

**PILOT JUDGEMENT PROCEDURE**  
**OF THE EUROPEAN COURT OF HUMAN RIGHTS: PANACEA**  
**OR DEAD-END FOR POLAND, RUSSIA AND UKRAINE**

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## **Abbreviations**

CoE - Council of Europe

CoM – Committee of Ministers

Court - European Court of Human Rights

Convention - European Convention of Human Rights

NHRI – National Human Rights Institution

NGO - Nongovernmental Organization

PJP - Pilot Judgment Procedure

QPJ - quasi-pilot judgment

OGA – Office of Governmental Office

# Abstract

The present paper is devoted to the assessment of the effectiveness of the Court's new institute – Pilot Judgment Procedure. The research demonstrated the existence of 'implementation crises' within the Member States of the Council of Europe, followed by the 'plague' of the twenty first century – systemic human rights violations and structural dysfunctions in the national systems.

PJP is argued to be the most effective formula of 'penicillin' to heal systemic violations in Europe, since it bestows the country at issue with requirements to both engage an already existing national predisposition for the resolution of structural problem as well as to develop with the assistance of CoE bodies conditions favourable for the successful PJ's execution.

The research proves not only the effectiveness of the PJP, but also its great potential for further development in the direction of the "representative application procedure".

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# Introduction

*"The idea that the protection of human rights knows no international boundaries and that the international community has an obligation to ensure that governments guarantee and protect human rights has gradually captured the imagination of mankind."*

(Tomas Burgenthal)<sup>1</sup>

In recent years we have witnessed many important developments in the international protection of human rights. But doubles the one of the most impressive and far-reaching is the recent development of the ECHR system aimed on the improvement in the functioning of the European Court of Human Rights (hereafter – the Court). The Court is considered a modern phenomenon of international justice, the most effective instrument of the European Human Rights protection system and an advanced international judicial organ. In the last decade, facing the coercive consequences of its own success, the Court adopted a new judicial procedure - Pilot Judgment Procedure (hereafter - PJP), which was predestined to be one more step forward in Human Rights protection. PJP is defined “as a technique of identifying the structural problems underlying repetitive cases against countries – parties to the Court and imposing on them an obligation to address these problems.”<sup>2</sup>

The **problems and importance** of the research subject are based on the following grounds: First of all, PJP is a highly innovative institution, a result of regarding the date of its codification in the Rules of the Court, March 2011, and the most contemporary idea of an international judiciary seeing the conception of the PJP in “*Broniowski v Poland*” on 22 June 2004. Next, PJP changed the existing understanding of international human rights agreement, going far beyond the individual case to a more collective consideration. Furthermore, PJP

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<sup>1</sup> Cronin-Furman, Kathleen Renee “60 Years of the Universal Declaration of Human Rights: Towards an Individual Responsibility to Protect” [article] American University International Law Review, Vol. 25, Issue 1 (2010), pp. 175-198, 25 Am. U. Int'l L. Rev. 175 (2010);

<sup>2</sup> Court's Factsheet – Pilot judgments July 2012,  
<http://www.echr.coe.int/ECHR/EN/Header/Press/Information+sheets/Factsheets/>

extended remedial competence of the Court, bringing remedy from the political shadows of the Committee of Ministers negotiations to the light of the Law. Moreover, PJP is a new opportunity of ‘*Amicus Curie*’ activities through the third-party interventions before the Court and by Rule 9 submission to the CoM meeting. And finally, the recent termination of Ukrainian *Ivanov* PJP “on the account of the failure to resolve the situation” raised the stakes.<sup>3</sup>

**The literature** on the research subject is scarce, insufficient and often misleading. The most recent comprehensive monograph is from 2010, edited by Philip Leach *et al.*,<sup>4</sup> where they look at the nature of PJP and the PJ delivered. However, their principal case studies are different, except Poland. They analyse Slovenian and Italian pilot judgments. Ukraine and Russia are only partially covered together with Moldova’s failure. Due to the fact that the book was published in 2010, it clearly does not cover the process of execution after that, thus, the most significant current events. They give expectations and perspectives for Russia and Ukraine’s positive outcome from their difficulties to enforce their PJ.

The bigger research field can be found in journal articles, the most part of which was found during a research visit to the Court in March 2013. The articles of Leach, Elisabeth Lambert Abdelgawad, Stuart Wallace, James Welch, Nikos Frangakis, J-F Renucci Hardman, Paraskeva, Buyse and Keller raise the PJP question, its nature, practice and failure of Russia to execute PJ. But due to recently occurring events, Ukraine’s difficulties with the executed PJ “Yuriy Nikolayevich Ivanov v. Ukraine”, its consequences go beyond those articles. The discussion of the *Amicus Curiae* activity finally attracted the attention of Dutch researcher L. Van Den Eynde,<sup>5</sup> who in his latest article explored the practice of third-party interventions by

<sup>3</sup> Steering Committee for Human Rights DH-GDR Draft CDDH report on the advisability and modalities of a “representative application procedure” Addendum III of 15 February 2013, para 13, available at: [http://www.coe.int/t/dghl/StandardSetting/CDDH/DH\\_GDR/DH-GDR\(2013\)R3\\_Addendum III\\_EN.pdf](http://www.coe.int/t/dghl/StandardSetting/CDDH/DH_GDR/DH-GDR(2013)R3_Addendum III_EN.pdf)

<sup>4</sup> Leach, Philip Hardman, Helen Stephenson, Svetlana, K. Brad (eds) *Responding to Systemic Human Rights Violations: An Analysis of Pilot Judgments of the European Court of Human Rights and Their Impact at National Level*. Blitz, Oxford: Intersentia, 2010.

<sup>5</sup> L. Van Den Eynde, ‘An Empirical Look at the *Amicus Curiae* Practice of Human Rights NGOs before the European Court of Human Rights’, NQHR, vol. 31, no. 3 (2013);



the NGOs and NHRIs. NGOs reports have been especially helpful for creation of general picture of implementation problems. Among those two published by Open Society Justice Initiative *Judgment to Justice: Implementing International and Regional Human Rights Decision* in 2010 and *From Right to Remedies: Structures and Strategies for Implementing International Human Rights decisions* in 2013.

Therefore it was crucially important to conduct the present comprehensive research, which answers the following primary research questions: **to what extent is PJP an advanced tool of an international judicial organ or a dead-end without political will for its execution? Can PJs help to resolve systemic HR Violations in Europe in general and in Poland, Russia and Ukraine, in particular?**

The acknowledging of the PJ's non-execution as Respondent State's deny to their citizens' access to international justice was recognized as the primary research aim. In the frame of the principal research question the work addresses further Subsidiary research aims and questions:

1. Regarding recent Court practice of PJP, so far twenty-five pilot judgments within thirteen different countries, a subsidiary aim is to clarify the selection criteria for the indication of the systemic nature, alleged 'double standards' in PJP application and to analyse the difference between pilot judgment and quasi-pilot judgment and their consequences in domestic legal systems of Member States.

