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Ukrainian Perspectives

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# Fighting the Lernaean Hydra — General Measures in the Operative Part of the European Court of Human Rights’ Judgments: Broad Context and Ukrainian Perspectives

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## Abstract

The European Court of Human Rights recently has introduced a variety of instruments to streamline the flow of applications and to address the handling of repetitive applications. This article discusses one of these instruments — the indication of “general measures” in the operative part of the Court’s judgments, a reform introduced in 2004. This article also discusses the issues likely to cause the Court to indicate “general measures” in its judgments against Ukraine: the length of judicial proceedings and the conditions of detention.

**Key Words:** European Court of Human Rights, European Convention on Human Rights, general measures, pilot judgment, well-established case law, Ukraine.



## Introduction

The European Court of Human Rights (the “Court”) was established in 1959 within the framework of the Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”). The Court’s jurisdiction is limited to the alleged violations of the rights covered by the Convention by the Contracting (Member) States, which now total 47.

The Court has become “a victim of its own success”; its docket is overloaded.<sup>1</sup> Since its inception, Court has delivered 17,000 judgments. Of these, 5.7% were against Ukraine,<sup>2</sup> which ratified the Convention on 11 September 1997.<sup>3</sup> The number of applications lodged in the first semester of 2013, about 50,000, set an all-time record. This is a 25% increase as compared with

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1 Laurence R. Helfer, “Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime,” *The European Journal of International Law* 19.1 (2008): 125–159, 126.

2 Overview 1959–2013 ECHR. European Court of Human Rights’ website, accessed July 28, 2014, [http://www.echr.coe.int/Documents/Overview\\_19592013\\_ENG.pdf](http://www.echr.coe.int/Documents/Overview_19592013_ENG.pdf).

3 Overview 1959–2013 ECHR.

the same period in 2012.<sup>4</sup> Many applicants have to wait for years for a response from the Court.<sup>5</sup> This delay is at odds with one of the Court's strategic goals, namely, a complete elimination of its docket backlog by 2015.<sup>6</sup> To cope with an ever-growing number of applications, the Court has responded with a series of reforms.<sup>7</sup> Human rights advocates criticized some of these reforms, arguing that the Court "is placing too much emphasis on case dismissal, and not enough on how to decide meritorious cases more efficiently."<sup>8</sup>

The Court has taken a variety of measures to streamline the flow of applications, and, in particular, to address the handling of repetitive applications, which currently constitute 41% of the applications pending before the Court.<sup>9</sup> The Court is using three legal concepts — general measures, pilot procedure, and well-established case law — as its "three pillars" for eliminating its docket's backlog and reducing the number of repetitive applications.

Structural and systemic issues in the respective Member States' domestic legal systems are responsible for most of the repetitive applications. Therefore, identifying these issues could be an effective step toward resolving them and decreasing the number of repetitive applications.

Consistent with this thought, the participants of the Conference on the long-term future of the European Court of Human Rights held in Oslo in April 2014 concluded, "[t]he most important way to address the overload of cases is [...] [for] the Member States [to] take effective measures in domestic legislation and practice."<sup>10</sup> Therefore, by creating and applying general measures, the Court can guide and assist the Member States in their respective reforms aimed at solving their systemic domestic problems, many of which are generic.

The Court's indication of general measures is a relatively recent judicial instrument. The Court first used it in 2004, although the Convention neither defines general measures nor provides the procedure for indicating them. However, this should not be cause for discounting their value. When the Court refers to general measures, it seeks not only to indicate the underlying problem but also to suggest a solution.

In proceedings against Ukraine, the Court has indicated general measures in the operative part of its judgment on only one occasion. In 2011, in *Yuriy Nikolayevich Ivanov v. Ukraine*, the Court urged Ukraine to introduce "without delay, and at the latest within one year from the date

4 Le processus d'Interlaken et la Cour. European Court of Human Rights' website, August 29, 2013, accessed July 28, 2014, [http://www.echr.coe.int/Documents/2013\\_Interlaken\\_Process\\_FRA.pdf](http://www.echr.coe.int/Documents/2013_Interlaken_Process_FRA.pdf).

5 High Level Conference on the Future of the European Court of Human Rights. Brighton Declaration. European Court of Human Rights' website, accessed July 28, 2014, [http://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf), § 16.

6 Le processus d'Interlaken et la Cour.

7 Conference on the Long-term Future of the European Court of Human Rights Proceedings. European Court of Human Rights' website, April 7–8, 2014, accessed July 28, 2014, <http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Proceedings-Oslo-2014.pdf>.

8 Karen Corrie, "European Court of Human Rights: Efficiency at What Cost?" *Open Society Foundation*, last modified April 22, 2013, accessed July 2, 2014, <http://www.opensocietyfoundations.org/voices/european-court-human-rights-efficiency-what-cost>.

9 Le processus d'Interlaken et la Cour.

10 Conference on the long-term future of the European Court of Human Rights Proceedings, 191.

on which the judgment becomes final,”<sup>11</sup> effective domestic remedies to complaints of prolonged non-enforcement of judgments against the State.<sup>12</sup>

In light of this instance of the Court’s indication of general measures in the operative part of its judgments, this article will examine this instrument, including its nature, its use, and its strengths and weaknesses. It also will identify issues that could be occasions for the Court to indicate general measures in its judgments against Ukraine. This analysis will largely draw on two sources: first, a range of analytical documents drafted by the Government Agent of Ukraine before the European Court of Human Rights; and, second, a selection of previous judgments that have invoked general measures against other Member States, particularly those representing young democracies facing similar structural and systemic problems of the legal order.

By limiting this article’s scope to instances where the Court indicated general measures in the operative part of its judgment, we will not consider whether general measures that are not directly included in a judgment’s operative part are coercive when the judgment is executed. Furthermore, we also will not consider in detail the responses by the States involved, leaving this for further research.

Finally, this article, albeit briefly, will deal with the interplay of general measures with other Court instruments, in particular, the pilot-judgment procedure<sup>13</sup> and the concept of well-established case law.<sup>14</sup>

This article’s authors, both former lawyers of the Court Registry, hope that their knowledge of the Court’s inner workings have allowed them to draw a set of valid conclusions about the potential developments in the case law on the Court’s indication of general measures in the operative part of its judgments.

## 1. The Place of General Measures in the Practice of the ECHR

### 1.1. *General Remarks*

General measures, like the pilot judgments that contain them, are ways of dealing with repetitive cases. “Repetitive cases” are a category of applications that reach the Court because of a widespread human rights problem in the defendant State. A pilot judgment usually indicates general measures aimed at eliminating the underlying issue that caused (or could potentially cause) those repetitive cases.

General measures must be viewed in light of one of the core principles of the Court’s decision-making process — subsidiarity. According to the Court’s jurisconsult, subsidiarity “can have several different shades of meaning, depending on the sphere in which it is being invoked. However, in the specific context of the European Court of Human Rights, it means that the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with

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<sup>11</sup> *Yuriy Nikolayevich Ivanov v. Ukraine*, 40450/04 (ECHR, October 15, 2009), § 94.

<sup>12</sup> *Yuriy Nikolayevich Ivanov v. Ukraine*, § § 63–66.

<sup>13</sup> Rules of Court, September 18, 1959 (with subsequent amendments), Rule 61.

<sup>14</sup> European Convention on Human Rights, November 4, 1950, as amended by Protocols Nos. 11 and 14, Article 28.

the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task.”<sup>15</sup> Effective domestic remedies ensure that individuals are not forced to apply to the Court for relief that could otherwise and more appropriately have been addressed initially at the level of the national legal system, a point the Court recently emphasized in *Dimitrov and Hamanov v. Bulgaria*.<sup>16</sup>

Also relevant is the proposition that the Court’s case law closer to *res interpretata* than to *res judicata*. Therefore, compliance with the Convention tends to mean compliance with the whole body of the Court’s case law.<sup>17</sup> Arguably, the Court’s judgments have already received an *erga omnes* effect. As was pointed out by Judge Lazarova Trajkovska in 2010, although the *erga omnes* status of the Court’s judgments is debated among academics and legal practitioners, judicial practice has shown that some of the judgments have had a strong “de facto *erga omnes* effect.” That is, a judgment adopted by the Court can have stronger effects than initially foreseen. For example, the judgments in *Kudla v. Poland*, *Scordino v. Italy*, and *Zoltuhin v. Russia* have enhanced reform processes in many European countries.<sup>18</sup>

At the same event where Judge Lazarova Trajkovska expressed these views, however, Christos Pourgourides, Chairperson of the Committee on Legal Affairs and Human Rights (AS/Jur), Parliamentary Assembly of the Council of Europe, provided a counter example:

The Court held as early as in 1979, in *Marckx v. Belgium*, that children born out of wedlock must not be discriminated. French law was similarly discriminatory. But the necessary changes were made only after France herself was condemned by the Court in the case of *Mazurek v. France*, in 2000! It was obvious, already back in 1979, what the Court’s position would be. Twenty years lost for the victims of such discrimination, and many years of unnecessary litigation before the Court in Strasbourg. [...] Such practice is simply unacceptable if we agree that the common objective of all Parties to the Convention, under its first article, is to “secure” the rights and freedoms laid down in the Convention. This means that human rights violations must first and foremost be avoided. Effective remedies to provide redress when a violation has nevertheless occurred are only second-best. And only when these remedies do not function at the national level must the Strasbourg Court step in. This is what the principle of subsidiarity means.<sup>19</sup>

15 Interlaken Follow-up: Note by the Jurisconsult. European Court of Human Rights’ website, July 8, 2010, accessed July 28, 2014,

[http://www.echr.coe.int/Documents/2010\\_Interlaken\\_Follow-up\\_ENG.pdf](http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf).

