

Human Rights Protection Begins and Ends at Home: The ‘Pilot Judgment Procedure’ Developed by the European Court of Human Rights

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Abstract

This article analyses the ‘pilot judgment procedure’ developed by the European Court of Human Rights (after the adoption of the ‘reform package’ of measures in May 2004, including Protocol No.14 to the European Convention on Human Rights) in an attempt to tackle the phenomenon of ‘repetitive’ or ‘clone’ cases. These are applications (mainly coming from the new member states of Council of Europe) deriving from a structural or systemic situation in the respondent member state, which generates large numbers of, by definition, well-founded cases. The purpose of designating a case for the ‘pilot-judgment procedure’ is to process cases that violate the European Convention on Human Rights promptly and effectively. This article identifies the main characteristics and elements of this procedure and the principles applied by the Court when delivering pilot judgments. Furthermore, it discusses the application of this approach to various situations revealing systemic problems. Finally, the article critically evaluates the effectiveness, the weaknesses and the prospects of this procedure.

1. Introduction

The reforms contained in the package of measures adopted in May 2004, including Protocol No. 14, primarily aimed to tackle the two main challenges confronting the European Court of Human Rights (ECtHR). First, the burden of screening out the huge number of unmeritorious applications and second, the burden of delivering a judgment and assessing just satisfaction in repetitive or routine applications that are well-founded.¹ It was observed that much of the ECtHR’s time is spent in dealing with cases that are either inadmissible or concern repetitive violations. In 2003, 96% of the applications that were considered by the ECtHR were declared inadmissible (unmeritorious applications). However, they take up a considerable proportion of judicial and above all Registry time.² Further, some 60% of the judgments delivered by the ECtHR concerned repetitive cases or routine applications that are well-founded.³ These are

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¹ Position Paper of the ECtHR on Proposals for Reform of the ECHR and Other Measures as Set Out in the Report of the CDDH of 4 April 2003, 12 September 2003, CDDH-GDR(2003)024 at para. 5.

² Ibid. at para. 6.

³ In 2002 the ECtHR delivered 844 judgments, of which some 65% concerned repetitive cases, including cases concerning the length of judicial proceedings in States Parties-Steering Committee for Human Rights (CDDH),

applications deriving from a structural or systemic situation in the respondent member state, which generates large numbers of well-founded cases.⁴

This article analyses the ‘pilot judgment procedure’ developed by the ECtHR in an attempt to tackle the phenomenon of ‘repetitive’ or ‘clone’ cases. It identifies the characteristics and main elements of this procedure and the principles applied by the ECtHR when it delivers pilot judgments. Furthermore, it discusses the application of this approach to various situations revealing systemic problems. Finally, this article critically evaluates the effectiveness, the weaknesses and the prospects of this procedure.

2. Violations of a Structural Nature

The largest category of repetitive cases concerns the problem of excessive length of proceedings in many of the member states of the Council of Europe (CoE). A high number of applications lodged before the ECtHR alleged that the length of the domestic criminal, civil or administrative court proceedings had exceeded the reasonable time, as stipulated in Article 6(1) of the European Convention on Human Rights (ECHR) (more than 3,129 of a total of 5,307 applications declared admissible between 1955 and 1999).⁵ In addition, the ‘reasonable time’ requirement has been cited in nearly 50% of the ECtHR’s judgment as well as in many admissibility decisions.⁶ Although delay in the administration of justice seems to be a common phenomenon in most European legal systems, Italy has been ‘found guilty of a violation of the right to due process’⁷ the most often. Indeed, a particularly high number of applications regarding the reasonable time requirement has concerned Italy; of a total of 21,128 applications registered in the period from 1 November 1998 to 31 January 2001 2,211 were directed against Italy: of these, 1,156 related to the length of the proceedings.⁸ In *Bottazzi and Others v Italy*,⁹ a case concerning a complaint about the length of the proceedings, the ECtHR pointed out that the frequency with which violations were found, showed that there was ‘an accumulation of identical breaches’ which were ‘sufficiently numerous to amount not merely to isolated incidents’. Such breaches reflected a continuing situation that had not yet been remedied and in respect of which litigants had no domestic remedy. This accumulation of breaches accordingly constituted a practice that was incompatible with the ECHR.¹⁰

Guaranteeing the long-term effectiveness of the control system of the ECHR--Addendum to the final report containing CDDH proposals (long version), 9 April 2003, CDDH(2003)006 Addendum final, at paras 8 and 9.

⁴ CDDH-GDR (2003) 024, supra n. 1 at para. 8.

⁵ Evaluation Group Report to the Committee of Ministers on the ECtHR, 29 September 2001, at para. 27, available at: <http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm>.

⁶ Brett, ‘Justice in Time’, 26 August 2004, available at: <http://lawzone.thelawyer.com/human>.

⁷ Wolf, ‘Trial Within a Reasonable Time: The Recent Reforms of the Italian Justice System in Response to the Conflict With Article 6 (1) of the ECHR’, (2003) 9 *European Public Law* 189.

⁸ Evaluation Group Report, supra n. 5 at para. 27.

⁹ *Bottazzi and Others v Italy*, 1999-V.

¹⁰ Press Release issued by the Registrar, ECtHR, 28 July 1999.

A. Reasons for Structural Violations

Many of the repetitive cases concern structural problems existing in the newer member states of the CoE and these cases could be seen as a result of the enlargement of the CoE and the manner in which the enlargement took place.

The end of the Cold War encouraged many of the former communist states of Central and Eastern Europe to apply for membership of the CoE. There was a rapid expansion of the ECHR system in the 1990's when most of the Central and Eastern European countries joined the CoE and ratified the ECHR. From the former Soviet Bloc countries, Hungary (1990), Poland (1991) and the Czech Republic (1991) were among the first to ratify the ECHR and join the CoE. As a result, there was a dramatic increase in the number of the member states of the CoE, from 23 at the end of 1989 to 46 in 2005,¹¹ bringing the total number of potential applicants to 800 million.

