for Special Measures to Deal With Influx of Hungarian Pension Cases, 11 January 2012, ECHR 009 (2011).

56 Ibid.

57 ECtHR, Preliminary Opinion of the Court in Preparation for the Brighton Conference, 20 February 2012 at para 21, available at: www.echr.coe.int/Documents/2012_Brighton_Opinion_ENG.pdf [last accessed 29 July 2014].

58 Ibid.; see also supra n 52 at para 27.

59 For another example where the Court used elements of the procedure, see supra n 52 at para 28.

the problem of non-execution of domestic judgments in the Ukraine, a problem which remained unresolved in spite of a pilot judgment.[60] In *Kharuk and Others v Ukraine*, the Court adopted a uniform approach to just satisfaction: it awarded 3,000 Euros to applicants who had been waiting for more than three years to have their favourable judgments executed, and 1,500 Euros to other applicants.[61] The Court subsequently announced that it would award a single lump sum to each applicant in the future, regardless of the non-enforcement period involved.[62] In the judgment, the Court remarked that its 'principal task is to secure the respect for human rights, rather than compensate applicants' losses minutely and exhaustively' and that the emphasis of its activity is 'on passing public judgments that set human-rights standards across Europe'.[63] It invited the Ukraine to issue unilateral declarations, based on the awards in *Kharuk and Others,* in similar applications. An expedited and simplified process of communication followed this judgment: the Registry collected only the key facts, did not compile individual factual summaries and did not communicate information about the individual applications to the respondent state. If the Ukraine does not file a unilateral declaration within six months, the Court will give judgment.[64] Again, this approach clearly equips the Court to process these applications efficiently, yet the expedited and simplified process also means that individual cases are not addressed on their own merits in each and every case.

The Court in its case law, as well as the states parties by way of reform measures, has endeavoured to increase the Convention system's efficiency so it can handle more applications in a shorter span of time than before. The effect of this endeavour is that the Court is dealing decreasingly on an individual basis with especially repetitive applications. Another effect is that certain applications are returned to the domestic level without a decision by the Court on the merits of the complaint made in the application.

B. Direction 2: The Court's Increasing Influence over Execution

As Section 4 will further explain, the Court has been established mainly to verify whether a state has violated a Convention right in the context of an individual application. A separate institution, the Committee of Ministers, which is a political body, was assigned the responsibility to supervise the execution of judgments in which the Court indeed finds a violation. Nevertheless, the Court's influence currently no longer just includes the merits of a complaint, but increasingly extends to execution matters as well. The reforms and case law developments examined below show how this influence has come into existence and to what aspects of the execution phase the influence relates.

60 *Yuriy Nikolayevich Ivanov v Ukraine* Application No 40450/04, Merits and Just Satisfaction, 15 October 2009.

61 Application No 703/05 et al., Merits and Just Satisfaction, 26 July 2012 at paras 23–25.

62 *Kononova and Others v Ukraine* Application No 11770/03 et al., Merits and Just Satisfaction, 6 June 2013 at para 24.

63 *Kharuk and Others v Ukraine*, supra n 61 at para 23.

64 Supra n 39 at paras 13–14.

(i) Request for interpretation of a judgment

Protocol No 14 has given the CM the power to request the interpretation of a judgment by the Court, if its task to supervise the execution of a judgment is hindered by a problem of interpretation.[65] Although the Court does not itself pronounce on the execution measures taken by the respondent state in an interpretative judgment, and thus does not take over the CM's more political role, the reform measure is a means for the Court to become directly involved in the execution phase and to assist the CM in its supervisory task.[66] This involvement is particularly important, as it means that the Court can potentially influence the decisions taken in that phase. After all, its clarification of how its judgment should be interpreted can have consequences for how the judgment is to be executed by the national authorities. Thus far, however, requests for interpretation of a judgment have not yet been made, so it is not possible to estimate how far the influence of the Court on the execution of its judgments would reach in practice.

(ii) Infringement proceedings

Also owing to Protocol No 14, the CM has the power to start infringement proceedings against a respondent state if it considers that the state refuses to abide by a judgment.[67] The Court's Grand Chamber decides on the question referred. More precisely, it establishes whether the respondent state has breached its duty, laid down in Article 46(1), to execute a judgment.[68] If the Court finds a breach, the CM decides on the measures to be taken. Alternatively, if no breach has occurred, the CM closes its examination of the execution of the judgment.[69] Infringement proceedings, just like requests for interpretation, allow the Court to become directly involved in execution matters. They even allow the Court to pronounce itself on the execution measures taken by the respondent state, which clearly indicates an important measure of influence in the execution phase. The potential importance of this possible involvement is even further increased by the fact that this decision determines whether the execution phase as supervised by the CM proceeds or ends. Nevertheless, it is important to note here that the competence to bring infringement proceedings has not been used by the CM yet. This possibility for the Court's involvement in execution matters therefore has not had any practical effect so far.

(iii) The pilot judgment procedure

Two features, which have already been mentioned in Section 2, illustrate more clearly than the above two reform measures that the Court already has obtained a stronger grip on execution than it had previously. First, the Court typically orders general measures in a pilot judgment and thus determines in a binding manner which measures the state must implement. It has, for example, ordered Serbia to take all

65 Article 46(3) ECHR.
66 Explanatory Report to Protocol No 14, supra n 8 at para 97.
67 Article 46(4) ECHR.
68 Article 31(b) ECHR.
69 Article 46(5) ECHR.

necessary measures within six months in order to allow the applicant and all others in his position to be paid back their foreign currency savings under certain conditions.[70] Requiring such general measures to be introduced has expanded the Court's influence over execution, especially as it orders such measures in the operative provisions of its judgment. They thereby obtain binding force, which means that the respondent state is obliged to comply with them. The state is therefore left much less leeway than under the Court's 'old' case law.

Second, the PJP has helped to strengthen the Court's involvement in the execution of its judgments, because the Court itself plays a role in supervising the execution of the general measures it ordered in the pilot judgment. Such supervision is, according to the Court, 'inherent in' the PJP, as the 'situation complained of in a "pilot" case necessarily extends beyond the sole interests of the individual applicant'.[71] The Court can exercise supervision in different rulings that follow-up on a pilot judgment. Such rulings include decisions approving a friendly settlement between the parties to the pilot judgment and strike-out decisions clarifying to the applicants with a case similar to the pilot case that they should use the domestic remedy created pursuant to the pilot judgment.