2. The analysis extends to the Court's remedial competence: prima facie review, infringing proceedings;

3. Whether the negative experience of Ivanov PJ execution can be considered a failure of PJP application? To trace the contributory reasons of Ukrainian PJ Ivanov failure.

4. To identify the determinants of success formula for effective PJ implementation.

Turning to the jurisdictions of the research subject, research is conducted in following

ones:

1. Regional jurisdiction of European Human Rights protection system, namely European Convention of Human rights and Fundamental freedoms 1950 ('Convention') system, in particular the Court as its new judicial procedure PJP and CoM control mechanism;

2. Particular national jurisdictions of Members-States: Poland, Ukraine and Russia.

• **Poland** as recognized positive example of PJ's enforcement by national authorities.

• **Ukraine and Russia** as countries, which faced difficulties enforcing PJs against them, with common systematic violation – non-enforcement or prolonged non-enforcement of court decisions, peaceful enjoyment of property and lack of domestic remedy (violation of Articles 6. and 13 of ECHR and Article 1 of First Protocol to it).

To address the primer research question in addition to drawing on secondary resources, compared and analysed following **primary resources** of the chosen jurisdictions: PJs against Poland, Ukraine and Russia: *Broniowski v Poland* of 22 June 2004, *Burdov v. Russia* (no. 2) of 15 January 2009 respectively (hereafter - *Burdov*), *Yuriy Nikolayevich Ivanov v. Ukraine* of 15 October 2009 (hereafter - *Ivanov*); DH DGI following monitoring regulation: memorandums, reports, resolutions; national implementation Laws and policies, regulations (Russian “Compensation Act” and regulations; Ukrainian Remedy ).

To answer the subsidiary questions the first pilot judgment “*Broniowski v. Poland*” was analyzed as a conception of the PJP; a general comparative analysis of the existing PJP case-law was conducted and assumptions made of the PJP’s perspective development.

The research mainly used an integrating method of **empirical analysis** of national implementation practice with legal qualitative research. Due to the nature of “moving target”, the research interviews and meetings with the Court’s Secretary and OGA lawyers had been conducted to present insight views on the process.

Thus, in march 2013, in additions to the meetings within Dialogue of Courts course, was

managed interviews with **Michael Siroyezhko** from the Department for the Execution of Judgments of the Court DGI – Directorate General of Human Rights and the Rule of Law Council of Europe, **Pavlo Pushkar** and **Dmytro Tretyakov** Court Registry, senior lawyer, **Ganna Boicheniuk** Court Registry, lawyer responsible for the Ivanov cases filtration, **Oleksij Gotsul** Court Registry, lawyer, ex-deputy Director of the Office of Government agent before the Court in Kyiv and **Olga Dubinska**, Court Registry, lawyer, filtering and WELC.

# Chapter I Theoretical and Legal Framework of Pilot

## Judgment Procedure

Since we are witnessing the emergence of this international judicial institution, the theoretical and legal framework of the institution is not settled yet. Until now (11 September 2013), the Court has delivered twenty-five full PJs within thirteen different countries and seven quasi-pilot judgements, most of them during the last two years.

PJP as a judicial institution did not appear at one point of time. Ten years of the elaboration and two years of the intensive negotiation during three ministerial conferences brought the current PJP understanding and its nowadays application. Current understanding of the PJP enshrined in rule 61 of Rules of the Court is the Court's *response to structural or systemic problems or other dysfunctions of the domestic legal systems of Member State*.

As a result of the comprehensive and deep analysis of the existing legal framework and PJP practice this chapter presents the origins and reasons behind the PJP, pursuing aims and stages of procedure. Since the Interlaken conference, 18-19 February 2010, became an official modification of PJP as institution, due to the purpose of the present chapter, the PJP development is worthy to divide into *pre-Interlaken* and *post-Interlaken* periods.

## 1.1 Origins of PJP institution: reasons and aims

The Rome Conference in 2000 is recognized<sup>6</sup> as the inception of PJP's concept. It followed the audit, which brought preoccupation about the ever-increasing number of **repetitive cases** pending in the Court and failure of Member States to comply with their general measures of the judgment execution targeting the prevention of the recurrence of the same violations. Those became the main reasons for the launch of a new action procedure tool.

Later, the concept was practically applied in QPJ *Kudla v Poland* raising the right to an effective remedy in case of excessive length of proceedings.<sup>7</sup> However, the inception of PJP was not the first response to the Court's caseload. As reasonably pointed out by Pr. McBride, the first reform of the Court (Protocol 11), the creation of a permanent Court, which handles both the admissibility and merits phases of application was the very first respond for the growing amount of applications.

### 1.1.1 Interlaken process

After the Roma conference, the CoE community took a decade to commit and start the Interlaken Reform process. Meanwhile, the Steering Committee carried out the everyday reform process. During this pre-Interlaken reluctant phase of PJP development only a few position documents were presented: The Court's Position paper in 2003,<sup>8</sup> Wise Persons' report from the perspective of the Court on Colloquy in San Marino in 2007<sup>9</sup> and an Information note of the Court Registrar in 2009.<sup>10</sup>

In its Position paper the Court explained PJP as “*procedural tool for dealing with*

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<sup>6</sup> *ibid.* Leach et al;

<sup>7</sup> Wolasiewicz, Jakub, *Pilot Judgment Procedure in the European Court of Human Rights* 3rd Informal Seminar for Government Agents and other Institutions, Warsaw, 14–15 May 2009 (2009), p7;

<sup>8</sup> Court Position Paper of September f 4 April 2003, Steering Committee for Human Rights;

<sup>9</sup> Wise Persons' report from the perspective of the Court, San Marino, 22.03.2007;

<sup>10</sup> Information note issued by the Court Registrar in 2009, The Pilot Judgment Procedure;

*repetitive well-founding applications.*”<sup>11</sup> According to it, the Court intended to introduce PJP as a Convention amendment. Despite the support from the Steering Committee (CDDH), these propositions met strong political opposition from the side of Member States and were not approved. The main arguments concerned the limits of the Court’s competence in the interpretation and application of the Convention and not its amendment, prescribed by Art. 32 of the Convention.<sup>12</sup> However, the political reluctance of MSs to take responsibility did not stop Conventional bodies from reform. Thus, on May 12, 2004, Committee of Ministers (“CoM”) adopted a **Resolution on judgments revealing an underlying systemic problem**, together with a **Recommendation of the CoM to member states on the improvement of domestic remedies** of 12 May 2004.<sup>13</sup> Thus, from the very beginning despite the silence over the failure of MS as principal reason of PJP, CoM noted in the very Res(2004)3 in that “*the subsidiarity character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities.*”<sup>14</sup> By this, CoM spurred the Court to start PJP without word “pilot” as such.