The procedure that the CoE followed for the enlargement was that new member states had to sign the ECHR on the day they formally joined the CoE and then proceed rapidly to ratify it.¹² Hence, membership of the CoE and acceptance of its human rights protection system has in practice become one and the same.¹³ However, the speed of the enlargement process was strongly criticised. The critics suggested that the CoE admitted a number of states which manifestly did not meet the established minimum standards concerning respect for the rule of law and the existence of stable and functioning democratic institutions.¹⁴ Peter Leuprecht¹⁵ noted that 'intellectual honesty requires acknowledging that some of the countries admitted ... clearly did not comply with the statutory requirements at the time of accession'.¹⁶ He further stated that 'as far as the ECHR is concerned, some of the new member states have rushed into ratification without bringing domestic law and reality into line with its requirements'.¹⁷ Frederick Sudre argued that the CoE underwent an unfortunate transformation from an established 'club of democracies' to a simple 'training centre' for countries that, in some instances, were clearly incapable of respecting the organisation's founding principles.¹⁸ On the other hand, Daniel Tarschys, former Secretary-General of the CoE, disagreed with such criticisms. He acknowledged that there were new member states whose democratic institutions and behaviour were still at a formative stage. He also noted that there were serious problems in the geographical

¹¹ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom.

¹² Leuprecht, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible With Reinforcement?', (1998) 8 *Transnational Law and Contemporary Problems* 327.

¹³ Harmsen, 'The ECHR After Enlargement', (2001) 5 *International Journal of Human Rights* 19.

¹⁴ *Ibid.* at 19.

¹⁵ Peter Leuprecht was an official of the CoE from 1961 to 1997. From 1980 to 1993, he served as Director of Human Rights; in 1993 he was elected Deputy Secretary General. He resigned from his post in 1997 because of disagreement with dilution of CoE standards and values.

¹⁶ Leuprecht, *supra* n.12 at 328.

¹⁷ *Ibid.* at 333.

¹⁸ Sudre, 'La Communauté européenne et les droits fondamentaux après le Traité d'Amsterdam: Vers un nouveau système européen de protection des droits de l'homme?', *La Semaine Juridique*, 7 January 1998.

area covered by the CoE, but he was convinced that membership of the CoE strengthened the prospects for democratic stability and respect for human rights¹⁹ in Europe. Andrew Drzemczewski²⁰ stated that the enlargement of the CoE posed a serious threat for the ECHR *acquis* since the legal standards in a number of new member states from Central and Eastern Europe fell below those required by the ECHR control organs.²¹ He also stressed the necessity to maintain high standards²² in order to avoid, as Lord Lester of Herne Hill has put it, the ‘insidious temptation to resort to a “variable geometry” of human rights which pays undue deference to national or regional sensitivities’.²³

Rapid enlargement has undoubtedly had a noteworthy impact on the caseload of the ECtHR, since the vast majority of the current caseload comes from Central and Eastern European countries where the political system and the methods of rights protection are still healing from the former communist regimes. As a result, in 2004 the Russian Federation (14%) and Poland (14%) had the most number of applications lodged with the ECtHR against them, just ahead of Turkey (12%), Romania (12%), Ukraine (6%) and France (6%).²⁴ Clearly, some 60% of the 2004 caseload of the ECtHR concerned the Central and Eastern European countries that had recently acceded to the CoE.

It cannot be claimed that this development was unforeseeable since these financially weak countries were emerging from decades of totalitarian governments and were required to ratify the ECHR within a very short time after joining the CoE, rather than being granted a reasonable time within which to bring their legal systems into conformity with the ECHR.²⁵ It appears that the CoE embarked on a risky policy of enlargement, by bringing new state parties into the ECHR system, which were likely to be unprepared to meet its standards, and thus created problems for the ECHR system.²⁶ Robert Harmsen stated in very critical language that the CoE had ‘gambled’ that the states concerned would be encouraged to complete the process of democratic transition more quickly by being in the organisation as opposed to being kept outside.²⁷ In his view, the CoE followed this particular strategy that privileged inclusiveness, seeking to bring states ‘into the club’ as soon as possible, so that they could be ‘socialised into its norms’.²⁸

The impact of the accession of these countries to the CoE on the ECtHR was not only quantitative. For the former Soviet Bloc states, the system of protection of human rights

¹⁹ Tarschys, ‘The CoE: strengthening European security by civilian means’, (1997) 45 *NATO Review* 4, available at: www.nato.int/docu/review/articles/9701-1.htm.

²⁰ Andrew Drzemczewski is the Head of Secretariat of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe.

²¹ Drzemczewski, ‘The European Human Rights Convention: Protocol No.11- Entry Into Force and First Year of Application’, (2000) 21 *Human Rights Law Journal* 10.

²² *Ibid.* at 10.

²³ Lord Lester of Herne Hill, ‘The ECHR in the New Architecture of Europe’, (1995) 38A *Yearbook of the European Convention on Human Rights* 226.

²⁴ ECtHR Statistics 2004, April 2005, available at: www.echr.coe.int/.../0/MicrosoftWordstatistical_charts_2004_internet_.pdf.

²⁵ Wildhaber, ‘Consequences for the ECtHR of Protocol No. 14 and the Resolution on Judgments Revealing an Underlying Systemic Problem- Practical Steps of Implementation and Challenges’, *Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the high-level seminar*, Oslo, 18 October 2004, at 27, available at: www.coe.int/T/E/Human_rights/prot14e.asp.

²⁶ Evenson, ‘Reforms Ahead: Enlargement of the CoE and the Future of the Strasbourg System’, (2001) 1 *Human Rights Law Review* 239.

²⁷ Harmsen, *supra* n.13 at 22.