(iv) Article 46 indications

Until the 1990s, the Court used to categorically refuse to make any indication as to the measures the respondent state should take to execute an adverse judgment.[72] Indeed, there was no need to do so, as the obligation to execute rests on the states by virtue of Article 46(1) of the ECHR, not by virtue of the Court's indications. Moreover, it was generally considered that the choice for certain execution measures belonged to the states' discretion and was not part of the Court's role. In the mid-90s, the Court nevertheless started to make such 'Article 46 indications', mainly for purposes of clarification. The first indications concerned individual measures required to remedy a violation of Article 1 of Protocol No 1 to the ECHR because of expropriation or nationalisation.[73] From mid-2000, the Court has indicated, and sometimes repeated in the operative provisions of a judgment, individual measures in other contexts as well. It has, for example, indicated that an Article 2 violation should be investigated,[74] that an applicant should receive free medical cover[75] and that an applicant should be set free immediately.[76] After its first pilot judgment in 2004, the Court also started to indicate execution measures of a general nature in

70 *Ališić and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* Application No 60642/08, Merits and Just Satisfaction, 16 July 2014 at para 10 (operative provisions).

71 *Wolkenberg and Others v Poland* Application No 50003/99, Strike Out, 4 December 2007 at para 35.

72 See, for example, *Dudgeon v United Kingdom* (Article 50) A 59 (1983); 5 EHRR 573 at para 15.

73 Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the *Assanidze*, *Broniowski* and *Sejdovic* Cases' (2007) 7 *Human Rights Law Review* 396 at 398; the Court made its first indication in *Papamichalopoulos and Others v Greece* (Article 50) A 330-B (1995); 21 EHRR 439 at paras 38–40.

74 *Abuyeva and Others v Russia* Application No 27065/05, Merits and Just Satisfaction, 2 December 2010 at para 243.

75 *Oyal v Turkey* 51 EHRR 30 at para 102.

76 *Assanidze v Georgia* 2004-II; 39 EHRR 32 at para 14(a) (operative provisions).

non-pilot judgments, normally without repeating them in the operative provisions. It has, for example, indicated that Turkey should enact legislation on conscientious objectors and introduce an alternative form of service.[77] The development of Article 46 indications exemplifies the Court's growing influence over execution, as the Court can potentially influence which execution measures are taken.

C. Consequences: Moving Away from Deciding Individual Applications and Influencing Execution of Judgments

This Section has demonstrated how the Court is moving in two clearly discernible directions. First, it is clear that the Court has shifted its attention from deciding each individual application on its merits to dealing with complaints as efficiently as possible. In particular, this means that it pays less attention to individual applicants in certain categories of cases. This is the case, for example, for applicants who have not suffered a significant disadvantage or who bring a low-priority repetitive application. Their applications often have a legal and factual background comparable to a judgment of principle, a pilot judgment or well-established case law and are decided with reference to this earlier case law. These categories of individual applications frequently result in relatively formal judgments, that is judgments in which a standardised amount of just satisfaction is awarded, and in strike-out decisions which do not address the merits of a complaint. Further, often the Court does not deal with such categories of applications individually. Indeed, it may even make it practically impossible for the applicant whose application falls into these categories to undertake friendly settlement negotiations or to arrive at a friendly settlement at all. Such results enable the Court to improve its decision-making capacity and direct its attention to applications pertaining to an urgent complaint or important Convention question of general importance, such as a domestic dysfunction, an issue of principle or a leading case.

Secondly, the above analysis has made clear that the Court has obtained and created increasing potential to influence the execution of its judgments. In particular, the Court can exert such influence by suggesting or ordering execution measures. Further, after it has issued a pilot judgment, the Court can supervise the execution of its judgment on its own initiative. Finally, there is a potential (albeit not yet used) for influence by way of the newly created competences for interpretation of its judgment and by way of deciding whether a state has failed to execute a judgment in an infringement proceeding.

3. EXPLAINING THE BACKGROUND TO THE DIRECTIONS IN WHICH THE COURT IS MOVING

A. Introduction

The previous Section described the reforms and developments which have shaped the two directions in which the Court is moving. In order to facilitate an evaluation of the changes which the two directions have brought about, which will be provided in Section 4, it is important to contextualise these two directions. For that reason,

77 *Erçep v Turkey* Application No 43965/04, Merits and Just Satisfaction, 22 November 2011 at para 80.

their context is sketched in this Section by outlining how three factors can help to explain why the reforms and developments shaping the directions have developed. After having introduced these factors, this Section addresses their relevance for each of the two directions separately.

B. The Explanatory Factors

The first possible explanation for the Court's shift in focus from individual applications to efficiency and for its increasing involvement in the execution of its judgments can be found in the need for a response to three interconnected problems which the supervisory system is faced with.

The first of these problems is the inadequate national implementation of the Convention and the partial and delayed execution of the Court's judgments. The matter of implementation is particularly problematic in certain states parties, for example those from which high numbers of repetitive cases result.[78] The European Ministerial Conference on Human Rights, amongst others, acknowledged the problem already in 2000 by stressing 'the need to improve even further the implementation of the Convention by the member states'.[79] As regards the execution of the Court's judgments, states frequently do not execute a judgment in time or they pay compensation to the applicant, but do not take measures to prevent future violations. Therefore, the execution problem is often a matter of delay and incompleteness, rather than of complete refusal.[80]

The second problem for the Convention system is the large and increasing portion of repetitive applications. At the beginning of 2013 nearly 41,000 repetitive cases were pending, which is an increase of 92 per cent compared to 2010.[81] Such applications arise from 'systemic or structural issues at the national level' and the 'term "repetitive" implies that the Court has already addressed the underlying issue in a judgment.'[82] This problem is a symptom of the first, as these applications demonstrate 'that national systems are not well-adapted and that, quite often, judgments are not properly executed by States.'[83]

The caseload problem, the third problem, is well-known. In December 2013, there were 99,900 pending applications, with 82 per cent of them originating from

78 For more information, see Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (New York: Open Society Foundations, 2010) at 52–6; Pourgourides, Report: Implementation of Judgments of the European Court of Human Rights, 20 December 2010, Doc. 12455; and Kivalov, Report: Ensuring the Viability of the Strasbourg Court: Structural Deficiencies in States Parties, 7 January 2013, at 13087.

79 Resolution I: Institutional and functional arrangements for the protection of human rights at national and European levels, November 2000, at para 13, available at: www.coe.int/t/dghl/standardsetting/cddh/Proceedings/Rome_en.pdf [last accessed 29 July 2014].

80 For more information, see Lambert Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, 2nd edn (Strasbourg: Council of Europe Publishing, 2008) at 64–7.

81 Supra n 52 at para 8.

82 Ibid. at para 4.

83 Speech given by Mr Jean-Paul Costa, President of the European Court of Human Rights, on the occasion of the opening of the judicial year, 29 January 2010, available at: www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf [last accessed 29 July 2014].