16 *Dimitrov and Hamanov v. Bulgaria*. 48059/06; 2708/09 (ECHR, May 10, 2011).

17 David Harris, Michael O’Boyle et al., *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009), 7; Andrew Drzemczewski, “Quelques réflexions sur l’autorité de la chose interprétée par la Cour de Strasbourg,” *Rev. Fac. Direito UFMG, Belo Horizonte* 58 (2011): 85.

18 Mirjana Lazarova Trajkovska, “Strengthening Subsidiarity: Integrating the Strasbourg Court’s Case Law,” *Conference on the Principle of Subsidiarity*, Skopje, 2010, 12.

19 Christos Pourgourides, “Strengthening Subsidiarity: Integrating the Strasbourg Court’s Case Law,” *Conference on the Principle of Subsidiarity*. Skopje, 2010, 2

### 1.2. *The Long and Winding Road towards the General Measures*

The Court analyses the legal issues on a case-by-case basis<sup>20</sup> and does not have legislative authority. The Court's default mode is to award just satisfaction, which is the only measure of redress directly established by the Convention.<sup>21</sup> Often, the reasoning in the Court's judgments contains a part entitled "Application of Article 41 of the Convention." However, on certain occasions the just satisfaction mode does not fully resolve the issue that has brought the applicant to the Court. This is especially true of the cases of continuing violations. As Professor Jörg Polakiewicz has noted, these cases commonly involve continuing detention (Article 5), maintaining in force and applying a law incompatible with the Convention, denying parental access to children (Article 8), and the like.<sup>22</sup> Awarding monetary compensation without ending the underlying problem does not meet the Convention's goal of "safeguard[ing] the individual in a real and practical way as regards those areas with which it deals."<sup>23</sup> In many cases, merely awarding monetary compensation can be "absurd."<sup>24</sup>

However, prior to the 1990s, despite numerous parties' requests to order the defendant State to take actions other than paying compensation, the Court remained reluctant to do so. For example, in 1978 in *Ireland v. UK*, the Court refused the applicant Government's request to initiate criminal proceedings against the individuals responsible for human rights violations:

[T]he Court finds that the sanctions available to it do not include the power to direct one of those States to institute criminal or disciplinary proceedings in accordance with its domestic law.<sup>25</sup>

In doing so, the Court effectively put the burden of dealing with the aftermath of the judgment on the defendant State without indicating how the problem addressed in the judgment could be alleviated.

Ironically, in the same judgment of *Ireland v. UK* the Court famously<sup>26</sup> elaborated that its judgments "in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby

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20 For further reference, see J. G. Merrills, *The Development of International Law by the European Court of Human Rights*, 151.

21 European Convention on Human Rights, Article 41.

22 Jörg Polakiewicz, "The Execution of Judgments of the European Court of Human Rights," in *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States*, ed. Robert Blackburn and Jörg Polakiewicz (Oxford: Oxford University Press, 2001), 58.

23 See, among many other authorities, *Airey v. Ireland*. 6289/73 (ECHR, October 09, 1979), § 26.

24 *Broniowski v. Poland*. 31443/96 (ECHR, June 22, 2004), concurring opinion of Judge Zupančič.

25 *Ireland v. The United Kingdom*. 5310/71 (ECHR, January 18, 1978). § 187.

26 Andrew Drzemczewski, "Quelques réflexions sur l'autorité de la chose interprétée par la Cour de Strasbourg," 85.

contributing to the observance by the States of the engagements undertaken by them as Contracting Parties [...]"<sup>27</sup>

Taking this logic further, the Court gradually broadened its interpretation of Article 41. Starting in 1995, the Court repeatedly resorted to the notion of *restitutio in integrum* inviting the respondent States to put an end to the breach and make reparation for its consequences "in such a way as to restore as far as possible the situation existing before the breach" (*Papamichalopoulos and Others v. Greece*,<sup>28</sup> *Iatridis v. Greece, Former King of Greece and Others v. Greece*<sup>29</sup> *et cetera*). Nonetheless, in all those cases the Court's direct role was still limited to a just satisfaction award.

Meanwhile, in July 2000 the Court's Grand Chamber in its judgment *Scozzari and Giunta v. Italy*<sup>30</sup> combined Articles 41 and 46 of the Convention. Having first quoted the former, the Court then invoked the Member States' undertaking "to abide by the final judgment of the Court in any case to which they are parties" established by Article 46 § 1, as well as the supervisory role of the Committee of Ministers. The Court concluded that "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effect."<sup>31</sup> However, the Court did not indicate any concrete, non-pecuniary measures.

In these cases, as well as in many other judgments of the same period,<sup>32</sup> the Court emphasized the defendant State's freedom to choose the means to put an end to a violation and to redress its effect. Other cases, in which the Court's indication of measures going beyond monetary awards became more precise, followed. In 2003, in *Gençel v. Turkey*, and in 2004, in *Assanidze v. Georgia*, the Court finally imposed on the States non-monetary obligations; specifically, the applicant's prompt retrial by an independent and impartial court in the former<sup>33</sup> and the applicant's release at the earliest possible date<sup>34</sup> in the latter. Moreover, in *Assanidze* the Court for the first time indicated the measure of redress in the operative part of its judgment.

Despite this ever-broadening interpretation of Articles 41 and 46, the Court stayed within the *intra partes* approach. The Committee of Ministers, however, routinely requested

27 *Ireland v. The United Kingdom*, § 154.

28 *Papamichalopoulos and Others v. Greece* (Article 50). 14556/89 (ECHR, October 31, 1995), § 34.

29 *Iatridis v. Greece* (Article 41). 31107/96 (ECHR, October 19, 2000); *Former King of Greece and Others v. Greece* (Article 41). 25701/94 (ECHR, November 28, 2002).

30 *Scozzari and Giunta v. Italy*. 39221/98; 41963/98 (ECHR, July 13, 2000).

31 *Scozzari and Giunta v. Italy*. 39221/98; 41963/98 (ECHR, July 13, 2000), § 249.

32 *Brumărescu v. Romania* (Article 41). 28342/95 (ECHR, January 23, 2001), § 20; *Akdivar and Others v. Turkey* (Article 50). 21893/93 (ECHR, April 01, 1998), § 47; and, *Marckx v. Belgium*. 6833/74 (ECHR, June 13, 1979), § 58.

33 *Gençel v. Turkey*. 53431/99 (ECHR, October 23, 2003), § 27.

34 *Gençel v. Turkey*. 53431/99 (ECHR, October 23, 2003), § 203.

the Governments concerned to take measures to prevent violations already condemned by the Court.<sup>35</sup>

By 2004, the question of whether the Court itself could do more was as valid as ever. On 12 May 2004, the Committee of Ministers adopted a Resolution, by which it invited the Court

as far as possible, to identify, in its judgments finding, a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.

One month later, the Court adopted its first pilot judgment. The case *Broniowski v. Poland* concerned Poland's failure to compensate persons displaced after World War II for the property they left behind.<sup>36</sup> The Grand Chamber concluded that the violation of the applicant's property right "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."<sup>37</sup> It added that the violation "was neither prompted by an isolated incident nor attributable to the particular turn of events in his case, but was rather the consequence of administrative and regulatory conduct on the part of the authorities towards an identifiable class of citizens, namely the Bug River claimants."<sup>38</sup> The Court also referred to the May 2004 Resolution and its present and potential workload.<sup>39</sup>

In the operative part of the judgment, the Court indicated "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 Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1."<sup>40</sup> Thus began the general measures *sensu stricto*.