²⁸ *Ibid.* at 22.

guaranteed by the ECHR constituted ‘an important element for the building-up of fundamental rights, democracy and the rule of law’.²⁹ The rights defined in the ECHR have had a lasting influence on the lists of fundamental rights embodied in the new constitutions adopted after 1989 and all these states have incorporated the ECHR into their domestic law; most have given it precedence over domestic legislation.³⁰ However, this has also had a qualitative effect on the case law of the ECtHR. The nature of cases coming before the ECtHR has changed due to the fact that many applications concern countries that have a more fragile democratic base than the original participating countries.³¹ Consequently, it is necessary for the ECtHR to deal to a greater extent with structural and systemic problems of human rights protection, which are strictly related with the process of democratisation in these countries.³² Consequently, cases that have come before the ECtHR have arisen from the unsuccessful reform processes in the new member states, and the ECtHR has been called to act as an adjudicator in transition.³³ Complaints about the length of the judicial proceedings (although a problem which also concerns Italy to a great extent) is a common phenomenon in many Central and Eastern European countries; in 2004 there were 500 applications against Czech Republic, more than 700 against Poland and 410 against Slovenia.³⁴ Moreover, in regards to the issue of non-execution of judgments there were around 90 applications against Romania, 120 against Moldova and about 220 applications against Russia.³⁵ Additionally, there were 110 applications against Russia for the events in Chechnya.³⁶ Furthermore, there were around 1500 applications against Turkey concerning the forced displacement of people from their homes and the prohibition on returning to their village.³⁷ In addition, in 2005 there were approximately 1400 property cases pending before the ECtHR brought primarily by Greek-Cypriots against Turkey (known as post-*Loizidou* cases).³⁸ There is no doubt that the nature of cases coming before the ECtHR reflects the changed composition of the CoE, with a significant number of states which are still in many respects, and particularly with regard to their judicial systems, in transition.³⁹ Furthermore, it is worth mentioning that many of the cases pending before the ECtHR relate to violations of human rights which have already been judged, but the judgments of which have not been followed by the necessary reforms in the new member states that would avoid further violations.⁴⁰

²⁹ Council of Europe Parliamentary Assembly Recommendation 1194 (1992), 6 October 1992.

³⁰ Kruger and Polakiewicz, ‘Proposals For a Coherent Human Rights Protection System in Europe’, (2001) 22 *Human Rights Law Journal* 2.

³¹ Mahoney, ‘Speculating on the Future of the Reformed ECtHR’, (1999) 20 *Human Rights Law Journal* 4.

³² Harmsen, ‘The ECtHR as a Constitutional Court: Definitional Debates and the Dynamics of Reform’, *Conference in Memory of Stephen Livingstone, Queen’s University, Belfast*, 7-8 October 2005.

³³ Harmsen, *supra* n.13 at 30.

³⁴ ‘Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the high-level seminar’, *supra*, n. 25.

³⁵ *Ibid.* at 57.

³⁶ *Ibid.* at 58.

³⁷ *Ibid.*

³⁸ *Xenides-Arestis v Turkey*, Judgment of 22 December 2005, Application No.46347/99, at para. 38.

³⁹ Wildhaber, ‘A Constitutional Future For the ECtHR?’, (2002) 23 *Human Rights Law Journal* 163.

⁴⁰ Council of Europe Parliamentary Assembly Res. 1226, Execution of Judgments of the ECtHR, 28 September 2000, at para. 5.

3. Reformed Article 28

It is generally accepted that one of the main challenges of the reform process of the ECHR system is finding a successful and effective way of dealing with repetitive or clone cases.

The Protocol No. 14 (not yet in force)⁴¹ response to the phenomenon of repetitive cases is a new three-judge Committee competence. According to the new reformed Article 28(1)(b) of the ECHR, the three-judge committees are to be permitted to declare applications admissible and decide on their merits, when the questions raised by the case concerns the interpretation or application of the ECHR are covered by ‘well-established case-law’ of the ECtHR. Whether the case-law is well-established or not is obviously a matter open to interpretation. Nonetheless, according to the Explanatory Report to Protocol No.14, well established case-law normally means case-law that has been consistently applied by a Chamber.⁴² Nevertheless, it seems that there is no doubt that a Grand Chamber judgment, even if it is the first for a particular issue expresses the ‘established’ position of the ECtHR.⁴³ If a judge elected in respect of the respondent member state is not a member of the committee, the committee may invite him/her to replace one of the members of the committee, having regard to all the relevant factors including whether or not the respondent state has contested resort to the summary procedure.⁴⁴ The purpose of this provision is that the expertise of the national judge in domestic law and practice can be called upon if it will be relevant to the issue and will be helpful for the committee.⁴⁵ However, as Amnesty International has pointed out the particular expertise about the laws and legal system of the state, which is the subject of the application would not be necessary in such cases, because this procedure would only be applied to those applications which raise issues about which the case law of the ECtHR is already clear - manifestly well-founded, repetitive cases.⁴⁶ It must be added, that the finding of a breach of an international obligation by a state by an organ of international jurisdiction without the mandatory participation of a judge who has been elected in respect of the respondent state constitutes a small ‘revolution’ in the area of public international law, where the institution of a national judge or *ad hoc* judge has been a long tradition, reflecting an aspect of state sovereignty.⁴⁷ This procedure is the main measure for speeding up the processing of repetitive cases⁴⁸ and it is anticipated that its implementation will substantially increase the ECtHR’s decision-making capacity and effectiveness, since many cases can be decided by three judges, instead of the seven currently required when judgments or decisions are given by a chamber.⁴⁹ In a document prepared by a study group of the Registry, it was concluded that the proposal for amending the Article 28(1)(b) would have an undoubted impact, which

⁴¹ Protocol No. 14 will come into force only when it has been ratified by all signatories of the ECHR; Russia is the last state to ratify it. However, in December 2006 the Russian State Duma voted against the ratification of Protocol No. 14 to the ECHR.

⁴² Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, at para. 68, available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>.

⁴³ Σισιλιάνος, «Η Αναθεώρηση του Ευρωπαϊκού Συστήματος Προστασίας των Δικαιωμάτων του Ανθρώπου: Το 14^ο Πρωτόκολλο στην ΕΣΔΑ», *Νομικό Βήμα*, Τόμος 53 (2005) σελ. 222.

⁴⁴ Explanatory Report, *supra* n. 42, at para. 71.

⁴⁵ *Ibid.* at para. 71.

⁴⁶ Amnesty International’s Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights, AI Index IOR 61/005/2004, 1 February 2004, at para. 23.

⁴⁷ Σισιλιάνος, *supra* n. 43, σελ. 223.