11 states.[84] This problem is connected to the first, as inadequate implementation and execution is a major cause of the vast caseload, and to the second, because the caseload consists mostly of repetitive applications.

Further, the particular form and design of the reform efforts and case law developments can be explained by another factor, which is the well-known principle of subsidiarity. This principle forms an important foundation of the Convention system as it plays a role in *inter alia* the task division between the Court and the states parties and the admissibility criteria. The principle is based on a notion of primarity, which captures the primary responsibility of the states parties for securing the Convention rights, as stipulated by Article 1 of the ECHR.[85] The notion of primarity manifests itself in, for example, the requirement placed on the states to secure an effective remedy for violations of the Convention rights in Article 13 of the ECHR. Placing such primary responsibility on the states logically means that the Court has a subsidiary role to play. Manifestations of this notion of subsidiarity are visible throughout the text of the Convention, for example, in the requirement that the Court may only deal with an application after all domestic remedies have been exhausted.[86]

In addition to the subsidiarity principle, the effectiveness principle can help to understand the coming into existence of certain developments in the ECHR supervisory system. This principle follows from the Court's position that it is crucially important[87] and required by the object and purpose of the Convention[88] that the ECHR 'is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory'.[89] The principle therefore pertains to the effective protection of the ECHR rights, not to procedural effectiveness in the first place. To illustrate, the Court exceptionally declares applications admissible even though the applicant has not exhausted domestic remedies, which the applicant would be required to do in line with the subsidiarity principle, because they are ineffective.[90] In such an instance, the Court gives priority to respect for the effectiveness principle, in part at the expense of respect for the subsidiarity principle.

C. Explaining Direction 1

The Court's distancing itself from certain categories of applications is clearly a response to the three interconnected problems introduced above. The reforms and developments described in Section 2 give the Court tools to fight these problems and have been mostly applied to the problem of repetitive applications. To a certain extent, the movement away from dealing with all individual applications on their merits, is directed to simply dealing with all these complaints as quickly and efficiently as possible so as to reduce the caseload. In addition, however, the Court's

84 ECtHR, Annual Report 2013: Provisional Version at 61 and 195, available at: www.echr.coe.int/Documents/Annual_report_2013_prov_ENG.pdf [last accessed 29 July 2014].

85 Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden/Boston: Martinus Nijhoff, 2009) at 360.

86 Article 35(1) ECHR.

87 *Scoppola v Italy (No 2)* 51 EHRR 12 at para 104.

88 *Mamatkulov and Askarov v Turkey* 41 EHRR 25 at para 101.

89 *Scoppola v Italy (No 2)*, supra n 87 at para 104.

90 See, for example, *Isayeva, Yusupova and Bazayeva v Russia* 41 EHRR 39.

focus on systemic and generalised problems can be regarded as a way to respond to the implementation and execution problem. Another response is to find ways to solve deeper general and structural national problems, as can be seen in the PJP and judgments of principle.

The subsidiarity principle also helps to explain why the Court distances itself from deciding specific categories of applications on their individual merits. The Court declines to examine certain applications because their examination would require it to go beyond its subsidiary task, thus intruding on the states' primary task. The drafters of Protocol No 14, for example, noted that the principle of subsidiarity underlies the new admissibility criterion and the expanded Committee competence.[91] Further, the Court itself has referred implicitly to the principle when it, in its proposal of default judgments, stated that 'the examination of such large numbers of repetitive complaints is not compatible with the functioning of an international court', explaining that 'the underlying principle is that of "shared responsibility": more of the burden of processing repetitive cases has to be shifted away from the Court'.[92] The Court's case law also illustrates this point. In its pilot judgments, the Court has clarified that it is not for itself, but for the national authorities to take 'the necessary remedial measures in accordance with the subsidiary character of the Convention'.[93] In similar vein, it has held that referring back the question of appropriate relief to the domestic system 'reflects the subsidiarity principle'.[94] Moreover, an 'important aim' of the PJP is to 'induce the respondent State to resolve large numbers of individual cases arising from the same structural problem…, thus implementing the principle of subsidiarity'.[95] As a last example, the Court stated that when a domestic remedy for repetitive applications has been designed, continuing to decide such applications 'would be at odds with the principle of subsidiarity'.[96] It added that deciding such applications

> mainly involves the establishment of basic facts and calculation of monetary compensation – both of which should, as a matter of principle…, be the domain of domestic jurisdictions.… The Court reiterates that its task, as defined by Article 19, would not be best achieved by taking such cases to judgment in the place of domestic courts, let alone considering them in parallel with the domestic proceedings.[97]

In these examples, the subsidiarity principle plays a central role in the Court's decision to take a certain approach to handling its caseload. It does not refer to the

91 Supra n 20 at para 12.

92 CDDH, Report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court, 11 July 2013, CM(2013)93 add.6 at paras 24 and 26.

93 *Broniowski v Poland*, supra n 35 at para 193.

94 *Association of Real Property Owners in Łódź v Poland* ECHR Reports 2011 at para 86.

95 *Greens and M.T. v United Kingdom* ECHR Reports 2010; 53 EHRR 21 at para 108.

96 *Nagovitsyn and Nalgiyev v Russia* Application Nos 27451/09 and 60650/09, Admissibility, 23 September 2010 at para 40.

97 Ibid.

effectiveness principle, even though its approach could mean that the rights of an applicant are protected less effectively.

D. Explaining Direction 2

The Court's increasing influence over execution can also be explained as a reaction to the caseload problem. This direction primarily has to do with the cause underlying the caseload problem, namely the implementation and execution problem; for example, the CM has been given the power to request the Court's interpretation of a judgment, because experience demonstrates that states may encounter difficulties in the execution of a judgment because of disagreement or uncertainty as to its interpretation.[98] This might lead to flawed or delayed execution, which can be avoided by requesting a more detailed explanation of the Court. Further, the possibility of infringement proceedings was deemed desirable considering that the '[r]apid and full execution of the Court's judgments is vital'.[99] The PJP is also, *inter alia*, a means to facilitate execution.[100] Comparably, the Court's practice of identifying a systemic problem prior to making an Article 46 indication serves to 'assist the Contracting States in finding the appropriate solution and the [CM] in supervising the execution of judgments'.[101] In all these situations, thus, the new procedural solutions and the interventions of the Court in the execution process may help to remove the root causes of flawed execution, which may contribute to reducing the caseload eventually.