The Court set a six-month term for the Government to introduce the relevant measures. It adjourned all similar applications pending before it for the same period, reserved the question of just satisfaction for further consideration, and invited the parties to inform the Court if they settled the dispute.<sup>41</sup>

Indeed, the Government of Poland and Mr Broniowski settled their dispute. Poland also introduced a compensation procedure for the remaining Bug River claimants. In September 2005, the Court reviewed the settlement. Although it bound only the parties, it contained a section

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35 Mesures générales adoptées afin de prévenir de nouvelles violations de la Convention européenne des Droits de l'Homme. H/Exec (2006)1, European Court of Human Rights' website, 2006.

36 *Broniowski v. Poland*.

37 *Broniowski v. Poland*, § 189.

38 *Broniowski v. Poland*, § 189.

39 *Broniowski v. Poland*, § 193.

40 *Broniowski v. Poland*, Operative part.

41 *Broniowski v. Poland*, Operative part.



concerning the Government's general undertakings. The Court credited the Government for its actions to comply with the general measures.<sup>42</sup>

As for the unsatisfied applicants who continued to pursue their applications, the Court addressed them in 2007 in *Wolkenberg and Others*.<sup>43</sup> It analyzed the Polish procedure, concluded that the matter had been resolved at the domestic level, and struck the applications from its list of cases.<sup>44</sup>

To sum up, the Court is more frequently using procedures that the Convention does not explicitly establish. This reflects the Court's view of the "Convention as a living instrument."<sup>45</sup> It is also a sign of the "constitutionalisation"<sup>46</sup> of the Court; that is, a trend toward addressing general issues going beyond the mere interests of the applicant.

### 1.3. *The Legal Basis, Procedural Aspect and Definition of General Measures*

As we have noted, the Convention does not explicitly mention special procedures such as "general measures" or a "pilot judgment." This is why Judge Lech Garlicki called the legal basis of the special procedures "fragile."<sup>47</sup>

The Convention's silence on general measures and pilot judgments, together with the constant criticism of the Court for its "judicial activism,"<sup>48</sup> calls for the Court to be prudent. This need for prudence extends to resorting to general measures, to choosing the judgments in which to indicate such measures, and to formulating the measures.

Firstly, when the Court indicates general measures, it refers to Articles 41 and 46 (an approach used in *Scozzari and Giunta*<sup>49</sup> and subsequent judgments). In addition, the Court invokes Article 1, which imposes on the High Contracting Parties an obligation to secure to everyone within their respective jurisdictions the rights and freedoms guaranteed by the Convention.

Secondly, reaching beyond the Convention, the Court in *Broniowski*<sup>50</sup> invoked the Resolution of 12 May 2004 when it explained its reasons for indicating general measures. While agreeing with the Court's recourse to the Resolution, Judge Zupančič was critical of the Court's

42 *Broniowski v. Poland* (Struck out of the List). 31443/96 (ECHR, September 28, 2005).

43 *Broniowski v. Poland*.

44 *Wolkenberg and Others v. Poland*. 50003/99 (ECHR, December 4, 2007, § 77).

45 See footnote 19.

46 Helen Keller and Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems* (Yale Law School Legal Scholarship Repository, 2008), 676–712, 703.

47 Antoine Buyse, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges," in *European Court of Human Rights. 50 Years*, ed. Vasilio Chiridaros (Athens: Athens Bar Association, 2010), 86.

48 Marc Bossuyt, "Judicial Activism in Europe: the Case of the European Court of Human Rights," Open Europe's website, September 16, 2013, accessed July 28, 2014, <http://www.openeurope.org.uk/Content/Documents/speechmarcbossuytopeneuropesept2013.pdf>.

49 *Scozzari and Giunta v. Italy*.

50 *Broniowski v. Poland*, §§ 190–91.

overly humble manner, and urged it to be more assertive in future in his concurring opinion: “[w]hat I do not agree with is the ambivalent and hesitant rationale of the judgment. I do not think this Court needs, apart from the Convention itself, any additional legal rationalization to legitimize its principled logic, and especially if it is to seek that legal basis in a resolution of the Committee of Ministers [...]”<sup>51</sup> Judge Zupančič further explained, drawing from the *travaux préparatoires* of the Convention, that the underlying logic behind the “enigmatic and confusing” wording of Article 41 was not, in fact, to limit the Court’s power, but to indicate measures capable of ending violations of the Convention in any way the Court sees fit.<sup>52</sup>

The lack of a codified legal definition is a shared concern. Interests of multiple actors are at stake when the Court decides to resort to special procedures, namely:

- 1) three categories of the applicants: those of the case concerned, those who have lodged similar applications, and those who are potential<sup>53</sup> applicants because they have not yet been affected by the relevant problem;
- 2) the defendant State;
- 3) the Court itself.

The Court has acknowledged its aim to reduce the number of applications alleging similar problems in many of its judgments dealing with general measures. In *Broniowski*, for example, the Court described in detail its crowded docket, concluding that because 167 applications were already pending before the Court and the same issue affected nearly 80,000 people, the underlying problem represented “a threat to the future effectiveness of the Convention machinery.”<sup>54</sup> In another Polish case, *Hutten-Czapska* (Grand Chamber, 2006), the Court warned of a potentially increasing flow of applications beyond the 18 already pending before it. It stated that “[i]n the context of systemic or structural violations the potential inflow of future cases is also an important consideration in terms of preventing the accumulation of repetitive cases on the Court’s docket, which hinders the effective processing of other cases giving rise to violations, sometimes serious, of the rights it is responsible for safeguarding.”<sup>55</sup>

Some ambiguity exists around the execution of judgments dealing with general measures. Although the Committee of Ministers is the Convention’s main supervisory authority, critics accuse the Court of assuming the functions assigned to the Committee.<sup>56</sup> They note that when

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51 *Broniowski v. Poland*, concurring opinion of Judge Zupančič.

52 *Broniowski v. Poland*.

53 CM(2004)PV1: Addendum to the Minutes of the sitting held at the Palais de l’Europe, Strasbourg. Committee of Ministers’ website, last modified May 12–13, 2004, accessed July 28, 2014, [https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2004\)PV1&Language=lanEnglish&Ver=add&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2004)PV1&Language=lanEnglish&Ver=add&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

54 *Broniowski v. Poland*, § 193.

55 *Hutten-Czapska v. Poland*. 35014/97 (ECHR, February 2, 2005), § 236.

56 Lucius Caflisch, “La mise en oeuvre des arrêts de la Cour: nouvelles tendances,” in *La nouvelle procédure devant la Cour européenne des droits de l’homme après le Protocole n° 14: actes du colloque tenu à Ferrara les 29 et 30 avril 2005* (Ferrara: Bruylant, 2005), 157–74, 169.

the Court indicates general measures, it simultaneously may reserve its examination of the just satisfaction claim and thus keep the proceeding open.<sup>57</sup>

Keeping the proceeding open allows the Court to evaluate, among other things, the defending State's progress in introducing such measures.<sup>58</sup> When it later considers applications containing similar complaints, the Court will analyze the effectiveness of the newly-available domestic remedies.<sup>59</sup>

Without doubt, the two factors of utmost importance to any State's response to general measures judgments are the State's political will to implement the measures and the Court's precision in formulating them. As Judge Zagrebelsky observed in his partial dissent in *Lukenda v. Slovenia*, the Court's judgment should possess the usual qualities of a judicial order, and the Court should avoid being vague.<sup>60</sup>

Conversely, if the judgment concerning a persistent issue does not reserve any questions for further examination, the Court is limited in its options for assessing the State's response. The Convention does not provide for means for the Court to re-open a proceeding on its own accord. Arguably, the only choice available to the Court is to re-examine the issue in later cases. The judgment of *Rumpf v. Germany*,<sup>61</sup> delivered in 2010, was, in this manner, another look at the circumstances leading to *Sürmeli v. Germany*,<sup>62</sup> a decision rendered four years earlier.

An even more illustrative example of the Court's changing approach to recurring issues (namely, the length of judicial proceedings) features Italy. This judicial saga started in 1987, before the concept of general measures was even conceived, and it continued well into the first decade of the 21st century.

The Court had addressed the excessive length of proceedings in Italy as early as 1987 in *Capuano v. Italy*.<sup>63</sup> In 1999, in *Bottazzi v. Italy*,<sup>64</sup> the Court concluded that the number and frequency of identical breaches (by that time 65 judgments) reflected a persisting situation without a domestic remedy and constituted a practice incompatible with the Convention.<sup>65</sup>

Italy responded by introducing in 2001 the so-called Pinto Act, which allowed defendants denied the right to a trial within a reasonable time to seek compensation before a court of appeal.<sup>66</sup> It also affected cases that were already pending before the European Court when the Act entered into force.

57 *Broniowski v. Poland*.

58 *Broniowski v. Poland* (Struck out of the List).

59 *Wolkenberg and Others v. Poland*.

60 *Lukenda v. Slovenia*, 23032/02 (ECHR, October 6, 2005), partially dissenting opinion of Judge Zagrebelsky.