A few weeks later the Court delivered its first PJ, *Broniowski*, with explicit references to the 2004 Rec (2004)3 next to Art.46 as legal justification for such application. The Court continued pre-Interlaken application of PJP. In sum, over six years nine full PJ and two QPJ, *Sejdovic* and *Scordino v. Italy* were issued.<sup>15</sup> In comparison to the post-Interlaken period, for instance, solely in 2012 there were five full PJs, obviously the Court was cautious in its action in pre-Interlaken.

<sup>11</sup> Wołasiewicz, Jakub *The Role of Governmnet Agent in a pilot judgment’ procedure*, conference, p.1-2;

<sup>12</sup> Fyrnys, Markus *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights* / German Law Journal, Vol. 12 No.05, 2011;

<sup>13</sup> Committee of Ministers (2004), RES 2004 (3), *Resolution on judgment revealing an underlying systemic problem* of 12 May 2004 and Committee of Ministers (2004), Rec (2004)6 *Recommendation of the CM to member state on the improvement of domestic remedies* of 12 May 2004;

<sup>14</sup> *Ibid* Rec(2004)3, Para 4;

<sup>15</sup> HUDOC *Sejdovic v. Italy* judgment 2006 of and *Scordino v. Italy* judgment of 29.03.2006;

Just in 2010 the official reform process commenced with the first High Level Conference on the Future of the Court in **Interlaken**.<sup>16</sup> Section “D” of the Interlaken Action Plan was directly devoted to the repetitive applications. In particular, Member States were called to settle those cases by friendly settlement or unilateral declarations. Moreover, the impotence for the Court to develop clear and predictable standards for PJP was reasonably stressed, namely the selection process for initiation, adjournment of similar applications and finally, evaluation of PJP application.<sup>17</sup> The Committee of Ministers, in its turn, was obliged to cooperate with the respondent state in order to elaborate a remedy for the structural problem.

Only when the Fourteenth Protocol was signed by Russia in March 2011, the PJP was codified within the Rules of Court (Rule 61). The PJP was defined “as a technique of identifying the structural problems underlying repetitive cases against Member States to the Convention and imposing on them an obligation to address these problems.”<sup>18</sup> By this the Court clarified how it would handle potential systemic or structural violations of human rights. The Court may apply this judicial tool to the systemic or structural dysfunction in the relevant country, which has given or could give rise to repetitive applications before the Court.

The PJP was settled together with a range of other innovations, such as a Single judge formation with power to declare application inadmissible, three judge Committee dealing with the well established case-law (‘WELC’) and working methods of filtering and grouping of the repetitive cases.

On April 25-27, 2011, the second phase of Interlaken reform took place at the **Izmir conference**.<sup>19</sup> In one of the smallest parts of its Follow-up plan, Section E “Repetitive application”, the Conference repeated Interlaken calls to settle those cases by friendly settlement or unilateral declaration. In addition, the importance of the Court in such a settling

<sup>16</sup> Interlaken Declaration of 19 February 2010;

<sup>17</sup> *ibid*, section D. Para. 7;

<sup>18</sup> Court Factsheet – Pilot judgments July 2012

<http://www.echr.coe.int/ECHR/EN/Header/Press/Information+sheets/Factsheets/>;

<sup>19</sup> Izmir Declaration of 27 April 2011;

was underlined. In comparison to the Interlaken Action plan, the Izmir Follow-up plan mentioned that in order to extend the Court's capacities to apply PJP and adjourn repetitive cases, CoM should work on specific proposals of amendments to the Convention (para 7 of *Follow-up plan of Izmir Declaration*).

Only on the last held **Conference in Brighton** was second principal reason for PJP stressed - the **Member-State' failure to implement the general measures of Court's judgement**. The Brighton Conference emphasized the aim to re-awaken the Member-State' responsibility to ensure protection of Conventional rights as the principal purpose of PJP. It was argued that it was the Member-State's responsibility to comply with the Convention under the proper guidance of measures to be taken and follow-up supervision of their execution.<sup>20</sup> Moreover, an effective implementation at the national level was presented as a one-way solution for the long-term future of the Conventional system. Thus, during the Brighton Conference PJP was the most discussable subject. All sections of the Brighton Declaration were in one or another way revealing to the problem of repetitive application or to PJP as the main solution to the workload or to an interaction between the Court and national authorities as the execution of PJs.

In sum, ten years of the preparation for the negotiation and two-years of the intensive negotiation during three ministerial conferences brought the Court to meet its "first major staging post"<sup>21</sup> in 2012 settled by the Interlaken Action Plan.<sup>22</sup> *Ergo*, it is reasonable to argue that only the current development of PJP and its application in 2012 finally gave the possibility to draw the full picture of this institution and define its legal nature.

<sup>20</sup> Brighton Declaration of 20 April 2012, paragraph G "Longer-term future of the Court", page 8;

<sup>21</sup> Annual report 2012 of the Court (published in March 2013) [http://www.echr.coe.int/ECHR/Homepage\\_EN](http://www.echr.coe.int/ECHR/Homepage_EN), page 11;

<sup>22</sup> Interlaken Declaration, Action Plan, Section "Implementation" para 5;



### 1.1.2 Reasons for PJP's launch

The widely recognised principal reason of PJP institution is the Court's backlog of the repetitive cases due to Member-State's failure to implement the court's judgements. The workload of Court or, as *Stéphanie Lagoutte* figuratively called it, the Court's fight "with his back to the wall",<sup>23</sup> is doubtless the main reason for PJP's establishment. The workload as a reason has its own causes, which deserve its own examination.