The effectiveness principle can also explain part of the Court's increased intervention in the execution process. In conformity with a strict reading of the subsidiarity principle, it would not be the Court's task to indicate execution measures as this would fall under the primary responsibility of the states, as supervised by the CM. The Court relies on the effectiveness principle to make such indications nevertheless. It has, for example, clarified that the object in designating a case for the PJP, which brings with it ordering general measures, 'is to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the Convention right in question in the national legal order'.[102] Making an Article 46 indication as regards general measures serves the same purpose[103] and indicating individual measures facilitates repairing the effective protection of the rights of an individual applicant.[104]

E. Explaining the Directions the Court Is Moving In

It is clear from the above that the two directions discussed in Section 2 can be explained to a large extent by three factors, namely the three interconnected problems which have troubled the Convention system since the 1990s and the principles of subsidiarity and effectiveness. The Court appears to be moving in the direction of

98 Supra n 20 at para 96.
99 Ibid. at para 98.
100 *Greens and M.T. v United Kingdom*, supra n 95 at para 117.
101 *Gülmez v Turkey* Application No 16330/02, Merits and Just Satisfaction, 20 May 2008 at para 62.
102 *Hutten-Czapska v Poland* 2006-VIII; 45 EHRR 4 at para 234.
103 *Gülmez v Turkey*, supra n 101 at para 63.
104 See, for example, *Al-Saadoon and Mufdhi v United Kingdom* ECHR Reports 2010; 51 EHRR 9 at para 171.

distancing itself from certain applicants mainly in order to fight the problem of the caseload by way of handling repetitive applications efficiently. This direction hardly directly addresses the cause of the high caseload, namely the execution and implementation problem. Many of the measures introduced in this regard can also be explained by the subsidiarity principle, as they mainly aim to stimulate the states to solve Convention violations themselves: as the Court emphasises, dealing with certain applications is not its task. The Court's growing influence over execution can also be explained as a response to the high caseload, which is a response that is aimed in particular at solving underlying execution and implementation problems. Moreover, the effectiveness principle may explain the choices made as to the design of the reform measures, as many of these measures contribute to the effective protection of the Convention rights on the national level in the long run.

4. CHANGES RESULTING FROM THE DIRECTIONS FOR THE ACTORS IN THE CONVENTION SYSTEM

A. Introduction

This section assesses the effects of the two directions in which the Court has been moving on the Court itself and three other important actors in the Convention system, namely the states parties, the Committee of Ministers and the applicants. Prior to this assessment, however, it must be defined where these actors stood when Protocol No 11 took effect. A description is therefore given in this Section of their task/position at the time of Protocol No 11's entry into force in 1998. Protocol No 11 is taken as a reference point because it laid down the outlines of the current Convention system and because the main reforms and developments discussed here have—roughly speaking—taken place since.

B. The Court

(i) The Court's task in the Convention system

In accordance with Article 19 of the ECHR—an Article which has been in the Convention since its adoption—it is the Court's 'sole duty… to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention'.[105] It discharges this duty mainly by examining individual applications.[106] The Court's task can therefore be characterised as supervisory and oriented towards delivering individual justice. In conformity with the subsidiarity principle, the Court establishes whether the states have complied with their obligation under Article 1 of the ECHR to secure to everyone within their jurisdiction the Convention rights.[107] This makes its judgments 'essentially declaratory',[108] meaning the states parties choose the

105 *Kononov v Latvia* Application No 36376/04, Merits and Just Satisfaction, 24 July 2008 at para 108; this judgment was referred to the Grand Chamber.

106 The Court also has the power to decide inter-state cases (Article 33 ECHR), but such cases are rare.

107 *Weixelbraun v Austria* 36 EHRR 45 at para 27.

108 *Assanidze v Georgia*, supra n 76 at para 202.

measures to execute a judgment. Originally, therefore, the Court cannot verify whether the chosen measures are adequate, let alone find a violation on account of inadequate measures.[109] This can also be derived from the fact that the CM is responsible for supervising the execution of the Court's judgments under the Convention, as mentioned above.[110] According to the Court, '[it] cannot assume any role in this dialogue' about 'the means by which [the respondent] will discharge its legal obligation under Article 46'.[111] The subsidiarity principle also limits the Court's supervisory jurisdiction in areas other than execution.[112] The principle means, for example, that it is normally 'solely for the domestic courts to establish the facts of the case and to interpret domestic law'.[113] The Court, in sum, used to be primarily oriented towards delivering individual justice by examining individual applications and abstained from interfering with execution matters.

(ii) Changes in the Court's task

The way in which the Court discharges its task under the Convention has changed in various respects since 1998. Section 2 already referred to these changes. To reiterate, one first important development is that the Court increasingly rejects (repetitive) applications not raising an important Convention issue. This is either a complete rejection, namely when it applies the new admissibility criterion, or a partial rejection, namely when it strikes an application out without deciding its merits. The reforms and developments resulting in this change may lead the Court to refuse to scrutinise certain applications more and more as it stated in 2008 that 'it cannot be ruled out that in the future [it] may wish to redefine its role…and decline to examine' applications 'where there is no longer any live Convention issue'.[114] However, as of yet, the Court has not redefined its role accordingly and the use of the new admissibility criterion, empowering the Court to completely reject an application, still 'seems limited'.[115] It is furthermore unlikely that it will use the criterion more extensively, as 'the great majority of cases which might fall to be dealt with under [the new criterion] are declared inadmissible more rapidly and more easily under other criteria.'[116] The first development is therefore only the beginning of what may become a fully fledged change in the future.

The second change in respect of the Court is that it decreasingly provides justice in an individualised manner in respect of some applications. Although it continues to decide and to provide justice to individuals bringing repetitive applications, it

109 Ibid.

110 Article 46(2) ECHR.

111 *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* Application No 32772/02, Merits, 4 October 2007 at para 48; this judgment was referred to the Grand Chamber: see *Verein gegen Tierfabriken Schweiz (UgT) v Switzerland* ECHR Reports 2009.

112 *Kononov v Latvia,* supra n 105 at 108.

113 Ibid.

114 *E.G. and Others v Poland* ECHR Reports 2008; 48 EHRR SE3 at para 27.

115 Buyse, supra n 23 at 13.

116 CDDH, Draft CDDH Report Containing Elements to Contribute to the Evaluation of the Effects of Protocol No. 14 to the Convention and the Implementation of the Interlaken and Izmir Declarations on the Court's Situation, 31 October 2012, DH-GDR(2012)R2 Addendum II at para 31.

decreasingly handles them on an individual basis, but rather as part of a group, because 'in cases involving many similarly situated victims a unified approach may be called for.'[117] Such an approach encompasses, for example, awarding standardised amounts of just satisfaction, joining repetitive applications and deciding them based on well-established case law.