61 *Rumpf v. Germany*, 46344/06 (ECHR, September 2, 2010).

62 *Sürmeli v. Germany*, 75529/01 (ECHR, June 8, 2006).

63 *Capuano v. Italy*, 9381/81 (ECHR, June 25, 1987).

64 *Bottazzi v. Italy*, 34884/97 (ECHR, July 28, 1999).

65 *Bottazzi v. Italy*, § 22.

66 CM/Inf/DH(2005)33: Fourth Annual Report on the Excessive Length of Judicial Proceedings in Italy for 2004 (Administrative, Civil and Criminal Justice). Committee of Ministers' website, § § 121–22, June 6, 2005, accessed July 28, 2014, <https://wcd.coe.int/ViewDoc.jsp?id=864733&Site=CM>.

The Court was not satisfied with Italy's response.<sup>67</sup> In an admissibility decision of 17 March 2003 (*Scordino and Others*, application No. 36813/97),<sup>68</sup> the Court found that the Italian courts were not applying the Pinto Act in conformity with the Convention: the compensations awarded were not adequate and did not reflect the criteria developed in the Court's case law. The Court noted that the Italian Court of Cassation's case law neither recognized the right to a hearing within a reasonable time as a fundamental right nor was the Convention and the Court's case law directly applicable on the issue of just satisfaction.

The Court analyzed the remedies for excessively lengthy proceedings in two judgments given by the Grand Chamber on the same day in March 2006 — *Scordino* and *Cocchiarella*.<sup>69</sup> These judgments responded to the request of the defendant State and the third-party interveners, the Governments of Poland, Slovakia and the Czech Republic.<sup>70</sup>

Firstly, the Court stated that while it was obvious that a combination of the two types of remedies, one designed to expedite the proceedings and the other to afford compensation, was a perfect measure (Austria, Croatia, Spain, Poland and Slovakia),<sup>71</sup> introducing only one remedy could also be a solution, depending on the context.<sup>72</sup>

Secondly, it concluded that in either case, a remedy had to be effective; that is, it had to be capable of hastening the proceedings or promptly providing an adequate compensation.<sup>73</sup>

Finally, the Court reiterated that Italy's compensatory remedy had not solved the substantive problem. The length of proceedings continued to be excessive; the remedy was still not in place.<sup>74</sup>

Ironically, Italy's courts had become even more overburdened because they had received an additional task, the Pinto proceedings.<sup>75</sup> Additionally, the Court concluded that the enforcement term of the decisions given within the Pinto proceedings remained excessive. It encouraged Italy "to take all measures necessary to ensure that the domestic decisions are delivered not only in conformity with the case-law of this Court but are also executed within six months of being deposited with the registry."<sup>76</sup>

Because Italy failed to eliminate the shortcomings of the Pinto procedure, the Court entered another judgment on this issue in 2010 in the case *Gaglione and Others* concerning 475 applications.<sup>77</sup> The Court reminded Italy that the problem of excessive length of proceedings as well as a lack of an effective remedy remained relevant. However, given that the Court's

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67 Fourth Annual Report, § 125.

68 *Scordino and Others v. Italy* (No. 1, Dec.), 36813/97 (ECHR, March 27, 2003).

69 *Scordino v. Italy* (No. 1), 36813/97 (ECHR, March 29, 2006); *Cocchiarella v. Italy*, 64886/01 (ECHR, March 29, 2006).

70 *Scordino v. Italy*.

71 *Cocchiarella v. Italy*, § 77.

72 *Cocchiarella v. Italy*, § § 74–78.

73 *Cocchiarella v. Italy*, § § 74–78.

74 *Cocchiarella v. Italy*, § 118.

75 *Cocchiarella v. Italy*, § 118.

76 *Scordino v. Italy* (No. 1), § 240; *Cocchiarella v. Italy*, § 130.

77 *Gaglione and Others v. Italy*, 45867/07; 45918/07; 45919/07 et al. (ECHR, December 21, 2010).

repeated calls for changes did not cause material shifts in the attitude of the Italian authorities, one may speculate that Italy seems to be determined to pay off the successful complainants but not to make any changes to the way its judicial procedure and courts are organized.

Based on these examples, general measures are one of the mechanisms that allow the Court to address underlying deep-rooted problems in the domestic legal systems of Member States that either actually or potentially cause repetitive violations of the human rights protected by the Convention and its Protocols.

#### *1.4. The Interaction of General Measures and Other Special Procedures in the Framework of the European Convention of Human Rights*

When the Court receives a substantial number of applications triggered by the same root cause, it may decide to select one or more of these applications in which to indicate general measures covering all similar cases raising the same issue. The resulting judgment is a “pilot judgment.”<sup>78</sup> Every pilot judgment includes general measures.

The term “pilot judgment” did not appear in the Court’s case law until the second *Broniowski* judgment in 2005. This judgment contains a section entitled “Implications of a ‘pilot judgment procedure.’”<sup>79</sup>

In December 2007 Judge Wildhaber, the Court’s President when *Broniowski* was decided, identified the various aspects of a pilot judgment. First, a pilot judgment emanates from the Grand Chamber and finds deficiencies in the Member State’s domestic legal system that deprive a class of individuals of their Convention rights. Second, it concludes that these deficiencies may give rise to numerous well-founded applications. Third, it recognizes the need for general measures and indicates their nature and form. Fourth, it also specifies that these should have retroactive effect. Fifth, it adjourns the Court’s consideration of all pending applications deriving from the same cause. Sixth, it includes the general measures in its operative part to reinforce the State’s obligation to implement them. Seventh, it reserves the Article 41 issue. Finally, the Court informs the Committee of Ministers of what it has done and periodically updates the Committee of Ministers, the Parliamentary Assembly and the Council of Europe’s Human Rights Commissioner on further developments in the case.<sup>80</sup>

Whether all of these elements are necessary for a judgment to be a “pilot judgment” is an open question. While the judgment in *Broniowski* included all of them, many later judgments did not exhaust Judge Wildhaber’s list. For example, the *Lukenda* judgment adopted in 2005 by the Chamber, though not the Grand Chamber, neither reserved any issues nor adjourned

78 The Pilot-Judgment Procedure: Information Note issued by the Registrar. European Court of Human Rights’ website, accessed July 28, 2014,

[http://www.echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf).

79 *Broniowski v. Poland* (Struck out of the List).

80 Luzius Wildhaber, “Pilot Judgments in Cases of Structural and Systemic Problems on the National Level,” in *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Heidelberg: Springer, 2007), 71.

similar cases.<sup>81</sup> Nevertheless, the Court stated that “the violation of the applicant’s right to a trial within a reasonable time is not an isolated incident, but rather a systemic problem that has resulted from inadequate legislation and inefficiency in the administration of justice.”<sup>82</sup> The Court also invited the respondent State “to either amend the existing range of legal remedies or add new remedies so as to secure genuinely effective redress for violations of that right”<sup>83</sup> to prevent future violations.

In February 2011, the Court codified pilot judgments by adding a new rule to its Rules of Court<sup>84</sup> clarifying how it should handle potential systemic or structural violations of human rights.<sup>85</sup> The rule reflects the Court’s view, expressed in *Lukenda* and other judgments, that the entire set of elements listed by Judge Wildhaber was not a *conditio sine qua non* for a pilot judgment.

Additionally, under § 9 of Rule 61, the Committee of Ministers and other Council of Europe bodies “shall be informed of the adoption of a pilot judgment as well as of any other judgment in which the Court draws attention to the existence of a structural or systemic problem in a Contracting Party.”<sup>86</sup> This means that the pilot judgment procedure is not the only available means to address a structural or systemic deficiency in the internal legal order of a Contracting Party.

As to these available means, Dr. Antoine Buyse proposes considering them along a continuum with those possessing all eight elements of a pilot judgment suggested by Judge Wildhaber (and found in *Broniowski*) on one extreme, and those simply pointing to a problem going beyond any specific violation on the other extreme (e.g., the national legislation in *Marckx v. Belgium*).<sup>87</sup>

Professor Philip Leach locates on this continuum three types of judgments concerning general issues. The first are pilot judgments *stricto sensu*. The second are quasi-pilot judgments in which the Court refers to Article 46 but does not prescribe general measures in the operative part of the judgment and usually does not adjourn similar cases. The third are other judgments addressing systemic issues that do not explicitly apply Article 46. Instead, they identify a systemic or widespread problem.<sup>88</sup>

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81 *Lukenda v. Slovenia*.

82 *Lukenda v. Slovenia*, § 93

83 *Lukenda v. Slovenia*, § 98.