First of all, beyond the arguing is the idea that the main part of Court's workload was and continues to be the *repetitive applications* and as a result of "cloning" cases, defined by the European Law institute as "*applications in which the origin of the complaint made is a structural or systemic dysfunction in the national legal order that is or has already been the subject of PJP before the Court*".<sup>24</sup> The Court in its very first PJ, *Broniowski*, explicitly stated that the primary cause for applying PJP was "*the growing threat to the Convention system resulting from large numbers of repetitive cases that derive ... from the same ... systemic problem*". Moreover, the Court itself pointed out the role of new procedural tool "*to facilitate the most speedy resolution affecting the protection of the Convention right in question in the national legal order*".<sup>25</sup>

Second, the countries responsible for the repetitive applications (systemic dysfunctions) are important to identify on the way to resolve such workload. Most authors, like Antoine Buyse<sup>26</sup> or Markus Fyrnys, retraced the necessity for PJP from the accession of Post-Soviet countries to the Council of Europe ("CoE"), whose structural dysfunctions of legal systems with profound roots in communistic traditions literally blocked the Court.<sup>27</sup>

<sup>23</sup> Buyse, Antoine *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, Greek Law Journal, November 2009, p.1-2;

<sup>24</sup> European Law Institute, Statement on case-overload at the European Court of Human Rights. Vienna, July 6-th, 2012 <http://echrblog.blogspot.fr/2012/09/eli-research-paper-on-courts-case.html>

<sup>25</sup> *Broniowski* para. 35;

<sup>26</sup> *ibid.* Buyse, Antoine, p. 1;

<sup>27</sup> *ibid.* Fyrnys, Markus p.1231-1232;

This approach is problematic. On the one hand, the very avenue is supported by the simple analysis of PJ case-law on violation of property protection. *Ergo*, PJ like Albanian *Manushage*<sup>28</sup>, Romanian *Atanasiu*<sup>29</sup>, Russian *Burdov*, Ukrainian *Ivanov* and not to mention the successful Polish *Broniowski*, all revealed the national chronic illnesses which originated in the USSR: nationalized property or soviet social benefits. On the other hand, the blame should not be solely borne by post-Soviet new Member-States, as far as original signers of the Convention like Italy, had no less structural and profound problems with the length of court proceedings, underlined in Italian QPJ *Scordino*. The same can be said about the Turkish PJ *Xenides – Austis* concern occupation of North Cyprus and subsequent violation of the protection of property.<sup>30</sup>

And finally, turning to the side of statistical data, the responsibility for 63% of the pending applications from the total number of 128,100 cases and 50 % of all delivered judgments are shared by five members, namely **Russia, Turkey, Italy, Ukraine and Serbia**.<sup>31</sup> In comparison to previous years, the leader team replaced only one player. Serbia got the honourable fifth place instead of Romania.<sup>32</sup> Almost all the leaders earlier or later were issued PJs against them.

### 1.1.3 Aims of the Pilot Judgment Procedure

Following the examination of the reasons and the Interlaken process of PJP settling, PJP can be presented as a multi-dimensional solution, which involves main three parties of the process: the Court, Respondent State and applicants.

The first aim is *Court-oriented*, which is targeted to decrease the Court's burden of

<sup>28</sup> HUDOC PJ *Manushage Puto and others v. Albania* of 31 June 2012;

<sup>29</sup> HUDOC PJ *Atanasiu and others v. Romania*, of 12 October 2010;

<sup>30</sup> HUDOC PJ *Xenides – Austis v Turkey* of 22/12/2005 (no. 46347/99);

<sup>31</sup> The Court Analysis statistic 2012 [http://www.echr.coe.int/NR/rdonlyres/9113BE4E-6682-41D4-9F8B-0B29950C8BD4/0/Analysis\\_Statistics\\_2012\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/9113BE4E-6682-41D4-9F8B-0B29950C8BD4/0/Analysis_Statistics_2012_ENG.pdf)

<sup>32</sup> ECHR Analysis statistic on 2011 [http://www.echr.coe.int/NR/rdonlyres/11CE0BB3-9386-48DC-B012-AB2C046FEC7C/0/STATS\\_EN\\_2011.PDF](http://www.echr.coe.int/NR/rdonlyres/11CE0BB3-9386-48DC-B012-AB2C046FEC7C/0/STATS_EN_2011.PDF)

pending cases. From the first glimpse it seems more like the Court followed its self-preservation instinct since PJP serves the Court as “Life boat”. However, this approach is not that selfish since the suffocation of the most famous international judicial institutions are not favourable for its applicant as well. In this context the effectiveness of this “Life Boat” for Court should be assessed. According to the Court annual report, crucial improvements have been made in the number of pending cases. In comparison with September 2011 when pending applications had topped 160,000 cases, the end of 2012 reduced them to 128,000 cases.<sup>33</sup> Obviously, PJP is working together with other reform tools such as single-judge formation, launched by Protocol 14, with competence to declare inadmissible or struck from the list, which was done with almost 82,000 applications.

However, in contrast to Single Judge, PJP is aimed not just at dealing with new-submitted repetitive applications but with the Court’s backlog, which are collecting dust. Thus, from 24,000 resolved cases grate part was settled within PJP. The number of applications struck out following a friendly settlement or a unilateral declaration, increased by 25% in 2012 (1,532 in 2011). Friendly settlement increased by 57%, but there were 14% fewer unilateral declarations. For example, in the case of Ukraine, friendly settlements and unilateral declarations settled, approximately two thirds from 2000 adjourned cases and following repetitive case.<sup>34</sup>

Second aim, emphasised by the Court Registrar Erik Fribergh, is the *Member-State oriented aim*.<sup>35</sup> Embedding subsidiarity principle, PJP targets to re-awake the Member-State responsibility to ensure protection of Convectional right. With conditional Court’s and CoM’s full support to enable the State to resolve systemic human rights violations. There are two main ways to reduce the burden of cases. From the inside of the Court, make an internal procedure more simple and efficient and from outside, to improve the national implementation of the

<sup>33</sup> *ibid.* Court’s Annual report 2012 pages 4-6;

<sup>34</sup> *ibid.* p.73;

<sup>35</sup> Fribergh, Erick, Court Register, presenting paper on Pilot judgment from the Court’s perspective at the Stockholm colloquy, p.1;

Conventional rights.<sup>36</sup> Court from its side reformed working methods, namely the Filtration procedure, WELC and Committee formation, now it is turn of Member-States.

And last but not least aim is *applicants – oriented*: to expedite the redress for the applicants as was stated by the Court itself in *Hutten-Czapska*.<sup>37</sup> As was mentioned before, PJP can be seen not only as a modern tool of the Court time management but also as the speedier redress to the individuals concerned since the thousands of applications through WELC procedure were turned back to national authorities for settlement. However, in the case of the failure of PJ, as Ukrainian *Ivanov*, namely the prolonged adjournment for over two years, the excessive adjournment of cases can undermine the credibility of the Court and aim of speedier redress itself.

Thus, PJP rescuing the Court from its own ‘success’, case overload, becomes de-facto the Court’s ‘Time Manager’ with such new gadgets as ‘frozen repetitive application’ and ‘Table judgments’. And despite the fact that, PJP goes far beyond the individual case to more collective consideration, endangering by that the individuals concerns, PJP successful time managing helps the Court to balance between the adjournment of similar cases and speedier redress to the individuals.