The Court's movement away from decision-making in certain individual cases is matched by the Court's increasing focus on providing 'general justice'.[118] It provides general justice in 'public judgments that set human-rights standards across Europe'[119] as well as in judgments concentrating on the cause underlying an individual violation. Standard-setting judgments are, for example, pilot judgments, judgments of principle and judgments immediately establishing well-established case law. Based on such judgments, new applications can be decided relatively quickly and without much ado. Pilot judgments and judgments in which the Court makes an Article 46 consideration are examples of judgments which aim to solve the underlying systemic or structural domestic problem. The development towards delivering 'general justice' will be further fuelled by the new optional Protocol No 16. This Protocol extends the jurisdiction of the Court to give advisory opinions on questions of principle relating to the interpretation or application of the Convention rights on request of the highest national courts.[120] The aim of this Protocol is *inter alia* to 'enhance the Court's "constitutional" role', and it thereby clearly will contribute to the tendency to offer general justice rather than (only) individual justice.[121] It is important to observe, however, that the strengthening of this tendency of providing general justice is not a radical departure from how the Court used to function. To illustrate, even though the Court observed in the context of the PJP that its 'principal task' is to ensure the observance of the engagements undertaken by the states parties,[122] it remarked in a non-pilot judgment at a later date that it 'primarily' fulfils its task 'by providing individual relief'.[123] Besides that for a long time the Court has stressed that its task is not only to deliver individual justice, but also to elucidate the terms of the Convention in a more general sense.[124] In other words, the Court has not exchanged one task for another, but has mainly strengthened and widened its constitutional function next to its individual justice task.

Another change is that, unlike before, the Court can become involved in execution matters in different ways. The Court thus goes beyond its originally purely supervisory task. By doing so it limits the freedom of choice of the states parties when fulfilling their primary responsibility to execute a judgment. Moreover, some of the Court's activity may have the effect of blurring the previously clear-cut task

117 *Stošić v Serbia* Application No 64931/10, Merits and Just Satisfaction, 1 October 2013 at para 67.

118 This article uses the term 'general' rather than 'constitutional' to avoid the discussion as to whether the Court has become or is becoming a constitutional court. For this discussion, see Greer and Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12 *Human Rights Law Review* 655.

119 See, for example, *Kharuk and Others v Ukraine*, supra n 61 at para 23.

120 Article 1(1) Protocol No 16.

121 Explanatory Report to Protocol No 16, supra n 14 at para 1.

122 *Witkowska-Tobola v Poland*, supra n 36 at para 78.

123 *Djokaba Lambi Longa v The Netherlands* ECHR Reports 2012; 56 EHRR SE1 at para 58.

124 See, for example, *Ireland v United Kingdom* A 25 (1978); 2 EHRR 25 at para 154.

division between the CM and itself. However, it will become clear from describing the effect of this change on the states and the CM in more detail below that this is a subtle change rather than a sea change. Moreover, as was already mentioned, the practical impact of some of the changes to the Court's competences in the execution phase is limited, because the CM has neither made a request for interpretation nor started infringement proceedings yet.

Thus it can be seen that the Court presently fulfils its task both more and less in conformity with the subsidiarity principle than it did in 1998. Enhanced respect for the primary role of the states and the Court's subsidiary role can be seen in developments in its case law giving states the opportunity to solve an application on the domestic level, even after it has reached Strasbourg. This is, for example, possible due to unilateral declarations, the adjournment of applications similar to the pilot judgment and judgments of principle. Simultaneously, however, some developments indicate a certain decline in the Court's respect for the subsidiarity principle. This applies in particular for the Court's creation of opportunities to indicate execution measures and to supervise execution. In turn these developments disclose a continuing attention to the effectiveness of the protection of (individual) Convention rights. Considering the foregoing, it can be concluded that the reforms and developments in the Court's case law have brought change, but that they have not profoundly changed the very foundations of its task.

C. The States Parties

(i) The states parties' task in the Convention system

As explained above, traditionally the states parties bear primary responsibility for securing the Convention rights. Most importantly, this means they must secure to everyone within their jurisdiction the Convention rights.[125] When they nevertheless violate a Convention right, they must provide an effective remedy to the victim of the violation.[126] When they also fail to fulfil this task and the Court makes a finding to this effect in a judgment, they must execute the judgment in conformity with Article 46(1) of the ECHR. Execution requires the state to end the violation, provide redress to the victim and prevent future violations.[127] The states are, in line with the notion of primarity discussed in Section 3, in principle free in how they fulfil their tasks,[128] but they are supervised by the Court when discharging their first two tasks (that is, securing Convention compliance and remedying violations) and by the CM when discharging their third task (that is, executing the Court's judgments). The CM supervises the third task in the execution phase in the manner explained below in Section 4.D. In spite of supervision by both the Court and the CM, the states are originally granted much freedom to meet their obligations under the Convention in accordance with the subsidiarity principle and the notion of primarity of national protection of fundamental rights.

125 Article 1 ECHR.

126 Articles 13 and 35(1) ECHR.

127 *Papamichalopoulos and Others v Greece*, supra n 73 at para 34; and *Erçep v Turkey*, supra n 77 at para 80.

128 *Kurić and Others v Slovenia* ECHR Reports 2012; 56 EHRR 20 at para 406.

(ii) Changes in the states parties' task

The two directions in which the Court is heading have changed the degree of freedom that the states parties have to discharge the tasks imposed on them by the Convention. On the one hand, the developments have given them more discretion when performing their task to remedy a violation. This is, for example, a product of the increasing number of applications being struck out. Strike-outs mainly signify that the Court accepts the way in which the national authorities aim to offer redress, which it may even do if the applicant does not agree with this. Indeed, such discretion to remedy violations on the national level is a constant feature of PJP judgments, judgments of principle, routine friendly settlements, unilateral declarations, the default judgment procedure and the expedited committee procedure. This discretion is, however, not uncontrolled, because whether a case is struck out on the state's proposed terms depends on whether the Court approves the terms and, in the case of a friendly settlement, whether the applicant agrees as well.

On the other hand, however, the states' discretion as to how they discharge their task to execute a judgment has become more limited because of the Court's increasing influence over execution. This is a consequence of the Court's Article 46 indications and the monitoring of execution by both the Court and the CM in the PJP. The obligation to execute has thus become harder to escape. However, the Court's increasing involvement in execution matters is subtle, as the Court tends to only indicate that measures be taken or gives an inexact description of the execution measures.[129] The states can therefore decide themselves on the content and design of the measures. Furthermore, although Article 46 indications seem to go against the subsidiarity principle temporarily, the Court thereby aims to eventually achieve that the system as a whole functions (again) in conformity with the principle. The indication of general execution measures in particular is a reaction to a domestic dysfunction, which causes repetitive applications and which signifies that the respondent state has failed to fulfil its primary responsibility.[130] The implementation of these measures by the state, in the PJP partially under the Court's supervision, serves to resolve the dysfunction. If this result is achieved, the state has resumed its primary responsibility and the Court can stick to its subsidiary task.[131] In the end, thus, the directions apparent in the Court's case law do not fundamentally affect the basic task division underlying the Convention system, even if there may be a certain impact on the immediate level of discretion granted to the states.