⁴⁸ Article 28(1), ECHR, as amended by Article 8, Protocol No. 14.

⁴⁹ Explanatory Report, *supra* n. 42 at para. 70.

could be further enhanced if the legal condition for its application (the underlying question of interpretation have already been decided by the ECtHR) were understood as going beyond the present rather conservative list of established clone cases.⁵⁰ Also, it was noted that under this proposal a considerable number of cases could be dealt with by a committee of three judges rather than in a Chamber of seven judges.⁵¹

4. Pilot Judgment Procedure

During the reflection period for Protocol No. 14, the Steering Committee for Human Rights (CDDH) suggested⁵² the establishment of a pilot judgment procedure. The CDDH concluded that it was for the ECtHR to quickly identify different kinds of cases, notably repetitive cases or clone cases. It suggested that these be defined as cases concerning a specific piece of legislation or a specific practice that the ECtHR has already assessed.⁵³ In the various opinions of the ECtHR submitted to the CDDH, the ECtHR deemed it necessary to urge the introduction of an ECHR provision formally establishing a pilot judgment procedure.⁵⁴

The CDDH rejected this proposal and decided that it should not be included in Protocol No. 14 but that the Committee of Ministers should instead make appropriate recommendations. The CDDH took the view that it was legally difficult to provide for a general legal obligation of this kind. In their view ‘the pilot judgment procedure could be followed without there being a need to amend the ECHR’.⁵⁵

Thus, when approving Protocol No. 14, the Committee of Ministers adopted Resolution Res(2004)3,⁵⁶ which was addressed to the ECtHR and invited it: a) as far as possible, to identify, in its judgments when finding a violation of the ECHR, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments; and b) to specifically notify any judgment containing indications of the existence of a systemic problem and the source of this problem not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary

⁵⁰ Steering Committee for Human Rights, Impact Assessments of Some of the Reform Proposals Under Consideration, 12 March 2003, CDDH-GDR(2003)017, at para. 11.

⁵¹ Ibid. para. 12.

⁵² CDDH(2003)006, supra n. 3.

⁵³ Steering Committee for Human Rights, ‘Guaranteeing the long-term effectiveness of the European Court of Human Rights’, Interim Report of the CCDH to the Committee of Ministers, 18 October 2002, CM(2002)146, at para. 68.

⁵⁴ See paras 43-6 of the ECtHR’s position paper of 12 September 2003, CDDH-GDR(2003)024, supra n. 1 and the response by the ECtHR to the CDDH Interim Activity Report, prepared following the 46th Plenary Administrative Session on 2 February 2004, at para. 37.

⁵⁵ ‘Guaranteeing the long-term effectiveness of the ECtHR – Implementation of the Declaration adopted by the Committee of Ministers at its 112 Session (14-15 May 2003) Interim Activity Report’, CDDH(2003)026, Addendum I Final, 26 November 2003, at para. 21.

⁵⁶ The Committee of Ministers also adopted three recommendations for ensuring the protection of ECHR rights within the national legal systems (Recommendation Rec(2004)5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR, 12 May 2004; Recommendation Rec(2004)4 on the ECHR in university education and professional training, 12 May 2004; and Recommendation Rec(2004)6 on the improvement of domestic remedies, 12 May 2004).

Assembly, to the Secretary General of the CoE and to the CoE Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the ECtHR.

In this way the Committee of Ministers invited the ECtHR to identify, in its judgments, those cases which revealed the existence of structural or systemic problems in the state concerned, especially if those problems were, or could become, the source of a large number of similar applications, in order to assist that state in finding an appropriate solution to the problem as a whole and the Committee of Ministers in securing the implementation of the judgment concerned.

It is questionable whether the process that was followed in order to establish the pilot judgment procedure and the procedure as such is compatible with the ECHR or whether an amendment of the ECHR should have taken place, as the ECtHR itself suggested. It should be noted that the weakness in the legal basis of the pilot-judgment procedure has already been criticised by Judge Zagrebelsky. In a partly dissenting opinion, in the judgment of *Hutten-Czapska v Poland*,⁵⁷ he stated on the one hand that the arguments set out by the Committee of Ministers in Resolution Res(2004)3 and Recommendation Rec(2004)6 of 12 May 2004, which are addressed to governments, ‘are undoubtedly of much importance and must be taken into account by the ECtHR with a view to ensuring that the reasons given in its judgments are as clear as possible’. On the other hand, he disputed that the ‘fact that the proposals to which the ECtHR refers in paragraph 233⁵⁸ of the judgment were not included in the recent Protocol No. 14 amending the ECHR’ cannot be overlooked.

A. Broniowski v Poland

The first judgment in which the ECtHR responded to the resolution and recommendations of the Committee of Ministers was *Broniowski v Poland*.⁵⁹ This case concerned a compensation scheme for Polish citizens displaced after the Second World War. The ECtHR found a violation of Article 1 of Protocol No. 1 as a result of the failure to compensate the applicant for property which he and his family had lost after being forced to move to Western Poland leaving behind their home and property located beyond the Bug River.

Invoking Resolution Res(2004)3, the ECtHR transmitted its judgment to the Committee of Ministers, and the two bodies eventually brokered a deal between Broniowski and Poland which also contained the seeds of a settlement for all the other claimants. It has been suggested that the application of Resolution Res(2004)3 by issuing a pilot judgment saved the ECtHR an enormous amount of time and labour.⁶⁰ By issuing only a single judgment the ECtHR had dealt with all the 167 related cases pending before it and gave a solution for the 80,000 Bug River potential applicants.

This judgment provides a definition of systemic violation⁶¹ in the following terms as: ‘where the facts of the case disclose the existence, within the [relevant] legal order, of a

⁵⁷ *Hutten-Czapska v Poland*, Judgment of 19 June 2006, Application No. 35014/97.

⁵⁸ See paras 43–46 of the ECtHR’s position paper of 12 September 2003, CDDH-GDR(2003)024, *supra*. n.1 and the response by the ECtHR to the CDDH Interim Activity Report, prepared following the 46th Plenary Administrative Session on 2 February 2004, at para. 37.