84 Rules of Court, Rule 61.

85 New Rule Introduced Concerning Handling of Systemic and Structural Human Rights Violations in Europe. Press Release issued by the Registrar of the Court, European Court of Human Rights’ website, March 24, 2011, accessed July 28, 2014, <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3481961-3922418>.

86 Rules of the Court, Rule 61.

87 Buyse, “The Pilot Judgment Procedure,” 84.

88 Philip Leach et al., “Responding to Systemic Human Rights Violations: An Analysis of Pilot Judgments of the European Court of Human Rights and Their Impact at National Level,” London Metropolitan University’s website, June 14, 2010, accessed July 28, 2014, <https://metranet.londonmet.ac.uk/fms/MRSite/Research/HRSJ/Events/HRSJ%20Presentations%20Pilot%20Strasbourg.pdf>.

Another legal concept closely related to general measures is the well-established case law mentioned in Article 28<sup>89</sup> of the Convention, as amended by Protocol No. 14. According to Protocol No. 14 explanatory report,<sup>90</sup> the concept of well-established case law captures the reform efforts aimed at reducing the time spent by the Court on repetitive applications. This article, however, does not examine this concept. Instead, it only observes that even one judgment indicating general measures can be enough for subsequent cases dealing with similar issues to fall under the umbrella definition of “well-established case law”. This instrument has already proven its effectiveness, including when the Court examines applications against Ukraine.<sup>91</sup> Thus, in sum, the legal concepts of general measures, pilot procedure and well-established case law are the “three pillars” on which the Court is now building its new body of case law to address the recurring issues.

## 2. General Measures: Ukrainian Context

### 2.1. *Relevant Ukrainian Legislation, the Judgment in Yuriy Nikolayevich Ivanov v. Ukraine and Its Implications*

On 23 February 2006, Ukraine’s Parliament adopted the Law of Ukraine “On Execution of Judgments and Application of Practice of the European Court of Human Rights” (the “Law”). The law provides its own interpretation of the State’s responsibilities<sup>92</sup> in responding to the Court’s general measures, in particular:

- 1) introducing changes to the current legislation and practice of its application;
- 2) introducing changes to administrative practice;
- 3) ensuring legal review of draft laws;
- 4) ensuring professional training on the issues regarding implementation of the Convention and the practices of prosecutors, attorneys, employees of law enforcement bodies, employees of migration services, other categories of the employees, whose professional activity is related to application of law and detention of individuals;
- 5) taking other measures deemed necessary by the Committee of Ministers in exercising its supervisory authority.<sup>93</sup>

The Law establishes a detailed follow-up procedure for the Government Agent before the European Court of Human Rights, the Prime Minister and the Ministries to address the

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89 European Convention, Article 28.

90 Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention: Explanatory Report, Council of Europe’s website, accessed July 28, 2014.

91 Pascal Dourneau-Josette et al., *Quel filtrage des requêtes par la Cour européenne des droits de l’homme?* (Strasbourg: Editions du Conseil de l’Europe, 2011), 239–40.

92 Law of Ukraine “On Execution of Judgments and Application of Practice of the European Court of Human Rights” of February 23, 2006, Article 13, accessed July 28, 2014, <http://zakono.rada.gov.ua/laws/show/3477-15>.

93 “On Execution of Judgments and Application,” Articles 13, 15.

indication of general measures.<sup>94</sup> Obviously, if legislative changes are needed, the political consensus on such changes has to be reached in the Parliament, and it is outside the scope of the Law to impose any obligations concerning the legislative process. At the same time, Article 17<sup>95</sup> explicitly mentions the Court's case law as a source of law, directly available for the domestic courts exercising their judicial function. As Meleshevich and Khvorostynkina point out, for Ukraine, a post-Soviet transitional country with the continental system of law, the implementation of the Convention and application of the Court's case law imply a profound shift of legal culture.<sup>96</sup>

So far, the judgment of *Yuriy Nikolayevich Ivanov v. Ukraine*<sup>97</sup> has been the sole occasion on which the Court indicated general measures to Ukraine in the operative part of its judgment. This case was lodged in September 2004, and by October 2009 approximately 1400 applications dealing with similar issues in Ukraine were on the Court's docket. In his case, the applicant, retired from the Ukrainian army, had to resort to defending his right to a lump-sum retirement payment and compensation for the military uniform before the Ukrainian courts. After a judgment in his favor in August 2001, it was only partially enforced, while a substantial part of the award remained unpaid. Neither the specialized enforcement legislation then in effect (the Laws of Ukraine "On Enforcement Proceedings" of 21 April 1999, "On State Bailiff's Service" of 24 March 1998)<sup>98</sup> nor the legislation defining the activities of the defendant (the Law of Ukraine "On Economic Activity in the Armed Forces of Ukraine" of 21 September 1999)<sup>99</sup> provided him with an effective remedy. Thus, this case manifested two problems: the prolonged non-enforcement of final domestic decisions and the lack of an effective domestic remedy to address this excessive delay.

On 6 March 2008, while the case was pending before the European Court of Human Rights, the Committee of Ministers considered, pursuant to Article 46 § 2 of the Convention, the measures adopted by Ukraine to comply with the Court's previous judgments concerning the prolonged non-enforcement of final domestic decisions. The Committee adopted an interim resolution that acknowledged that non-enforcement of domestic judicial decisions had created a structural problem in Ukraine. And, among other things, the resolution strongly encouraged the Ukrainian authorities to enhance their commitment to achieve tangible results and to make

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94 "On Execution of Judgments and Application," Article 15.

95 "On Execution of Judgments and Application," Article 17.

96 Andrey Meleshevich and Anna Khvorostyankina, "Ukraine," in *The European Convention on Human Rights and Fundamental Freedoms in Central and Easter Europe*, ed. Leonard Hammer and Frank Emmert (The Hague: Eleven International Publishing, 2012), 592.

97 *Yuriy Nikolayevich Ivanov v. Ukraine*. 40450/04 (ECHR, October 15, 2009).

98 Law of Ukraine "On Enforcement Proceedings" of April 21, 1999, accessed July 28, 2014, <http://zakono.rada.gov.ua/laws/show/606-14>; Law of Ukraine "On State Bailiffs' Service" of March 24, 1998, accessed 28 July 2014, <http://zakono.rada.gov.ua/laws/show/202/98-%D0%B2%D1%80>.

99 Law of Ukraine "On Economic Activity in the Armed Forces of Ukraine" of September 21, 1999, accessed July 28, 2014, <http://zakono.rada.gov.ua/laws/show/1076-14>.



it a high political priority to abide by their obligations under the Convention and the Court's judgments and to ensure full and timely execution of the domestic courts' decisions.<sup>100</sup>

In early June 2009, the Committee of Ministers resumed its consideration under Article 46 § 2 of the Convention of the Court's judgments against Ukraine concerning the failure to enforce, or delays in the enforcement of, domestic decisions. The decision<sup>101</sup> adopted by the Committee noted with concern that creating a domestic remedy had not been a priority, despite the Committee's repeated calls to this effect.

In the wake of these futile Committee efforts, the Court had to intervene in its judgment in *Yuriy Nikolayevich Ivanov* in October 2009.

First, the Court decided to apply a pilot procedure. Second, the Court analysed the particularities of the applicant's situation and found a violation on the part of Ukraine.<sup>102</sup> Third, it established that Ukraine had adopted a practice incompatible with the Convention<sup>103</sup> through its failure to provide for the enforcement of domestic judgments within a reasonable time. Fourth, it held that Ukraine had to set up within one year from the date on which the judgment became final an effective domestic remedy capable of securing adequate and sufficient redress for the non-enforcement or delayed enforcement of domestic decisions.<sup>104</sup> Such redress had to be granted to all applicants whose applications pending before the Court concerned arguable complaints relating to the prolonged non-enforcement of domestic decisions. Finally, it held that, pending the adoption of the above measures, it would adjourn the proceedings in all such cases for one year.

Ukraine failed to comply. On three separate occasions, the Committee of Ministers urged the Ukrainian authorities at the highest political level to hold to their commitment and resolve the problem of the non-enforcement of domestic judicial decisions by implementing, as a matter of priority, the specific reforms in Ukraine's legislation and administrative practice required by the pilot judgment.<sup>105</sup>

As no measures followed at the domestic level, the Court resumed the processing of incoming applications with the same complaint. In 2011, 1,000 new *Ivanov*-type cases were

100 Interim Resolution CM/ResDH(2008)1, Committee of Ministers' website, March 6, 2008, accessed July 28, 2014, <https://wcd.coe.int/ViewDoc.jsp?id=1259451&Site=CM>.

101 CM/Inf/DH(2009)29rev: Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights, Committee of Ministers' website, June 3, 2009, accessed July 28, 2014, <https://wcd.coe.int/ViewDoc.jsp?id=1450969&Site=CM>.