129 Darcy, 'Pilot Judgments from the Perspective of the Court and Possible Elements of the Pilot Judgment Procedure which Could be Drafted', in *Pilot Judgment Procedure in the European Court of Human Rights and the Future Development of Human Rights' Standards and Procedures, Third Informal Seminar for Government Agents and Other Institutions* (Warsaw: Kontrast, 2009) 36 at 38; and Gerards, 'The Pilot Judgment Procedure before the European Court of Human Rights as an Instrument for Dialogue', in Claes, de Visser, Popelier and Van de Heyning (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Antwerp: Intersentia, 2013) 371 at 386.

130 See, for example, *Driza v Albania* 2007-V; 49 EHRR 31 at para 125; *Gaglione and Others v Italy* Application No 45867/07 et al., Merits and Just Satisfaction, 21 December 2010 at paras 51–6; and *Pulatlı v Turkey* Application No 38665/07, Merits and Just Satisfaction, 26 April 2011 at paras 37–9.

131 *Greens and M.T. v United Kingdom*, supra n 95 at para 108.

D. The Committee of Ministers

(i) The CM's task in the Convention system

Ever since the entry into force of the Convention, the CM has been responsible for supervising the execution of the Court's judgments. Its task begins where the Court's task ends: when a judgment has become final or when the Court decides to strike a case out based on a friendly settlement.[132] After the CM has established that all the necessary measures to abide by a judgment have been implemented, it ends its task by adopting a final resolution concluding that its functions under the Convention have been exercised.[133] The task division between the Court and the CM was therefore clear-cut and divided along procedural lines: the Court decides on the admissibility and the merits of a case and the CM supervises the judgment's execution. Further, because the states parties bear primary responsibility for execution, the CM's supervisory task is, just like that of the Court, subsidiary in nature.[134]

(ii) Changes in the CM's task

The Court's tendency to distance itself from deciding a specific category of applications on their merits has had hardly any effect on the CM. The measures taken to alleviate the Court's work will decrease the CM's workload when they have effect, but this only impacts on how much, not on what it does. The Court's supervision of general execution measures in the context of the PJP is more relevant to the CM, since this means that the Court has become involved in matters which were previously only supervised by its counterpart. This could potentially have the effect of limiting the CM's original role in the Convention system and blurring the clear-cut task division between the two institutions. These effects have, however, hardly materialised, as the change is, once again, subtle. The Court remains 'careful to distinguish between its own role and that of the [CM]' in the PJP.[135] When the Court supervises general measures it, for example, uses different criteria than the CM.[136] Further, it tends to make only a global assessment, thus leaving the more detailed assessment to the CM.[137] After the Court has ended its supervisory involvement in execution it is, moreover, still 'for the [CM] to supervise…the execution' of the pilot judgment.[138]

132 Articles 39(4) and 46(2) ECHR.

133 Rule 17, Committee of Ministers, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, 10 May 2006.

134 Committee of Ministers, *6th Annual Report of the Committee of Ministers 2012* (Strasbourg: Council of Europe, 2013) at 24.

135 Leach, Hardman, Stephenson and Blitz, *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgments' of the European Court of Human Rights and Their Impact at National Level* (Antwerp: Intersentia, 2010) at 24; see also Darcy, supra n 129 at 38.

136 To illustrate, in a friendly settlement strike-out following up on a pilot judgment, the Court establishes whether general measures are based on respect for human rights, while the CM evaluates, at the end of the PJP, the 'general measures and their implementation as far as the supervision of the execution of the Court's principal judgment is concerned': see *Broniowski v Poland* 2005-IX; 43 EHRR 1 at paras 33 and 42.

137 See, for example, *Zadrić v Bosnia and Herzegovina* Application No 18804/04, Strike Out, 16 November 2010; *Greens and M.T. v United Kingdom*, supra n 95 at para 114; and *Association of Real Property Owners in Łódź v Poland,* supra n 94 at para 81.

138 *E.G. and Others v Poland*, supra n 114 at para 29.

Rather than describing these developments as limiting the CM's role, they therefore can be more appropriately characterised as the Court increasingly assisting the CM while respecting the CM's task. Therefore, the increased impact of the Court on execution of judgments has had limited influence on the CM and the influence that exists is mainly positive. Probably for these reasons, the CM has accepted the Court's involvement and considers it to be of added value.[139]

E. The Applicant

(i) The applicant's position in the Convention system

Up to the 1990s, the individual applicant had an 'inferior'[140] status in the Convention system, because the right to individual petition was optional and not widely opted into. Moreover, individuals could not apply directly to the Court; a case could only be referred to the Court by the states or the former Commission.[141] By the 1990s, however, all states had accepted the right to individual petition.[142] Further, Protocol No 9[143] gave individuals direct standing before the Court and Protocol No 11 made acceptance of the right mandatory. A strong right to individual petition was thus established. The Court used to effectuate this right by examining applications on their individual merits, normally not part of a joined application.

(ii) Changes in the applicant's position

When compared to the situation in 1998, the directions which the Court's work has taken appear to have both weakened and strengthened the position of the individual applicant.

The weakening of his position is the consequence of the Court's distancing from (repetitive) applications which do not raise an important or urgent Convention matter. To illustrate, some potential applicants no longer have the possibility to have their cases decided on their merits, namely when their application is declared inadmissible based on the new *de minimis* admissibility criterion. Other applicants, namely those with a 'Hungarian pension case', only have a collective, not an individual, right to petition. The Court may not do justice to the particularities of each such application when it decides them jointly with many others, wholly based on previously decided case law.[144] Further, ECHR proceedings have become so protracted

139 Gerards, supra n 129 at 329; see, by way of illustration, Committee of Ministers, Supervision of the Execution of the Judgments and Decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan – Elements for a Roadmap, 24 June 2010, CM/Inf(2010)28 revised at para 21; and Committee of Ministers, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: Annual Report 2011 (Strasbourg: Council of Europe, 2012) at 10.

140 Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010) at 405; see also Kjeldgaard-Pedersen, 'The Evolution of the Right of Individuals to Seise the European Court of Human Rights' (2010) 12 *Journal of the History of International Law* 267 at 269.

141 Article 48 ECHR (1950 version).

142 Bates, supra n 140 at 20.

143 1990, ETS 140, entry into force 1994.