⁵⁹ *Broniowski v Poland* 2004-V.

⁶⁰ Caflisch, ‘The Reform of the ECtHR: Protocol No. 14 and Beyond’, (2006) 6 *Human Rights Law Review* 411.

⁶¹ Wildhaber, *supra* n. 25.

shortcoming as a consequence of which a whole class of individuals have been or are still denied [their ECHR rights]', and 'where the deficiencies in national law and practice identified...may give rise to numerous subsequent well-founded applications'.⁶²

In the particular case the ECtHR found that the violation 'originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons'.⁶³ The ECtHR further indicated that 'general measures should either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found to have been in breach of the ECHR or provide equivalent redress in lieu'.⁶⁴ In the operative provisions, the ECtHR held particularly that the respondent state must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining claimants or again provide them with equivalent redress. Moreover, consideration of applications derived from the same general cause would be adjourned pending the adoption of the necessary general measures.⁶⁵

Although is not indicated anywhere in the judgment that this is a pilot judgment, it can be said that it contains all the basic characteristics in order to be 'baptised' as pilot judgment. It is suggested that, the characteristics which are crucial for a pilot judgment procedure, and can be found in *Broniowski*, are the following: 1) a finding that the facts of the case disclose the existence, within the relevant legal order of a shortcoming as a consequence of which a whole class of individuals have been or are still denied their ECHR rights; 2) a conclusion that these deficiencies in national law and practice may give rise to numerous subsequent well-founded applications; 3) recognition that general measures are called for and some guidance as to what such general measures may be; 4) an indication that such measures should have retroactive effect; and 5) a decision to adjourn consideration of all pending applications deriving from the same cause.

The *Broniowski v Poland* judgment was followed by a strike-out judgment.⁶⁶ The terms of the settlement concluded by the parties were intended to take into account 'not only the interests of the individual applicant...and the prejudice sustained by him ... but also the interests and prejudice of complainants in similar applications' and stressed 'the obligation of the Polish Government under Article 46 of the ECHR, in executing the principal judgment, to take not only individual measures of redress in respect of Mr. Broniowski but also general measures covering other Bug River claimants'.⁶⁷

B. Lukenda v Slovenia

In *Lukenda v Slovenia*,⁶⁸ a Chamber judgment delivered by the third Section in October 2005 concerning the length of proceedings, indicated the backlog in the Slovenian courts in general, noting that there were some 500 Slovenian length of the proceedings cases pending before it. The

⁶² *Broniowski v Poland*, supra n. 59, at para. 189

⁶³ Ibid. at para. 189.

⁶⁴ Ibid. at para. 194.

⁶⁵ Ibid. at para. 198.

⁶⁶ *Broniowski v Poland*, Friendly Settlement, Judgment of 28 September 2005, Application No. 31443/96.

⁶⁷ Ibid. at para. 38.

⁶⁸ *Lukenda v Slovenia*, Judgment of 6 June 2005, Application No. 23032/02.

ECtHR was confronted with a systemic problem that had resulted from inadequate legislation and an inefficiency in the administration of justice. In order to prevent future violations of the right to a trial within reasonable time, the Chamber encouraged the respondent state to either amend the existing range of legal remedies or add new remedies so as to secure genuine and effective redress for violations of that right. However, the Chamber did not take upon itself to adjourn the pending cases.

Judge Zagrebelsky, in a partly dissenting opinion stated that the Chamber should have relinquished jurisdiction in favour of the Grand Chamber as the proper forum for identifying the existence of a systemic problem and drawing the necessary consequences therefrom.⁶⁹ Such an obligation is not foreseen in any of the adopted texts concerning the pilot judgment procedure.⁷⁰ However, due to the importance of this procedure and due to the interest of the applicants whose cases are affected it is suggested that it is of paramount importance that these types of judgments should be delivered by the Grand Chamber. Furthermore, it must be added that not all the cases which concern the same systemic problem are usually pending before the same Chamber. Some cases are pending before other Chambers with a different composition and perhaps with a different opinion on the relevant question.

C. Scordino v Italy

In *Scordino v Italy*⁷¹ the Grand Chamber of the ECtHR found a double systemic problem in relation with the effectiveness of Law no. 89 of 24 March 2001, known as the Pinto Act, which introduced the possibility of lodging a complaint with the Italian courts in respect of excessively long proceedings and also with the right to receive expropriation compensation. In order to satisfy its obligations under Article 46 of the ECHR the ECtHR held that Italy should, above all, remove every obstacle to the award of compensation reasonably related to the value of the expropriated property. This should be guaranteed by appropriate statutory, administrative and budgetary measures so that the right in question is guaranteed effectively and rapidly in respect of other claimants affected by expropriated property. In respect of the Pinto Act the ECtHR noted that although the existence of a remedy is necessary, it is not of itself sufficient and invited the respondent state to take all measures necessary to ensure that the domestic decisions are not only in conformity with the case-law of the ECtHR but that they are also executed within six months of being deposited with the registry. It is worth mentioning that these indications did not appear in the operative provisions of the judgment and similar pending cases were not adjourned.

D. Hutten-Czapska v Poland

In the *Hutten-Czapska v Poland*⁷² the Grand Chamber shared the opinion of the Chamber, that the case was suitable for the application for the pilot-judgment procedure. This case concerned

⁶⁹ Ibid. Partly dissenting opinion of Judge Zagrebelsky.

⁷⁰ See Resolution Res(2004)3, 12 May 2004, and Recommendation Rec(2004)6, 12 May 2004, of the Committee of Ministers.

⁷¹ *Scordino v Italy*, Judgment of 29 March 2006, Application No. 36813/97.