102 *Yuriy Nikolayevich Ivanov v. Ukraine*, operative part.

103 *Yuriy Nikolayevich Ivanov v. Ukraine*, operative part.

104 *Yuriy Nikolayevich Ivanov v. Ukraine*, operative part.

105 Interim Resolution CM/ResDH(2010)222. Committee of Ministers Web site, November 30, 2010, accessed July 28, 2014, <https://wcd.coe.int/ViewDoc.jsp?id=1715937&Site=COE>; Interim Resolution CM/ResDH(2011)184. Committee of Ministers Web site, September 14, 2011, accessed July 28, 2014, <https://wcd.coe.int/ViewDoc.jsp?id=1832081&Site=DC>; Interim Resolution CM/ResDH(2012)234. Committee of Ministers Web site, December 6, 2012, accessed July 28, 2014, <https://wcd.coe.int/ViewDoc.jsp?id=2013425&Site=CM>.

registered.<sup>106</sup> Consequently, the Court created an expedited procedure for notifying Ukraine about the numerous applications before it. On 26 July 2012 in *Kharuk and Others v. Ukraine*,<sup>107</sup> the Court's Committee adopted the first judgment using this expedited procedure. The judgment concerned 116 applicants. They were awarded standard amounts of just satisfaction; if their domestic judgment had gone unenforced for three years or less, the award was €1,500; if their domestic judgment had not been enforced within three years, the award was €3,000.<sup>108</sup> The Court also directed Ukraine to enforce the domestic decisions that had not been enforced as of the time of the *Kharuk* judgment.<sup>109</sup>

Finally, in 2013 the legislation that was supposed to solve this recurring problem was adopted and came into force: changes to the Law of Ukraine "On Enforcement Proceedings"<sup>110</sup> and the Law of Ukraine "On State Guaranties for Enforcement of Judgments."<sup>111</sup>

In the letter to the Government dated 28 March 2014,<sup>112</sup> the Government Agent of Ukraine before the European Court of Human Rights stated that the same violation under Articles 6 § 1, 13 and Article 1 of Protocol No. 1 continued to be invoked in subsequent judgments of the Court. She noted that the majority of such cases resulted from the non-enforcement of final decisions concerning social payments. The Government Agent further acknowledged the continuing problems in enforcement of several categories of decisions against the State. Specifically, she drew the Government's attention to the fact that several moratoria established by the Laws of Ukraine "On Measures Aimed at Ensuring Sustainable Operation of Enterprises of Fuel and Energy Complex"<sup>113</sup> and "On Introducing a Moratorium on Mandatory Sale of Property"<sup>114</sup> had made the due enforcement a challenging task.

The experience of the Russian Federation in this regard is illustrative. Russia adopted a legislative reform in May 2010 to address the non-enforcement of its courts' decisions as a

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106 CDDH(2013)R77 Addendum IV. CDDH report on the advisability and modalities of a "representative application procedure." Council of Europe Web site, § 12, March 21, 2013, accessed July 28, 2014, [http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH\(2013\)R77\\_Addendum%20IV\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH(2013)R77_Addendum%20IV_en.pdf).

107 *Kharuk and Others v. Ukraine*, 703/05; 1007/09; 10432/06 et al. (ECHR, July 26, 2012).

108 *Kharuk and Others v. Ukraine*, § § 12–14.

109 *Kharuk and Others v. Ukraine*, § 26.

110 Law of Ukraine "On State Bailiffs' Service".

111 Law of Ukraine "On State Guaranties for Enforcement of Judgments" of June 5, 2012, accessed July 28, 2014, <http://zakon0.rada.gov.ua/laws/show/4901-17>.

112 Letter of the Government Agent of Ukraine Before the European Court of Human Rights to the Government of Ukraine Concerning General Measures Necessary for Execution of the Final Judgments of the European Court of Human Rights in the 1st Quarter of 2014 of March 28, 2014, accessed July 28, 2014, [http://cct.com.ua/2014/30.09.2014\\_12.0.1-9\\_8793.htm](http://cct.com.ua/2014/30.09.2014_12.0.1-9_8793.htm).

113 Law of Ukraine "On Measures Aimed at Ensuring Sustainable Operation of Enterprises of Fuel and Energy Complex" of June 23, 2005, accessed July 28, 2014, <http://zakon0.rada.gov.ua/laws/show/2711-15>.

114 Law Of Ukraine "On Introducing a Moratorium on Mandatory Sale of Property" of November 29, 2001, accessed 28 July 2014, <http://zakon0.rada.gov.ua/laws/show/2864-14>.

follow-up to the judgment in *Burdov v. Russia* (No. 2)<sup>115</sup> of 15 January 2009, seven years after the original *Burdov v. Russia* judgment of 7 May 2002<sup>116</sup>. In particular, the Federal Law No. 68-FZ of 30 April 2010<sup>117</sup> provided for compensation for the violation of the right to a trial within a reasonable time or the right to the execution of the decision within a reasonable time. Due to these efforts, by 2012 the percentage of cases concerning this problem dropped to 17% from 44%.<sup>118</sup> The Parliamentary Assembly of the Council of Europe commended these legislative developments. It simultaneously noted that, in addition to dealing with non-enforcement of domestic courts' judgments, Ukraine had to accelerate domestic judicial proceedings, reform criminal procedure, ensure the full independence and impartiality of judges and take measures to combat the abuse of force by police officers and ensure effective investigations into allegations of such ill-treatment.<sup>119</sup>

## ***2.2. Recurring Issues that Can Potentially Force the Court to Adopt General Measures in Actions Against Ukraine***

### ***2.2.1. General Remarks***

In the same letter of 28 April 2014, in addition to *Ivanov*-type cases, the Government Agent identified other recurring issues that called for the adoption of measures at the domestic level.<sup>120</sup> She grouped these issues into several categories:

- 1) violations of Article 6 that include excessive length of proceedings; infringements upon the right to defence through the legal assistance and lack of fair trial in the examination of civil claims for compensation stemming from poor conditions of detention in the temporary detention centres;
- 2) violations of Article 2 that include lack of effective investigation into the death of the applicants' relatives; failure of the authorities to guarantee the protection of the applicant's

115 *Burdov v. Russia* (No. 2), 33509/04 (ECHR, January 15, 2009).

116 *Burdov v. Russia*, 59428/00 (ECHR, May 7, 2002).

117 Federal Law of the Russian Federation "On Compensation for Excessive Length of Judicial and Enforcement Proceedings" of April 30, 2010, accessed July 28, 2014, [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_99919/](http://www.consultant.ru/document/cons_doc_LAW_99919/).

118 Committee on Legal Affairs and Human Rights. AS/Jur (2013) 13. Implementation of Judgments of the European Court of Human Rights Extracts from the Minutes of Hearings, Organised by the Committee, Parliamentary Assembly's website, March 28, 2013, accessed July 28, 2014, [http://www.assembly.coe.int/CommitteeDocs/2013/ajdoc13\\_2013.pdf](http://www.assembly.coe.int/CommitteeDocs/2013/ajdoc13_2013.pdf).

119 Resolution 1787 (2011)1: Implementation of Judgments of the European Court of Human Rights. Parliamentary Assembly's website, January 26, 2011, accessed July 28, 2014, <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1787.htm>.

120 Letter of the Government Agent of Ukraine Before the European Court of Human Rights to the Government of Ukraine Concerning General Measures Necessary for Execution of the Final Judgments of the European Court of Human Rights in the 1st Quarter of 2014.

- son during his imprisonment; inadequate health-care regulations on patients refusing to consent to treatment;
- 3) violations of Article 3 that include ill-treatment of the applicants (or their relatives) by the police officers either during their arrest or in detention; conditions of detention in temporary detention centres as well as conditions of transportation between such facilities and lack of effective investigation into ill-treatment;
  - 4) violations of Article 5 that include unlawful detention without a court decision validating it; couching of the court decisions on prolonged applicant's detention in general terms; excessive length of the applicant's pre-trial detention and lack of effective legal remedy in this respect; detention without proper police records and delays in bringing the applicant before a judge; absence of an enforceable right to compensation for the applicant's unlawful pre-trial detention;
  - 5) violations of Article 8 that include taking a blood sample from the applicant by an investigator instead of a medical specialist and unlawful search of the applicant's home by the police;
  - 6) violations of Article 11 by the lack of a clear and foreseeable procedure for organizing and holding peaceful demonstrations;
  - 7) violations of Article 14 in conjunction with Article 1 of Protocol No. 1 as to the termination of payment of a retirement pension on the ground that beneficiary was permanently residing abroad;
  - 8) violations of Article 34 as to the denial of the opportunity to obtain copies of the case file that the applicant had wished to submit to the European Court of Human Rights.