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<sup>36</sup>Interview with Fribergh E. Court Registry [in Leach p. 13];

<sup>37</sup> HUDOC PJ Hutten-Czapska v Poland (Grand Chamber) of 19 June 2006, para 234;

## 1.2 Stages of Pilot Judgment Procedure

Recent codification of PJP into Rule 61 and the examination of up-to-date PJP's case-law gave the possibilities to analyse and distinguish following stages of PJP application: the initiation of PJP, preliminary stage of Member-State's consent, the issuing of Pilot Judgment, the adjournment of similar cases and an execution and supervision. Every stage has its own particularities and problems, some of which deserve separate deliberation.

This is why issues of clear definition of *structural or systemic nature of the constituted violation* has been scrutinized apart from the general overview of PJP stages (see paragraph 'Common features of PJs: "structural nature"')

### 1.2.1 The initiation of PJP – the existence of systemic nature

The starting point for the initiation of PJ is *"the existence of a structural or systemic problem"*. Following this PJP, according to Rule 61, *"may be initiated by the Court of its own motion or at the request of one or both parties."*<sup>38</sup> Obviously the indication of 'structural nature' is the most delicate part of the initiation process, since an extent of its transparency can or dissipate the allegations of 'double standard' or create the impression of its inconsistency.

According Rec(2004)3, the Court itself is the most appropriate body to identify in its case-law widespread or systemic problems in particular Member-State. Most of Registry lawyer, like Pavlo Pushkar, strongly supports this approach, since, no one else can identify the structural nature of violation since it can be stipulated mainly through the cases resolved or still pending before the Court.

Clearly, the Court has leading and utter word on this mater. However, the Court can be "assisted" in the indication of structural problem, being supplied with the information about existence of one. In those cases or when strategic is involved, the attention should be paid to the

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<sup>38</sup> Rules of the Court, with last amendments made by the Plenary Court on 2 April 2012 (entered into force on 1 September 2012) <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Other+texts/Rules+of+Court/>

role of other actors as well.

Earlier in 2004, the CoM called not only the Court to tackle the sources of repetitive, “clone”, cases, but also the Parliamentary Assembly, Secretary General<sup>39</sup> and the CoE Commissioner for HR to highlight the Court judgments where they see systemic problems.<sup>40</sup>

Following this, some authors, for instance Anne Weber, stressed the underestimation of possibilities of the Commissioner of Human Rights of CoE to play a weighty role in PJP at different stages. Presenting positive example of the Court judgement in *MSS v Belgium and France case*, Ms Weber proposed for the Commissioner to play a preventive role by identifying cases for PJP initiation.<sup>41</sup> However, the author cannot totally agree with Ms Weber. First of all, because the Commissioner leading function is not ‘assisting’ in the identifying structural nature but direct cooperation with national bodies, that make the most Commissioner influence precious on the stage of implementation. Secondly, in contrast to NGOs and NHRIs, only Commissioner has constant dialogue with National allies (ombudsmen) and immediate access to other national bodies<sup>42</sup>

Next, no one can argue the influence of commonly seen in the Art.3 cases other European body - European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Committee continues to play the prominent role and in the PJP. In particular in the PJs concern the conditions in the prisons like *Ananyev and others against Russia*<sup>43</sup> or *Torreggiani and others v. Italy*<sup>44</sup>, and QPJ of *Orchowski v Poland*<sup>45</sup>.

<sup>39</sup> CoE, Secretary General (2009), Contribution of the Secretary General of the CoE to the preparation to the Interlaken Ministerial Conference, SG Info (2009)20;

<sup>40</sup> *ibid* CoM (2004), RES 2004 (3) and Rec (2004)6, paras 13-19 appendix.

<sup>41</sup> Weber, Anna, *Responding to Systemic Human Rights Violations: an Analysis of ‘Pilot Judgments’ of the European Court of Human Rights and their impact within national system. Paper at Pilot Judgments Seminar - Strasbourg*, 14 June 2010;

<sup>42</sup> DRAFTING GROUP ‘E’ ON THE REFORM OF THE COURT (GT-GDR-E) Open Society Justice Initiative briefing paper on supervision of execution of Court judgments, *Enhancing the Supervision of Execution of Courts Judgements* May 2012, p 7-8, available at: [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-E/GT-GDR-E%282013%29005\\_observations-by-OSJI.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-E/GT-GDR-E%282013%29005_observations-by-OSJI.pdf)

<sup>43</sup> HUDOC *Ananyev and others v. Russia*, judgment of 10.01.2012, para. 56-58, 144, 197;

<sup>44</sup> HUDOC *Torreggiani and others v. Italy* of 08.01.2013 para. 50,68,76;

<sup>45</sup> HUDOC *Orchowski v Poland* judgment of 22.10.2009;

However, the most promising and warmly welcomed is the increasing role the litigants and third – party interveners NGOs, NHRIs<sup>46</sup> and other civil societies groups, whose contribution became visible not only at the stage of delivery of the Court’s judgements but also in the course of their execution, owing to its Rule 9 submissions.

As an example of strategic litigation by the NGOs in identifying the systemic problem, QPJ, *D.H. v. Czech Republic* can serve, with explicit involvement of the Council of Europe bodies: CoM<sup>47</sup> and Parliamentary Assembly<sup>48</sup>, Commissioner for Human Rights<sup>49</sup>, the European Commission against Racism and Intolerance (ECRI)<sup>50</sup>; EU agency: the European Union Agency for Fundamental Rights; and UN: United Nations Human Rights Committee, Committee on the Elimination of Racial Discrimination, UNESCO together with the range of the international HR NGOs such as Interights and Human Rights Watch, Minority Rights Group International, the European Network Against Racism and the European Roma Information Office International Step by Step Association, the Roma Education Fund and the European Early Childhood Education Research Association, International Federation for Human Rights. The impact of their studies, reports and recommendations cannot be neglected. Present judgment is considered as QPJ since the Court referring to the Art 46 and *Broniowski* case established that ‘the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community’ and should be repealed<sup>51</sup>.

To conclude, the indication of ‘systemic problem’ by the Court can be, and should be,

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<sup>46</sup> OSJI Report *From Judgment to Justice: Implementing International and Regional Human Rights Decision* published by Open Society Justice Initiative in 2010, p 20;

<sup>47</sup> Recommendation No. R (2000) 4 of the Committee of Ministers to member States on the education of Roma/Gypsy children in Europe (adopted by the Committee of Ministers on 3 February 2000 at the 696th meeting of the Ministers’ Deputies);

<sup>48</sup> Recommendation No. 1203 (1993) on Gypsies in Europe Recommendation No. 1557 (2002) on the legal situation of Roma in Europe;

<sup>49</sup> Mr Alvaro Gil-Robles Final Report on the Human Rights Situation of the Roma, Sinti and Travellers in Europe (dated 15 February 2006);

<sup>50</sup> European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 3: Combating racism and intolerance against Roma/Gypsies (adopted by ECRI on 6 March 1998); ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination (adopted by ECRI on 13 December 2002);

<sup>51</sup> HUDOC *D.H. v Czech Republic* of 17 January 2007, paras 209 and 216;

assisted by other European bodies as well as by non-governmental organizations, both national and international.