⁷² *Hutten-Czapska v Poland*, supra n. 57.

the operation of the impugned housing legislation, which potentially entailed consequences for the property rights of a large number of people (some 600,000, or 5.2% of the entire housing resources of the country) whose flats were let under the rent-control scheme. At the time, 18 similar applications were pending before the ECtHR. However, the ECtHR noted that the identification of a systemic situation justifying the application of the pilot-judgment procedure did not necessarily have to be linked to, or based on, a given number of similar applications already pending. In the context of systemic or structural violations the potential inflow of future cases was also an important consideration in terms of preventing the accumulation of repetitive cases on the ECtHR's docket, which hindered the effective processing of other cases giving rise to violations, sometimes serious, of the rights it was responsible for safeguarding. The ECtHR noted that one of the implications of the pilot-judgment procedure was that its assessment of the situation complained of in a 'pilot' case necessarily extended beyond the sole interests of the individual applicant and required it to examine that case from the perspective of the general measures that needed to be taken in the interest of other people who might be affected. The ECtHR considered that the Polish state had to, above all, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords, including their entitlement to derive profit from their property, and the general interest of the community— including the availability of sufficient accommodation for the less well-off— in accordance with the principles of the protection of property rights under the ECHR.⁷³

E. Xenides-Arestis v Turkey

In *Xenides-Arestis v Turkey*,⁷⁴ a Chamber judgment from the third Section, concerning one of the post-*Loizidou* cases involving the denial of access to property in Turkish-occupied northern Cyprus, the Chamber held that the respondent state must introduce a remedy, which secured genuine effective redress not only for the applicant but also in respect of all similar applications pending before the ECtHR. Such a remedy was to be available within three months from the date on which the judgment was delivered and redress should occur three months thereafter. These directions were included in the operative part of the judgment. Pending the implementation of the relevant general measures, consideration of approximately 1400 applications deriving from the same general cause was adjourned.

The Chamber reserved the question of the application of Article 41 and delivered the just satisfaction judgment in December 2006. In that judgment the ECtHR welcomed 'the steps taken by the Turkish Government in an effort to provide redress for the violations of the applicant's ECHR rights as well as in respect of all similar applications pending before it'. The ECtHR noted that 'the new compensation and restitution mechanism, in principle, had taken care of the requirements of the decision of the ECtHR on admissibility of 14 March 2005 and its judgment of 22 December 2005'.⁷⁵

⁷³ Ibid. at para. 239.

⁷⁴ *Xenides-Arestis v Turkey*, supra n. 38.

⁷⁵ *Xenides-Arestis v Turkey*, Just Satisfaction Judgment of 7 December 2006, Application No. 46347/99, at para. 37.

F. Doğan and Others v Turkey

Consideration should also be given to the judgment of *Doğan and Others v Turkey*.⁷⁶ Although it has been suggested that this was not a pilot but a principal judgment,⁷⁷ it is quite clear that it contains all the basic elements in order to be characterised as a pilot judgment. It could be said that this was a pilot judgment in all but name. This judgment illustrates that sometimes it is uncertain and unclear whether a judgment is pilot thereby illustrating the need for clear guidelines. The ECtHR in that case, in June 2004, had identified the presence of a structural problem with regard to internally displaced people (mainly Kurdish villagers) and indicated possible measures to be taken in order to put an end to the systemic situation in Turkey. Following that judgment, the Turkish authorities had taken several measures, including enacting the Compensation Law of 27 July 2004, with a view to redressing the ECHR grievances of those denied access to their possessions in their villages.

The effectiveness of this remedy has been confirmed by the ECtHR in the *İçyer v Turkey*⁷⁸ case (declared inadmissible). The ECtHR noted that it could be seen, from a substantial number of sample decisions furnished by the Turkish government, that those who had sustained damage in cases of denial of access to property, including damage to their property or death or injury could successfully claim compensation by using the remedy offered by the Compensation Law. Those decisions demonstrated that the remedy in question was available not only in theory but also in practice.

The ECtHR considered that the provisions of the Compensation Law were capable of providing adequate redress for the ECHR grievances of those who were denied access to their possessions in their places of residence. Accordingly, the Government could be deemed to have fulfilled their duty to review the systemic situation at issue and to introduce an effective domestic remedy. Subsequently, approximately 1,500 similar cases from South East Turkey (where applicants complain about their inability to return to their villages) pending before the ECtHR were dismissed on the grounds that the applicants had not exhausted the effective domestic remedy provided by the national Compensation Law.

However, in a report published by Human Rights Watch⁷⁹ in December 2006 it was claimed that the Turkish government was failing to provide fair compensation for hundreds of thousands displaced people. The Compensation Law provides no viable opportunity to appeal assessments, and the mainly Kurdish villagers have no alternative but to accept whatever is offered. In fairly critical language Holly Cartner⁸⁰ stated that the displaced villagers had been victimised yet again by the arbitrariness of a compensation process that was supposedly established to help them. She went on to add that ‘a compensation process to benefit the displaced has now become a way to relieve the state of its liability. The derisory sums offered are not only unjust, but they also undermine any possibility for the villagers to rebuild their lives’.

⁷⁶ *Doğan and Others v Turkey*, Judgment of 29 June 2004, Application Nos 8803-8811/02, 8813/02 and 8815-8819/02.

⁷⁷ Meeting between ECtHR and organisations representing applicants and/or intervening as third parties, 10 April 2006, Strasbourg.

⁷⁸ *İçyer v Turkey*, Judgment of 9 February 2006, Application No. 18888/02.

⁷⁹ Human Rights Watch, Unjust, Restrictive, and Inconsistent- The Impact of Turkey’s Compensation Law with Respect to Internally Displaced People, December 2006 Number 1, available at: <http://hrw.org/backgrounder/eca/turkey1206/>.

⁸⁰ Holly Cartner, Europe and Central Asia Director, Human Rights Watch.