Of these, the issues of excessive length of proceedings as well as the lawfulness and excessive length of pre-trial detention are of particular interest, as the Court had indicated general measures in similar cases against other Contracting States. The assumption is that in the future the Court may also resort to the indication of general measures when considering similar applications lodged against Ukraine.

### *2.2.2. Length of Proceedings*

Article 6 § 1 of the European Convention on Human Rights obligates Member States to give a hearing within a reasonable time to those whose civil rights and obligations or criminal culpability are being determined. This right is among the most frequently violated Convention rights: more than a quarter of the cases in which the Court finds an infringement of the Convention concerns the length of proceedings.<sup>121</sup>

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121 "50 Years of Activity: The European Court of Human Rights. Some Facts and Figures," European Court of Human Rights' website, April 2010, accessed July 28, 2014, [http://www.echr.coe.int/Documents/Facts\\_Figures\\_1959\\_2009\\_ENG.pdf](http://www.echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf).

The Court usually determines whether the length of the proceedings is reasonable by applying four criteria established in the case law: the complexity of the case, the issue at stake for the applicant, the applicant's conduct and authorities' conduct.<sup>122</sup>

As early as in his annual report of 2007, the Government Agent of Ukraine, drew the Government's attention to the recurrence of this issue in the practice of the Court concerning Ukraine.<sup>123</sup> A year before, in *Efimenko v. Ukraine*, the Court pointed out the fact that it had frequently found violations of Article 6 § 1 of the Convention in cases concerned with length of proceedings.<sup>124</sup>

The dispute on presence and effectiveness of domestic remedies in *Efimenko* case warrants closer examination. On the one hand, the Government "maintained that, in so far as the applicant complained about the length of the court proceedings, she could introduce a complaint concerning the delay in the proceedings with the regional court, relying directly on Article 6 of the Convention."<sup>125</sup> The Court rebuffed this argument, noting that "the mere possibility of raising a complaint under the Convention before the domestic courts is not sufficient to reach a conclusion about the effectiveness of a particular domestic remedy."<sup>126</sup> On the other hand, the possibility of instituting proceedings before the Higher Judicial Qualifications' Commission did not amount to an effective remedy, as these proceedings were discretionary — neither the parties to the proceedings nor the courts could initiate disciplinary proceedings against a judge.<sup>127</sup>

The Court had long concluded that two types of remedies could be instrumental in eliminating excessively long proceedings. The preventive remedy, as the name suggests, concerns the mechanisms for stopping unnecessarily protracted proceedings, while the compensatory one deals with the mechanism by which the applicants are compensated for the infringement of their right to fair trial.<sup>128</sup>

When it comes to length of civil proceedings, a good example is the recent *Glykantzi v. Greece*,<sup>129</sup> in which the Court gave a thorough analysis of the measures available at the domestic level that should alleviate the problem. In particular, the Court examined<sup>130</sup> which measures the respondent State had taken to rationalise the civil process with a view of cutting its length. The Court commended the State for increasing the number of judges, establishing new courts, and introducing information technology in the registries of the domestic courts. All of these developments had been important in enhancing the domestic courts' productivity, the Court concluded.

122 See, among other authorities, *Frydlender v. France*, 30979/96 (ECHR, June 27, 2000), *Pélissier and Sassi v. France*, 25444/94 (ECHR, March 25, 1999).

123 Yearly Report of the Government Agent of Ukraine Before the European Court of Human Rights for the Year 2006, January 30, 2007 accessed July 28, 2014, <http://old.minjust.gov.ua/9329>.

124 *Efimenko v. Ukraine*, 55870/00 (ECHR, July 18, 2006), § 57.

125 *Efimenko v. Ukraine*, § 46.

126 *Efimenko v. Ukraine*, § 48.

127 *Efimenko v. Ukraine*, § 49.

128 *Scordino v. Italy* (No. 1) § § 178–89.

129 *Glykantzi v. Greece*, 40150/09 (ECHR, October 30, 2012).

130 *Glykantzi v. Greece*, § 70.

In *Lukenda* case,<sup>131</sup> the Court had to determine whether a number of measures of redress at the domestic level, namely administrative action, a claim for damages in civil proceedings, a request for supervision and a constitutional appeal, taken separately or in combination, were effective legal remedies within the meaning of Article 35 of the Convention.<sup>132</sup> The number and variety of the procedures did not change the Court's final view that, in this case, the applicant could not effectively accelerate his case through the domestic legal system or obtain any adequate compensation for impossibility of doing so.

The issue of excessive length of criminal proceedings was at stake in several recent cases, where the Court had indicated general measures under Article 46: in particular, *Dimitrov and Hamanov v. Bulgaria*<sup>133</sup>; *Michelioudakis v. Greece*.<sup>134</sup>

The same types of preventive or compensatory remedies can be applied in these cases.<sup>135</sup> The Government has to demonstrate, with examples from the domestic practice, that such remedies can expedite the process of determination of charges against the applicant or to provide him or her with adequate redress for delays that had already occurred.

The Court endorsed this approach in respect of criminal proceedings, where it was satisfied that the length of proceedings had been taken into account when mitigating the sentence.<sup>136</sup>

Since the adoption of the new Ukrainian Code on Criminal Procedure on 13 April 2012, the length of criminal proceedings issue has not yet been analyzed by the Court. Some of the earlier conclusions reached by the Court in 2004 in *Merit v. Ukraine* may stand<sup>137</sup>; at the same time, the new Code has introduced new mechanisms<sup>138</sup> to challenge the actions of various representatives of the State, involved in the proceedings. It also added "inaction" as a ground for complaints against the respective authorities in addition to "actions," which were the sole ground for complaints under the previous revision of the Code. The effectiveness of these mechanisms remains to be seen.

To conclude this discussion, it is worth looking at the example of how a simple change of judicial practice appears sufficient to make a certain remedy effective. In the middle of the 1980s the French administrative courts suffered from a dramatic increase in the number of new claims. Consequently, the problem of the excessive length of proceedings became crucial.<sup>139</sup> The legislation did not provide for any specific remedy. However, Article L. 781-1 of the Judiciary Organisation Code (*code de l'organisation judiciaire*) imposed a general obligation on the State to compensate for damage caused by any malfunctioning of the justice system. It also limited

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<sup>131</sup> *Lukenda v. Slovenia*.

<sup>132</sup> *Lukenda v. Slovenia*, § 46.

<sup>133</sup> *Dimitrov and Hamanov v. Bulgaria*.

<sup>134</sup> *Michelioudakis v. Greece*, 54447/10 (ECHR, April 03, 2012).

<sup>135</sup> Numerous cases, for example, *Kudła v. Poland*, 30210/96 (ECHR, October 26, 2000), § 159.

<sup>136</sup> *Beck v. Norway*, 26390/95 (ECHR, June 26, 2001).

<sup>137</sup> *Merit v. Ukraine*, 66561/01 (ECHR, March 30, 2004).

<sup>138</sup> Code on Criminal Procedure of Ukraine of April 13, 2012, Chapter 24, accessed July 28, 2014, <http://zakon0.rada.gov.ua/laws/show/4651-17>

<sup>139</sup> Jean-Paul Costa, "L'effectivité de la justice administrative en France," *Le Revue Administrative* 8 (1999): 132-38.

liability to instances of “gross negligence or a denial of justice.”<sup>140</sup> While this clause, formulated rather vaguely, gave space for interpretation, the courts took a limiting approach in defining a “gross negligence.”<sup>141</sup> Consequently, in 1991 in *Vernillo v. France*<sup>142</sup> the Court concluded that Article L. 781–1 was not an effective remedy, stating that it did not appear that the French courts had interpreted the concept of gross negligence sufficiently broadly to include, for example, every delay exceeding the “reasonable time” laid down in Article 6 § 1 of the Convention.<sup>143</sup> While the Court did not find any violations of the Convention in the *Vernillo* case, France understood the signal. No changes were introduced on the legislative level; however, the national courts began interpreting “gross negligence” more broadly.<sup>144</sup> Thus, in 2001 the Court declared a complaint about excessive length of proceedings inadmissible for non-exhaustion of the domestic remedies because the applicant had failed to make use of Article L. 781–1.<sup>145</sup>

Ukrainian legislation contains provisions comparable with Article L. 781–1. Article 1176 of the Ukrainian Civil Code envisages compensation for the damage resulted from illegal decisions, actions or inactivity by the preliminary investigation authorities, the Prosecutor’s office or the courts.<sup>146</sup>

### 2.2.3. Detention-related Issues

The detention-related issues typically involve one of three issues: the detention’s lawfulness, its length and its conditions. While the Convention covers any detention’s lawfulness and conditions, for the pre-trial detention it only covers the length.<sup>147</sup>

In 2011, the Court addressed all of these issues in *Kharchenko v Ukraine*<sup>148</sup> without indicating general measures in the operative part of its judgment. Nevertheless, it emphasized that violations of Article 5 constituted a recurring issue in its case law against Ukraine.<sup>149</sup> It invited the Government “under the supervision of the Committee of Ministers, to determine what would be the most appropriate way to address the problems.”<sup>150</sup> And it requested the Government “to submit the strategy adopted in this respect within six months from the date on which the present judgment becomes final at the latest.”<sup>151</sup>

140 Code de l’organisation judiciaire de la République Française, March 18, 1978, Art. L. 781–1.

141 Costa, “L’effectivité de la justice administrative en France.”

142 *Vernillo v. France*, 11889/85 (ECHR, February 20, 1991).