### 1.2.2 Preliminary stage - Member-State's consent

Due to the same Rule 61 before initiation, the Court should “*first seek the views of the parties on whether the application under examination results from the existence of such a problem or dysfunction in the Contracting Party concerned and on the suitability of processing the application in accordance with that procedure.*”<sup>52</sup> This gives us grounds to determine the *preliminary stage of PJP*. The Court needs to seek the consent, the acknowledgement by a Member-State that the systemic problem exists in the national legal order. Easy examples are *Broniowski* and *Hutten-Chapska* (see more details in chapter II).

The positions of the scientists on this matter are slightly varying. In general no one argue the importance of the cooperation between the parties of PJP. Although, P. Pushkar highlighted that the Court decision on PJP does not depend on the consent, consequently PJ can be and should be delivered despite the negative attitude of the respondent country<sup>53</sup>. On the contrary, as rightfully noted by Pr. Sajo, the failure of Ukrainian *Ivanov* and Italian *Pinto Law* make the Court more cautious in PJP application.<sup>54</sup>

Moreover, the group of PJ specialist, such as Weber<sup>55</sup>, Balcerzak<sup>56</sup> and Wołosiewicz<sup>57</sup>, was developing the concept of “Legal peace” in PJP. The main idea of latter is the co-operation between the Respondent state, the Court and the Commissioner for HR prior the PJ. The main reasoning of concept is that the systemic nature identified by the Court in PJ is usually notorious and, de-facto, well – known by the parties. However, mentioned above negative

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<sup>52</sup> *ibid* Rules of the Court;

<sup>53</sup> Interview with the senior Registry lawyer Pavlo Pushkar, ECtHR, Strasbourg, 15 March 20;

<sup>54</sup> Pr. Sajo, CEU course of Pr. Sajo “Courts in Dialogue: European Interaction in Human Rights Protection” in Strasbourg March 4-8, 2013;

<sup>55</sup> *ibid* A. Weber;

<sup>56</sup> Balcerzak [in *ibid* J. Wołosiewicz];

<sup>57</sup> *ibid* Wołosiewicz, p 8.



attitude of such government as Italian or de-facto Ukrainian brings “legal peace” to the utopian conceptions (see issue on “QPJ”). Consequently, it can be agreed that the reciprocal beneficiary brought the Court the most successful PJs. Such mutual understanding of the need for changes can be achieved only through continuing dialogue between the parties.

### 1.2.3. The Issuing of Pilot Judgement

Rule 61 does not give explicit requirements to the composition of the Court to deliver PJ. After the comprehensive research of the PJP experience so far the following outcomes can be presented. First of all, the Grand Chamber has issued only four PJs. Three PJs of pre-codification period, *Broniowski*, *Hutten-Czapska*<sup>58</sup> and *QPJ Scordino*, and only one after the Rule 61 was adopted, *Kurić and Others*<sup>59</sup>. All others are delivered by ordinary Chamber. The explanation for such practice is obviously the willingness to avoid the Member-State veto over the relinquishment of the Grand Chamber.

Therefore, the codification of PJP into Rule 61 has led to greater flexibility of PJ issuing by allowing Section and Chambers to deliver.<sup>60</sup> Plainly, the flexibility of Rule 61 gave the Court the possibility to develop a variety of PJP in three tiers: full, QPJ and “one that addresses systemic problems”.

However, by applying this composition to the PJP, the legitimacy and credibility of the PJ in question could be disputed, as Wołosiewicz has done. Views on this matter vary, for instance, Buyse together with the practicing researcher as Registry senior lawyer, Pavlo Pushkar,<sup>61</sup> do not see a problem whether the Grand Chamber delivers the PJ or not. At the same time, Buyse followed Wołosiewicz and Donald’s belief that it would be “very commendable”<sup>62</sup>. The same position kept by the J-F Renucci, pointed out that avoiding the Grand Chamber can undermined

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<sup>58</sup> *Ibid.* Hutten-Czapska;

<sup>59</sup> HUDOC *Kurić and Others v Slovenia*, judgment (GC) of 26 June 2012;

<sup>60</sup> Alice, Donald *The most creative tool in 50 years’? The ECtHR’s pilot judgment procedure*, EHRAC Bulletin #14, 2010, p. 13-14;

<sup>61</sup> Interview with the senior Registry lawyer Pavlo Pushkar, ECtHR, Strasbourg, 15 March 2013,

<sup>62</sup> *ibid.* Buyse p. 7-8;

first of all the quality of the procedure.<sup>63</sup>

In the light of further reformation of the Court, Protocol 15, the situation can change in favour of the Grand Chamber as the main formation for issuing such important judgments as PJ, since, according to the Opinion of the Court of 6 February 2013, the Draft Protocol 15 includes the removal of the parties' veto over the relinquishment of a case to the Grand Chamber (Article 30).

### **1.2.4 The adjournment of similar cases**

Probably the most problematic part of the PJP is the adjournment of all similar applications. The adjournment is a suspension of Court consideration of all similar cases, specified by the Court in PJ, till the national authorities, by meeting the deadline, settle them through the new introduced domestic remedy or by FS or UD. As was mentioned above, the adjournment of similar cases is not an indispensable part of PJP. A conducted comprehensive analysis of PJP practice so far shows that the Court is favourable to it since from the existing twenty-four PJs in the majority, namely in fourteen PJs, similar cases before the Court had been adjourned.

On the one hand, as rightfully noted by Fribergh, the very idea of the PJ that the Court should be dispensed from dealing with repetitive cases, which national authorities should settle. On the other hand, suspension of cases leaves those applicants in an uncertain position and often vulnerable to delay.<sup>64</sup>

Moreover, de-facto the applicants of adjourned cases are not participating in the proceedings of PJP and would, as practice shows, get less compensation from the national authorities in settlement or through the new-implemented domestic remedy. Evidently, the return of those cases to the Member-State is made at the expense of individual justice.