144 The PJP has been criticised because of this: see, for example, Szklanna, 'The Impact of the Pilot Judgment Procedure of the European Court of Human Rights on the Execution of Its Judgments', in

for some applicants that their right to individual petition has little practical relevance. The priority policy has left repetitive applications with low priority and non-repetitive medium-priority applications, with 'little prospect of adjudication within a reasonable time'.[145] Applicants whose application is adjourned in the course of the PJP must also exercise patience. When the state successfully implements the ordered general measures, they must again turn to the domestic level for a remedy and when the state fails to implement, they have waited in vain. This is particularly disadvantageous to them as these measures often serve to remedy the prolonged non-enforcement of domestic judgments or the excessive length of domestic proceedings.[146] Lastly, routine friendly settlements and unilateral declarations, and the interplay between them, have weakened the applicant's position significantly. The former have made one tentative aspect of the right to individual petition unattainable, namely the possibility to arrive at a settlement after negotiations with the respondent state. Further, unilateral declarations have undermined the position of the applicant in friendly settlement negotiations. Failed negotiations namely do not need to result in a judgment on the merits of a case, but can be overcome by a declaration. In the words of the Polish Government Agent: 'From time to time, the applicants refuse the proposed amounts. In such situations, I use unilateral declarations'.[147] The Court even agreed with him to accept declarations offering a fixed amount in certain groups of repetitive cases.[148] The undermining effect of unilateral declarations is particularly apparent in repetitive cases, where the Court accepts declarations even without requiring the state to attempt a friendly settlement. Unilateral declarations have also weakened the applicant's position independently of friendly settlements, because they facilitate striking a case out on the state's terms and against the will of the applicant. Although the Court must approve the settlement, this is not a guarantee that the applicant is protected adequately. It has namely been reported that some violations at the root of a unilateral declaration had 'arguably not been adequately resolved by the Government's proposed terms'[149] and that the Court sometimes accepts a unilateral declaration 'based on a questionable offer'.[150] The foregoing applies also to applicants with non-repetitive cases. Moreover, the CM, unlike in the case of a friendly settlement or a judgment,[151] normally does not supervise unilateral

Benedek et al. (eds), *European Yearbook on Human Rights 2010* (Antwerp: Intersentia, 2010) 223 at 227.

145 CDDH, CDDH Final Report on Measures Requiring Amendment of the European Convention on Human Rights, 15 February 2012, CDDH(2012)R74 Addendum I, Appendix IV at para 9.

146 These issues are often the subject of the PJP: see ECtHR, Factsheet: Pilot Judgments, October 2013, at 4–6, available at: www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf [last accessed 29 July 2014].

147 Keller et al, supra n 46 at 145 and 172.

148 Ibid.

149 Leach, supra n 28 at 72.

150 Keller et al, supra n 46 at 68; for other critical remarks, see Sardaro, 'Jus non Dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court' (2003) 6 *European Human Rights Law Review* 601; and Rozakis, 'Unilateral Declarations as a Means of Settling Human Rights Disputes: A New Tool for the Resolution of Disputes in the ECHR's Procedure', in Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch* (Leiden: Martinus Nijhoff, 2007) 1003.

151 Articles 39(4) and 46(2) ECHR.

declarations,[152] placing applicants whose cases were dealt with by a declaration in a comparably weak position regarding execution.

Despite the above negative depiction of the applicant's position, his position has also become stronger. The Court's distancing from certain categories of applications does not equal a worse position in all respects, as it often enhances the efficiency of ECHR proceedings. The reforms and case law developments, just discussed as bringing bad news, can therefore also be welcomed by the applicants. To illustrate, when a Committee of three judges decides an application based on well-established case law, the applicant does not need to submit observations regarding the alleged violation;[153] he must only submit a claim for just satisfaction, probably without extensive substantiation. This makes it rather easy to obtain a favourable judgment including an award of just satisfaction. When the expedited Committee procedure applies, these results are, moreover, achieved comparably quickly. For this reason, the procedure, applied pursuant to *Kharuk and Others*, has attracted large numbers of applications (1,100 in April 2013; prior to the application of the procedure around 300–350 per month).[154] The new practice of routine friendly settlements attains a comparable outcome as the ready-made draft agreement sent to the parties by the Registry makes potentially time-consuming and complicated negotiations unnecessary. The applicant thus receives a financial award 'much quicker than in a normal procedure'.[155] Further, the measures taken at the national level pursuant to a judgment of principle may be faster and give the applicant more clarity about his situation under national law than a Strasbourg judgment. When an application can be dealt with in such ways, the applicant would gain only little in terms of being given redress if the Court were to decide his application on its merits. The Hungarian pension cases illustrate this as well: if the Court registered, communicated and adjudicated the thousands of applications individually, this would take so much of its capacity that the right to individual petition would, although adhered to in theory, become illusory in practice. The tactic of grouping cases together may instead lead to effective redress for all applicants within a reasonable time.

The second movement, the Court's increasing influence over execution, can also strengthen the applicants' position, provided the influence is translated into better and faster execution. This also applies to applicants other than those bringing repetitive cases. Article 46 considerations on individual measures are especially relevant in this respect.

F. Effects of the Changes in the Procedural Practice on the Actors in the Convention System

The two directions in which the Court is moving have affected, albeit rather subtly, all actors in the Convention system. The Court, the CM and the states parties perform their tasks under the Convention in a different manner than in 1998 and the

152 Glas, 'Human Rights News: II European Convention on Human Rights' (2012) 30 *Netherlands Quarterly of Human Rights* 495 at 497–8.

153 *Voropayev and Others v Russia* Application No 4047/05 et al., Strike Out, 10 April 2012.

154 Supra n 52 at para 29.

155 Keller et al, supra n 46 at 143.

position of the applicants, in particular those bringing a repetitive application, has changed. To summarise, the Court increasingly refuses to deal with certain applications at all or with their merits, decreasingly provides individualised justice in the case of repetitive applications and focuses more on general justice. Further, it can become involved in execution questions and operates both more and less in conformity with the subsidiarity principle. As for the states parties, they have gained discretion in one area and lost discretion in another. Similarly, the applicants' position has strengthened in some regards, but has weakened in other regards. The CM has been influenced the least by the two directions the Court is moving in. It does not fulfil its obligation differently as a result of the directions, but now receives assistance from the Court when fulfilling its obligation.

The combined effect of these changes in respect of the Convention actors can be best characterised as being generally subtle and partially ambivalent. The functioning and position of the actors in the system may have changed, but has not radically departed from the situation in 1998. Instead, the changes are modest overall and gradual. This is apparent in, for example, the fact that the decreasingly individualised manner in which the Court provides justice does not apply to applications generally, but to repetitive applications specifically. Also, the Court's growing focus on general justice is an addition to, not a replacement of, its attention to individual justice. Its increasing influence over execution also is limited in different respects. Furthermore, the effects of the developments have been ambivalent for the Court, the states parties and the applicants. In particular, the Court has come to function more and less in conformity with the subsidiarity principle, the states parties have gained and lost discretion when performing their tasks and the position of some categories of applicants has become both weaker and stronger.