143 *Vernillo v. France*, § 27.

144 Costa. “L’effectivité de la justice administrative en France.”

145 *Giummarra and Others v. France*, 61166/00 (ECHR, June 12, 2001).

146 Civil Code of Ukraine of January 16, 2003, Article 1176, accessed July 28, 2014, <http://zakon.rada.gov.ua/laws/show/435-15>.

147 European Convention, Articles 3 and 5.

148 *Kharchenko v Ukraine*, 40107/02 (ECHR, February 10, 2011).

149 *Kharchenko v Ukraine*, 40107/02 (ECHR, February 10, 2011), § 98.

150 *Kharchenko v Ukraine*, 40107/02 (ECHR, February 10, 2011), § 101.

151 *Kharchenko v Ukraine*, 40107/02 (ECHR, February 10, 2011).

Although the new Ukrainian Code on Criminal Procedure<sup>152</sup> significantly changed Ukraine's pre-trial detention procedure, whether the new procedures and practices will be consistent with the Convention remains to be seen. The Court did not address the new legislation.

As to the conditions of detention, Ms Karen Reid, current Registrar of the Filtering Section, has highlighted a number of issues that can constitute an offence under Article 3 of the Convention, which prohibits torture, inhuman or degrading treatment. These include the conditions when transferring prisoners to and from court; serious overcrowding; insufficient sanitary and sleeping facilities; open, unpartitioned toilets in shared cells; high temperatures in unventilated cells; insufficient natural light and rundown conditions; lack of running water; insufficient and repulsive food; lack of bedding; requiring prisoners to pay to repair and furnish their cells; requiring prisoners to provide their own food, pest infestations linked to recurring skin diseases and fungal infections; insanitary and crowded conditions leading to infection and disease; and passive smoking in a shared cell.<sup>153</sup>

The Court examined at length conditions of detention in several Russian judgments: *Kalashnikov v. Russia* (2002)<sup>154</sup> and *Ananyev and Others v. Russia* (2012).<sup>155</sup> In the latter case, having found violations of Articles 3 and 13 of the Convention, the Court considered the case under Article 46 of the Convention. In its ruling in *Ananyev and Others v. Russia*, the Court relied on its previous judgments in the cases of *Orchowski v. Poland* and *Norbert Sikorski v. Poland*, in which it found under Article 46 of the Convention that the overcrowding in Polish remand centers had revealed a structural problem.<sup>156</sup>

To address the issues pertinent to overcrowding in Russian prisons, the Court noted:

It is not the product of a defective legal provision or regulation or a particular lacuna in Russian law. Rather, it is a multifaceted problem owing its existence to a large number of negative factors, both legal and logistical in nature. Some of them — such as the insufficient number of remand prisons, their antiquity and poor state of repair, misallocation of resources, and a lack of transparency in prison management — may be traced back to the penitentiary system, whereas others — such as the excessive and often unjustified recourse to detention on remand, rather than alternative preventive measures, or a lack of efficient remedies to ensure that the conditions comply with the Russian legislation — have originated elsewhere.<sup>157</sup>

Taking into account the magnitude of the problem, the Court admitted that it was none of its business “to advise the respondent Government about such a complex reform process, let

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152 Code on Criminal Procedure of Ukraine.

153 Reid Karen, *A Practitioner's Guide to the European Convention on Human Rights* (London: Thomson Reuters, 2012), 804–05.

154 *Kalashnikov v. Russia*. 47095/99 (ECHR, July 15, 2002).

155 *Ananyev and Others v. Russia*. 42525/07, 60800/08 et al. (ECHR, January 10, 2012).

156 *Orchowski v. Poland*. 17885/04 (ECHR, October 22, 2009), § 151; *Norbert Sikorski v. Poland*. 17599/05 (ECHR, October 22, 2009), § § 155–56; *Ananyev v. Russia*, § 61.

157 *Ananyev v. Russia*, § 191.



alone recommend a particular way of organizing its penal and penitentiary system.”<sup>158</sup> At the same time, the Court underlined two major issues that had to be addressed “inevitably” by the authorities in the course of their reforms. The first was the close affinity between the problem of overcrowding and the excessive length of pre-trial detention. The second was possible additional ways of combating the overcrowding through provisional arrangements and safeguards for the admission of prisoners in excess of the prison’s capacity.<sup>159</sup>

Once again, in addressing these issues the Court used the dichotomy of preventive and compensatory remedies. As preventive remedy, the Court suggested creating an efficient system for detainees to complain to the domestic authorities and the courts that also ensures the prompt and diligent handling of such complaints as well as a strict enforcement procedure when redress is awarded.<sup>160</sup> Furthermore, in the Court’s view, the introduction of the preventive remedy alone would clearly not be sufficient because it would not directly affect individuals who, by the time of introduction of preventive remedy, would have already endured inhuman or degrading conditions of detention.<sup>161</sup> Hence, the Court analyzed two ways to compensate such individuals: mitigation of their sentence and monetarily compensating them.<sup>162</sup> The Court emphasized the need for a compensatory remedy to operate retrospectively.<sup>163</sup>

Whether the Court will consider indicating general measures as to the conditions of detention in future cases against Ukraine remains to be seen. Yet, the case law in this regard is well- developed, as is evidenced by the recent judgment in *Buglov v. Ukraine*, which referred to the earlier judgments in *Dvoynykh v. Ukraine* and *Poltoratskiy v. Ukraine*.<sup>164</sup>

## Conclusions

In recent years, the Court has used variety of procedures to streamline the flow of applications and to deal with repetitive applications. This article has provided a brief and inconclusive discussion of one of such procedures — indication of general measures by the Court, a relatively recent judicial instrument first used in 2004. These reforms arose in different ways. First, changes to the European Convention introduced new procedures with Protocol No. 14 in 2010. Second, the Court’s own Rules changed in 2011. Third, the Court now tends to interpret measures of redress in its own case law to allow its judgments to have a broader effect.

An analysis of how measures of redress evolved in the Court’s case law testifies to the fact that the Court has become more articulate and emphatic in its application of Article 46 of the European Convention (“Binding force and execution of judgments”). In this light, the Court’s use of general measures is interrelated with its pilot-judgment procedure and well-established

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158 *Ananyev v. Russia*, § 194.

159 *Ananyev v. Russia*, § 196.

160 *Ananyev v. Russia*, §§ 214–20.

161 *Ananyev v. Russia*, § 221.

162 *Ananyev v. Russia*, §§ 222–30.

163 *Ananyev v. Russia*, § 231.

164 *Buglov v. Ukraine*, 28825/02 (ECHR, July 10, 2014).

case law. These legal concepts form the “three pillars” on which the Court is now building its new body of case law dealing with recurring issues.

Although general measures lack a precise legal definition, they are one of the mechanisms the Court uses to address underlying deep-rooted problems of internal legal order of the Contracting States that either actually or potentially cause repetitive violations of the human rights protected by the Convention and the Protocols thereto on a grand scale. The indication of general measures can trigger massive legislative reforms by the respondent States.

When it comes to Ukraine, the sole event on which the Court resorted to indicating general measures in the operative part of the judgment concerned the State's repetitive failure to enforce final decisions of the domestic courts (in *Yuriy Nikolayevich Ivanov v. Ukraine*). Nonetheless, it is plausible to assume that the Court could do this in the future to address other issues it has previously described as “systemic,” “structural” or “recurring.”

The Court's case law dealing with recurrent problems within the legal orders of other Contracting States (especially young democracies) offers guidance to predict which issues are the most likely to result in a judgment indicating general measures. On the other hand, our overview of a range of documents drafted by the Government Agent of Ukraine before the Court delivers a sufficiently clear picture of where Ukraine stands. Taken together, these two insights seem to provide a convincing argument that excessive length of legal proceedings (in both their criminal and civil limbs) under Article 6, § 1 of the Convention and poor conditions of detention under Article 3 could be invoked by the Court as a ground for general measures. Both are vulnerable to a Court judgment indicating general measures because they occur frequently and no domestic law provides their victims with redress.

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