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<sup>63</sup> Renucci, J-F 'L'arret pilot: le pragmatisme au service des droit de l'Homme Recueil Dalloz Droit europeen des droits de l'homme 24 Janvier 2013 n3/7540, p 201-207;

<sup>64</sup> *ibid.* Fribergh, Erick, p.1- 4;

The practice of adjournment is inconsistent due to its dependence on the nature of the violation, its complexity, urgency to present redress and the attitude of the respondent State. For instance, in the PJs on excessive length, like *Rumpf v Germany*<sup>65</sup>, *Dimitrov*<sup>66</sup>, *Finger*<sup>67</sup> or *Athanasίου*<sup>68</sup>, the Court decided to continue the examination of the similar cases in order to avoid prolonging the already excessive length of the proceeding during the time taken by respondent Member-State to implement general measures. Moreover, the groups of similar cases can be differently specified in the PJ: those pending in the Court on the moment of delivery (*Ivanov v Ukraine* 2,000 cases adjourned); those pending but not yet communicated (*Ümmühan Kaplan v. Turkey*<sup>69</sup>); those that would be lodged after delivery (*Olaru and Others v. Moldova*<sup>70</sup>). Thus, it can be concluded that the Court weighed the harm to be done to the applicants and evaluate the circumstances of particular country and the structural problem found.

However, a bizarre ‘double standard’ can be observed in a few cases. For example, the decision to continue examination also was taken in the case Russian *Ananyev* concerning inadequate conditions of detention in comparison to the same structural problem, unveiled in the last PJ against Italy *Torreggiani and Others*, where the Court adjourned all similar cases. The same situation happened with the PJs against Greece on excessive length, *Glykartz*<sup>71</sup> and *Michelioudakis*<sup>72</sup>, in contrast to *Rumpf*, *Dimitrov*, *Finger* or *Athanasίου*, the Court decided to adjourn the examination. This can be justified by the fact that in the 2010 PJ against Greece, *Athanasίου* on the length of administrative proceedings, the Court had not adjourned similar cases, however, in 2012, in *Michelioudakis* and *Glykartz* on the length of criminal and civil

<sup>65</sup> HUDOC PJ *Rumpf v. Germany* judgment of 2 September 2010;

<sup>66</sup> HUDOC PJ *Dimitrov others v. Bulgaria* of 10 May 2011;

<sup>67</sup> HUDOC PJ *Finger v. Bulgaria* of 10 May 2011;

<sup>68</sup> HUDOC PJ *Athanasίου and Others v. Greece* of 21 December 2010;

<sup>69</sup> HUDOC PJ *Ümmühan Kaplan v. Turkey* of 20 march 2012;

<sup>70</sup> HUDOC PJ *Olaru and Others (Racu, Lungu, Gusan) v. Moldova* of 28 July 2009;

<sup>71</sup> HUDOC PJ *Glykartz v. Greece* of 30 October 2012;

<sup>72</sup> HUDOC PJ *Michelioudakis v. Greece* of 03 April 2012;

cases, the court froze the examination.

Thus, it can be alleged that despite the similar structural problem in the most problematic and complex dysfunction of legal systems, the adjournment of cases depends in the majority of cases on the attitude of the respondent country to deal with both general measures and the adjourned cases.

### 1.2.5 The execution and supervision stage

The execution or implementation is undeniably both the most important and “nettlesome” part of any international or national judicial decision, which tests the credibility of the parties. There is no surprise that the implementation of the Court’s judgments was once called the “*acid test of any judicial system*”. In the case of implementation failure, not only the legitimacy of the court that issued the judgment came under threat, but also the integrity of any national or international legal system falls into question.<sup>73</sup>

The execution and supervision stage of the pilot procedure, as mentioned by Geneviève Mayer, the head of the Department for the Execution of Judgments in CoE, has not changed much compared with the ordinary procedure.<sup>74</sup> Plainly, CoM gives the pilot judgements high priority and applies enhanced supervision.

The execution of PJ is based on the negotiation between the Court, the Respondent State, the applicants and CoM’s CDDH. This interaction, as rightfully pointed out by Polish Government Agent Wołosiewicz, is “the most important aspect of the pilot judgment”.<sup>75</sup>

Thus, the dialogue between the State and the applicants is aimed at reaching a friendly settlement. According to Rule 62,<sup>76</sup> once the applications have been declared admissible, the parties can enter a friendly-settlement negotiation as was done in *Broniowski* (see Annex).

<sup>73</sup> *ibid.* OSJI Report *From Judgment to Justice*, p 13-14;

<sup>74</sup> *ibid.* Alice, Donald pages 14;

<sup>75</sup> Wołosiewicz, Jakub [in *ibid.* Donald, A.];

<sup>76</sup> *ibid.* Rules of the Court, Art 62;

Unfortunately, during PJs execution, Governments met some difficulties and dead-ends in this matter, in particular to secure friendly settlement with the applicants of similar applications, including frozen ones by that prolonging the already excessive length of the proceeding or non-execution as in the case of *Ivanov*.

In response, on April 2, 2012, the Court facilitated the process by inserting new provisions on the unilateral declaration (Rule 62A2). The latter brought new possibilities to settle cases without applicants' consent, when the Government proposes adequate redress, clearly acknowledges a violation and provides necessary remedies. The new provision allowed the Government to settle not only cases where the friendly proposal had been rejected by the applicants, but even those where prior attempt to friendly settlement had never been made.<sup>77</sup> This is a highly debatable innovation, since the unilateral declaration redress is significantly lower than that provided to the original applicant of PJ. For instance, **Michael Siroyezhko** is of the opinion that such inadequate sums of compensations became the main reason for the latest Court rejections of unilateral declarations proposed by the Ukrainian Government during *Ivanov* execution<sup>78</sup> (for more details see Chapter IV on Ukrainian PJ).

Another distinguished aspect of PJs' execution is the Court's *prima facie* evaluation. It is to be argued that *prima facie* is just a small fraction of more global change hidden beneath the PJP – the shift of remedial competence from the too consensual CoM to the Court. In the support of expressed allegations the author draws attention to the recently published CoM's Annual Report, where it was explicitly noted that:

*For several years now, the Court contributes to the execution process more and more frequently and in various ways, e.g. by providing, itself, in its judgments, recommendations as to relevant execution measures (so called quasi-pilot judgments or "Article 46 judgments") or more recently by providing relevant information in letters addressed to the Committee of Ministers.*<sup>79</sup>

<sup>77</sup> *ibid.* Art 62A2;

<sup>78</sup> Interview with Michael Siroyezhko from the Department for the Execution of Judgments of the ECtHR DGI – Directorate General of Human Rights and the Rule of Law Council of Europe, Strasbourg, March 2013.