5. Conclusion

The role of the ECHR system is closely associated with the protection role of national authorities since the ECHR system rests on the assumption that there are strong and effective protection systems in place at the national level. It has been pointed out that one of the basic elements of the ECHR system is the balance between national protection and international protection; both components must function effectively if the system is to work. It has been claimed that in recent years that balance has been upset to the detriment of the international component.⁸¹ Far too many cases come to Strasbourg that should, in accordance with the principle of subsidiarity, have been decided by domestic courts. The ECtHR cannot bear a disproportionate burden in enforcing the ECHR; that burden has to be shared with the domestic authorities.⁸²

The principal and overriding aim of the system set up by the ECHR is to bring about a situation by which every state party rights and freedoms are effectively protected by ensuring that the relevant structures and procedures are in place to allow individual citizens to vindicate those rights and to assert those freedoms in the national courts.⁸³ Leo Zwaak has argued that the ECtHR 'is not a victim of its own success, but a victim of a general reluctance of the member states, to take the ECHR seriously. Human rights violations first of all should be redressed at the domestic level and the Strasbourg Court should only be used as an *ultimum remedium*'.⁸⁴

It would seem preferable that domestic courts and tribunals should effectively secure the rights and freedoms guaranteed by the ECHR, since an attempt at vindication through a lengthy process before Strasbourg organs may well deprive an individual of the immediate redress which is associated with domestic law.⁸⁵ The settlement of litigation on the national level, saving both time and money, always remains the preferable solution.⁸⁶

The reforms adopted in May 2004 were an attempt to involve all the actors of the ECHR system (that is the ECtHR, member states and the Committee of Ministers) in order to share the burden of the backlog of the ECtHR. This was explicitly revealed by the establishment of the pilot judgment procedure. As President Wildhaber has successfully put it: 'faced with a structural situation, the ECtHR is in effect saying to the respondent state and to the Committee of Ministers that they too must play their role and assume their responsibilities'.⁸⁷

The pilot-judgment procedure is on the one hand strictly linked to the obligation of member states to take general measures to eliminate the causes of the violation in order to prevent its repetition whilst on the other hand this procedure constitutes a technique to tackle the backlog pending before the ECtHR. It is based on the assumption that once a judgment pointing to a structural or systemic problem has been delivered, and where numerous applications raising the same problem are pending or likely to be brought before the ECtHR, the respondent state should

⁸¹ Wildhaber, *supra* n. 25 at 24.

⁸² *Ibid.* at 25.

⁸³ Wildhaber, 'The ECtHR in Action', (2004) 21 *Ritsumeikan Law Review* 83.

⁸⁴ Zwaak, 'Overview of the European Experience in Giving Effect to the Protections in European Human Rights Instruments', Working Session on the Implementation of International Human Rights Protections, at 14, available at: <http://www.internationaljusticeproject.org/pdfs/Zwaak-speech.pdf>.

⁸⁵ Drzemchewski, *European Human Rights Convention in Domestic Law* (Oxford: Clarendon Press, 1983) at 333.

⁸⁶ Polakiewicz, 'The Application of the ECHR in Domestic Law', (1996) 17 *Human Rights Law Journal* 406.

⁸⁷ Wildhaber, *supra* n. 25 at 26.

ensure that applicants, actual or potential, have an effective remedy that will enable them to bring their case before a competent national authority.⁸⁸ It is worth noting that whilst setting out the specific requirement to take general measures by the ECtHR is a new procedure, in the sense that in cases like *Broniowski* the ECtHR is actively pushing for modifications of a national legal order, an indication that general measures should be taken was in fact first used in the case of *Marckx*.⁸⁹

A very significant contribution to reducing the case-load of the ECtHR could be achieved if a domestic remedy was available to other individuals who are also affected by the systemic problem exposed in the pilot judgment.⁹⁰ President Wildhaber seems to be convinced that ‘if the national authorities are in position to apply ECHR case-law to the questions before it, then much, if not all, of the Strasbourg Court’s work is done’. This is ultimately, the objective underlying the system: to ensure that individual citizens throughout the ECHR community are able to fully assert their ECHR rights within their own domestic legal system.⁹¹

Pierre-Henri Imbert has claimed that the ECHR system is of a circular kind.⁹² In his view, ‘effective national systems and structures should be able to prevent or remedy human rights violations at home and only where the national systems fails does the Strasbourg system step in.’⁹³ He went on to add that ‘after the ECtHR has given a judgment, the emphasis shifts back to the national arena where action must be taken to take the individual and/or general measures required to execute the judgment, under the supervision of the Committee of Ministers’.⁹⁴

The objective of the ECtHR in designating a case for a pilot-judgment procedure is to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the ECHR right in question in the national legal order. One of the relevant factors considered by the ECtHR in devising and applying that procedure has been the growing threat to the ECHR system resulting from large numbers of repetitive cases that derive from, among other things, the same structural or systemic problem.⁹⁵

The pilot-judgment procedure is still embryonic. The ECtHR is still discovering how this procedure can be developed. This can be seen from the small number of pilot judgments delivered to date. It is apparent that the ECtHR attempts to apply the *Broniowski* formula in different situations might lead to different types of pilot judgments. In some cases the ECtHR will go further in specifying the type of general measures required, sometimes including its

⁸⁸ CDDH(2003)006 Addendum final, supra n. 3.

⁸⁹ Roukounas, ‘The Role of NHRIs in Monitoring the Execution of Judgments of the ECtHR- What NHRIs Could Do’, Fourth Round Table of European National Institutions for the Promotion and Protection of Human Rights and the CoE Commissioner for Human Rights, Athens, 27-28 September 2006, at 5.

⁹⁰ CDDH(2003)006 Addendum final, supra n. 3.

⁹¹ Wildhaber, ‘The Role of the ECtHR: an Evaluation’, (2004) 8 *Mediterranean Journal of Human Rights* 12.

⁹² Imbert, ‘Follow-up to the Committee of Ministers’ Recommendations on the Implementation of the ECHR at the Domestic Level and the Declaration on ‘Ensuring the Effectiveness of the Implementation of the ECHR at National and European levels’ in ‘Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the high-level seminar’, supra n. 25, at 33-45.

⁹³ *Ibid.* at 35.

⁹⁴ *Ibid.* at 35.