5. CONCLUSIONS: CONSEQUENCES AND LESSONS TO BE DRAWN

As concluded in Section 4, the developments in the Court's work have effected gradual and modest changes with a subtle and ambivalent effect on the Court, the states parties, the applicants and the Committee of Ministers. In spite of the subtlety of these changes, the Court is clearly moving into two directions: it is increasingly less involved in dealing with individual applications and it is exercising more influence on the execution of its judgments. It can be seen from the analysis in Section 2 that the various changes stem from ad hoc and incremental forces, rather than from an overarching, well-considered vision with a clearly defined future destination for the Convention system. Moreover, it is evident that the net effect these changes have brought and will continue to bring in the future has been hardly thought through and agreed upon by the states parties. In this context, it is emblematic that it has been said that the Council of Europe 'formally committed itself not to consider fundamentals until near the end of this decade' in Interlaken, Izmir and Brighton.[156]

The combination of certain, albeit still subtle, changes and a lack of clear and comprehensive coordination carries with it various risks, which constitute persuasive reasons for thorough reflection on the long-term future of the Strasbourg supervisory system. Indeed, changes of the nature just described carry the risk that the problems

156 Greer and Wildhaber, supra n 118 at 658.

surrounding the Convention system are addressed on an ad hoc basis that treats symptoms (that is, the high caseload and the large portion of repetitive cases) to a limited extent, instead of the root cause of the problems engulfing the Convention system (that is, the implementation and execution problem). This risk is real and has already materialised in part. The reforms in Protocols No 14 and No 15, discussed in Section 2, have been and will be of little benefit to solving the caseload problem.[157] As explained previously, the new admissibility criterion is and probably will be used only to a limited extent, and the upcoming deletion of one of the safeguard clauses of the criterion will not 'contribute significantly to the decrease of the Court's workload'.[158] The committees of three judges, whose competences have been extended, have not been able to tackle the most critical aspect of the caseload problem: the growing backlog of Committee (and Chamber) cases.[159] To illustrate, the number of applications pending before a Committee rose by 84 per cent in 2012.[160] Further, committees have not succeeded in reducing the tens of thousands of repetitive cases to manageable proportions. On the contrary, the number of pending repetitive applications has increased since 2010,[161] by even 14 per cent in the first semester of 2013.[162] Further, the majority of the reforms and the case law developments leave unaddressed the implementation and execution problem, the root cause of the other two problems outlined previously. The Court is instead equipped to process repetitive cases fast and in large numbers. For example, unilateral declarations, now often applied to repetitive cases, do not induce states to take general measures. Nor can the CM require the state to take general measures following a declaration, because it does not normally supervise their execution. It is therefore open to question whether the declarations reduce the time the Court spends on repetitive cases in the long run.

The foregoing underlines that a coherent, well-informed vision including clear choices is required to adequately fight the three interconnected problems discussed in Section 3. In the absence of such a vision, which is shared by the Court and the states and is reflected in the text of the Convention, it seems that no fundamental changes that efficiently address the root cause of the problems can be legitimately made. Indeed, the relevant actors must reflect on questions such as what is currently the most pressing challenge, by what means can this challenge be met and what consequences does the implementation of these means have for the outlook for the Convention system?

Another undesirable side effect or risk of change which does not flow from a clear vision of the future Convention system is that the Convention and the Rules of Court fall behind practice. Currently, practice is already ahead of these documents. The Rules of Court, for example, dictate that a unilateral declaration may be filed in the absence of an attempt at a friendly settlement only in 'exceptional

157 ECtHR, The Interlaken Process and the Court ('2013 Report'), 28 August 2013, No 4447204, at 10, available at: www.coe.int/t/dghl/standardsetting/cddh/reformechr/Interlaken-report-2013-EN.pdf [last accessed 29 July 2014].

158 Supra n 144 at 37.

159 Ibid. at 8.

160 Analysis of Statistics 2012, supra n 32 at 6.

161 Supra n 52 at para 8.

162 2013 Report, supra n 157 at 9.

circumstances'.[163] Nonetheless, the Court accepts unilateral declarations in the absence of such an attempt if the application at issue is repetitive.[164] As repetitive applications are the rule rather than the exception, practice has clearly outdated the Rules of Court. Not updating relevant documents prior to implementing changes is problematic *inter alia* from the perspective of the Court's legitimacy. As its legitimacy has been questioned with increasing frequency, intensity and, at times, hostility,[165] legitimacy questions should be handled with special caution. Article 46 indications and the PJP, for example, have been introduced without explicitly empowering the Court to order execution measures in a binding fashion or to supervise execution. Regardless of whether this results in a legal caveat, the absence of Convention amendment could undercut the Court's legitimacy, especially because a draft Article giving the Court the power to make orders did not make it into the Convention in 1950.[166] Decreased legitimacy is likely to cause the states to feel less inclined to implement the Convention generally or, more specifically, to decline to accept and execute the Court's judgments fully and expeditiously. The effective protection of the Convention rights would thus be jeopardised. In addition to the foregoing, when amendments to the Convention and the Rules of Court do not precede change, the good functioning, transparency and predictability of Convention proceedings may be impaired. This is particularly problematic from the applicants' perspective. Procedural innovations are now often introduced by the Court without any prior amendment to its Rules of Court. This practice makes it hard to predict how Convention proceedings will develop and end. The foregoing used to apply to unilateral declarations and the PJP and now applies to the default judgment procedure and the Hungarian pensions cases. Reflecting on a vision of the ECHR system would contribute to ensuring that changes are adequately described in the Convention and in the Rules of Court prior to putting them to practice. In this way, the problem of Court documents, such as rules, falling behind practice, and legitimacy and transparency issues can be avoided.

It is thus clear why the Convention system should no longer continue to change in the currently somewhat haphazard manner, but should be reformed in conformity with a clear vision of the system's future that carries the states parties' approval. Such a vision is necessary to equip the system to enable it to respond adequately and efficiently to the various serious problems surrounding it, is beneficial to its legitimacy and makes it accessible in a predictable and transparent manner to the actor whose rights it aims to protect: the applicant.

163 Rule 62A(2) Rules of Court.

164 Supra n 52 at para 19.

165 For an overview of the criticism, see Gerards, 'The Prism of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 173 at 173–5.

166 Council of Europe, *Collected Edition of the "Travaux Préparatoires", Vol V* (The Hague: Martinus Nijhoff, 1979) at 300 and 302.