⁹⁵ *Hutten-Czapska v Poland*, supra n. 57, at para. 234.

recommendations as to general measures in the operative part,⁹⁶ and sometimes adjourning consideration of similar applications.⁹⁷

The Group of Wise Persons⁹⁸ in their report to the Committee of Ministers encourages the ECtHR to ‘use the pilot judgment procedure as far as possible in the future’.⁹⁹ It is to be expected that the ECtHR will apply the pilot-judgment procedure in many more cases revealing systemic problems. For this reason criteria and conditions need to be established, which will institutionalise the pilot-judgment procedure. It should not be forgotten that the adjournment of cases of similarly situated applicants leaves the remaining applicants in an uncertain position and perhaps vulnerable to long delays whilst a resolution is agreed upon and implemented.¹⁰⁰ Hence, the Committee of Ministers should not only ensure the rapid execution of pilot judgments, but also take all possible measures to guarantee that the manner of implementation genuinely affords an effective remedy for similarly situated persons.¹⁰¹ In considering the effectiveness of the remedy, the state concerned and the Committee of Ministers should examine not only whether the measures proposed afford just compensation, but also whether such measures effectively address the systemic problem.¹⁰² This is particularly important since it is not simply a question of instituting a compensation procedure which, while complex and costly, will apply to a series of clearly defined individual cases.¹⁰³ On the contrary, the solution to the problem in the relevant case might involve a total overhaul of the legal system taking into account all known difficulties.

There might be some enthusiasm that the ECtHR might have found the magic solution to tackle the repetitive cases and that issuing a single judgment deals not only with all the pending cases before it but also finds a solution for all potential applicants. However, it still remains to be seen how successful and how effective this procedure is. Some concern has been expressed that this procedure has been conducted in respect of certain complex systemic problems on the basis of a single case, which may not reveal the different aspects of the systemic problem involved. Under these circumstances, the pilot-judgment procedure may not allow a global assessment of the problem and since all other related cases are frozen, the risk emerges that this procedure delays rather than speeds up the full implementation of the ECHR.¹⁰⁴ It is worth mentioning that in the Chamber case of *Xenides-Arestis v Turkey* the applicant chose not to ask for a referral of the case to the Grand Chamber but an important number of applicants whose cases were frozen as a result of this ‘attempted’ to refer the case to the Grand Chamber. The applicants have suggested

⁹⁶ See cases of *Broniowski v Poland*, supra n. 59; *Xenides-Arestis v Turkey*, supra n. 38; and *Hutten-Czapska v Poland*, supra n. 57.

⁹⁷ See cases of *Broniowski v Poland*, supra n. 59; and *Xenides-Arestis v Turkey*, supra n. 38.

⁹⁸ The member states of the CoE in Warsaw Summit (16-17 May 2005), in an attempt to secure the efficiency of the ECtHR, had set up an international panel of eminent personalities (Group of wise persons) to examine the issue of the long-term effectiveness of the ECHR mechanism. The Group was made up of 11 members: Lord Woolf (United Kingdom), Veniamin Fedorovich Yakovlev (Russia), Rona Abray (Turkey), Fernanda Contri (Italy), Jutta Limbach (Germany), Marc Fischbach (Luxembourg), Gil Carlos Rodriguez Iglesias (Spain), Emmanuel Roucouas (Greece), Jacob Sodermann (Finland), Hanna Suchocka (Poland), Pierre Truche (France).

⁹⁹ Report of the Group of Wise Persons to the Committee of Ministers, 15 November 2006, CM(2006)203.

¹⁰⁰ Leach, ‘Beyond the Bug River- A New Dawn For Redress Before the ECtHR’, (2005) 2 *European Human Rights Law Review* 162.

¹⁰¹ Ensuring the long-term effectiveness of the European Court of Human Rights- NGO comments on the Groups of Wise Persons’ Report, 16 January 2007, AI Index: IOR 61/00/2007, at 11.

¹⁰² Ibid.

¹⁰³ *Hutten-Czapska v Poland*, supra n. 57, Partly Dissenting Opinion of Judge Zagrebelsky.

¹⁰⁴ ‘Implementation of Judgments of the ECtHR’, Report Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group, Doc. 11020, 18 September 2006.

that as a result of the judgment in question their cases have been adjourned and in this way they were affected and thus became parties to the proceedings to which this judgment relates. Their attempt did not have any success before the ECtHR. It seems that this development was not predicted by the ECtHR; the decision not to give the opportunity to the other applicants to be heard because they did not have standing under Article 43 of ECHR does not appear to be all that convincing.

It seems that there is no formal mechanism for selecting pilot-judgments and it is surprising that the ECtHR from the early stage of function of the pilot judgment procedure attempted to apply it in the case of *Xenides-Arestis v Turkey* since the respondent Government has been aware of its obligations for a number of years but has consistently failed to bring its violations to an end, despite numerous calls for it to do so from both the ECtHR and the Committee of Ministers.¹⁰⁵ Moreover, the illegal circumstances that exist in Turkish-occupied Northern Cyprus cannot be equated with the legal environment of the national legal orders in which the pilot-judgment procedure has been applied. This is particularly odd if it is taken into account that the ECtHR appears to be cautious and hesitant to go on and apply this procedure in more simple and well-suited situations.¹⁰⁶ Failure of the application of this procedure in the case in question would have a serious negative impact on this procedure in general. It should not be forgotten that not every structural deficiency (systemic or endemic) giving rise to repetitive cases is suitable for the pilot judgment procedure.¹⁰⁷ The suitability of the case should be considered as a *conditio sine qua non* for the application of this procedure. Furthermore, it should be added that the reformed Article 28 which could be applied complementary and provide an insurance against the failure of the procedure, for the applicants whose cases are frozen, is still not in force and it is uncertain when it will be since the Russian State Duma voted against the ratification of Protocol No. 14 to the ECHR in December 2006.

It is to be hoped that the ECtHR has found the means (through the pilot-judgment procedure) to push member states 'to take the European Convention seriously' and that this procedure will not become the Trojan horse of the ECHR system which will relieve states that violate the ECHR from their international obligations.

¹⁰⁵ See *Cyprus v Turkey* (2001) 35 EHRR 30; *Loizidou v Turkey* 23 EHRR 513 (1996).

¹⁰⁶ For example, detention facilities in various countries. See the example of Greece. See also a relevant Interim Resolution of the Committee of Ministers ResDH(2005)21 concerning the issue of conditions of detention in Greece, 7 April 2005.

¹⁰⁷ See CDDH(2003)006 Addendum final, supra n.3; Roukounas, supra n. 89 at 5; and Wildhaber, supra n. 25 at 28.