<sup>79</sup> 6<sup>th</sup> Annual Report of the Committee of Ministers 2012 (published April 2013), Supervision of the execution of

Thus, due to *prima facie* authority, the Court is the one who has preliminary review, only after which the CoM decides whether the enforcement was successful or not. The innovation to give the Court the power of assessment to define by itself the general measure is more than reasonable. Despite the fact that the CoM could be more aware of the execution process of the particular Member-State, the Court as the source of guidelines of General measures have all grounds to claim its *prima facie* authority.

As a result of the negative evaluation by the Court and CoM and *de-facto* failure of Member-States to execute its PJ, the adjourned cases can be reopened or “de-frozen” and resolved by the Court in speedy hearing. The major example of such practice has been the Ukrainian implementation problems to execute its *Ivanov*, which is analysed in Chapter III.

All Respondent Governments face implementation difficulties in one or another way. In such cases, CDDH and Court’s Secretary should turn their friendly side and assist the State in finding a resolution.<sup>80</sup> However, most of the difficulties arise from authorities’ low interest in time-consuming general measures, limiting domestic remedies to a compensation mechanism. Notwithstanding the most genuine and advantageous “assistance” from the side of CoM or Court, real results can be achieved only through the political support of national authorities. The latter is often missing, that leads us to the examination of the consequences of the State’s lack of political will in the case of implementation failure.

### **1.3.5 a. Sanctions for Respondent State implementation failure**

The ECHR’s system had not been created with harsh sanctions for the State’s disobedience to execute the Court’s judgments, however recent ECHR’s reforms grants the Court and CoM new procedures for direct pressure.

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judgments and decisions of the European Court of Human Rights; Section C Increased Interaction between the Court and the Committee of Ministers, Para 37

<sup>80</sup>Holzenberger, Joachim Deputy Permanent Representative Germany Permanent Representation, [in *ibid.* OSJI briefing paper p.14;

The classical CoM's arsenal consisted from poles apart tools: consensual interim resolutions, which are not mandatory for states, and an expulsion from the organisation, which has never been applied.<sup>81</sup> Up till recent, nothing existed between them, creating huge gap between the harmless Interim Resolution and impractical exclusion.

Protocol 14 brought a move forward in this direction, bestowing CoM with a new control procedure - *infringement proceedings* - prescribed by Rule 11, which took effect on June 1<sup>st</sup>, 2010.<sup>82</sup> The procedure combines the strength of two main bodies of ECHR's system: CoM and the Court. Thus, by the two thirds of country representatives, the CoM was empowered to refer to the Court questions whether the State has failed to fulfill its obligation.

Hence, instead of vain political discussions in CoM, now the last word is up to the Court, which are the one to decide whether the State failed to abide by its decision. Obviously, according to Rule 11, penalty procedure can be brought only in the exceptional circumstances with a range of conditions: the explicit State's refusal to abide by the judgment and six months term for the State to react to the CoM's formal notice. However, it is still to be argued that infringement proceedings alongside *prima facie* review are signs of new remedial competence in the hands of the Court. As a result, the Court's power is no longer limited to the delivering judgment.

In spite of the promising nature of infringement proceedings, still it does not cover all deficiencies in ECHR's sanctions. Numerous experts, as well as Court judges, paying attention to the absence of "middle ground" sanctions, came up with some alternatives. The latter vary from the political ones, like joint statements of the President, the CoM and the PACE or political asterisms,<sup>83</sup> to more practical ones, like imposing a double financial burden on the

<sup>81</sup> *ibid.* OSJI *From Judgment to Justice*, p 50-60;

<sup>82</sup> Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of the friendly settlements Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies;

<sup>83</sup> Prof. Antonio Bultrini and Mr. Joachim Holzenberger [in *ibid* OSJI briefing paper, p.10-18];

‘bad pupils’.<sup>84</sup> The latter was actually realized as a consequence of *Ivanov* failure, taking form of new Court’s procedural tool - ‘expedited Committee procedure’.

As practice shows, the burden of financial sanctions provokes more reaction from the State. An easy example is *Ivanov*’s execution and the launch of a new just satisfaction system (1,500 or 3,000 euros). The most practical and reasonable in this context is argued to be that proposed by OSJI - a financial sanction directly linked to funding of Human Rights Trust Fund (hereafter –HRTF), supporting implementation in a particular country.<sup>85</sup>

To this end, it is worth noting that settled up in 2008 there were twenty-two<sup>86</sup> targeted cooperation projects of HRTF. In particular, in Ukraine HRTF1 was implemented aiming at removing obstacles to the enforcement of domestic court judgments. For the Court Russia existed separate HRTF2 on the execution of all Court’s judgements by the Russian authorities. Unfortunately, despite the continuing existence of structural problems, both projects finished.<sup>87</sup>

To conclude, further amendments of the mentioned alternatives, mostly recommended fines directly linked with HRTF’s funding, are highly needed. Such fines will ensure disbursement of State’s funds to resolving structural problems in general and not only to just satisfaction compensation of separate events.

### 1.3.5 b. The lack of Amicus curiae activity within PJP

Another drawback for effective implementation is a lack of public awareness and contribution of NGOs and NHRIs and other civil groups, which could rebut the political resistance and move forward PJ execution. We rarely see active NGOs or NHRIs at the stage of identification of systemic nature of violations, when a post-judgment stage – implementation is totally disregarded from their side.

<sup>84</sup> Interview with the Ukrainian judge Yudkivska of 01.02.2013 in the to on-line political journal *Kommersant* available at <http://www.kommersant.ua/doc/2116983>

<sup>85</sup> *ibid.* OSJI briefing paper p.3;

<sup>86</sup> [http://www.coe.int/t/DGHL/Monitoring/Execution/Themes/HRTF/Intro\\_HRTF\\_en.asp](http://www.coe.int/t/DGHL/Monitoring/Execution/Themes/HRTF/Intro_HRTF_en.asp)

<sup>87</sup> *ibid.* 6<sup>th</sup> Annual Report of the Committee of Ministers, p. 36- 37;



Following Brinton conference's call for the "the cooperation with NGOs"<sup>88</sup>, PJP legal framework together with Rules of CoM, namely Rule 9 "Communications to the CoM", bestow such opportunity of an active role not only to the Respondent State, applicants and their advocates, but also to civil society groups, such as NGOs, NHRI etc. In spite of these possibilities, the current perception of PJP is limited to the Respondent state's obligations to execute PJ.

Such undeveloped potential leads to a lack of amicus curie activity<sup>89</sup> ("friend of the Court")- third-party interventions by the NGOs, NHRIs and other civil society groups before the Court and CoM. The latter concedes an active participation in Convention control mechanism and Court judgements' execution. In addition, PJs and amicus curie activity can be seen as a highly legitimate tool in the hands of public interest litigator in a particular national legal system.

Although Rule 9 has existed for over seven years<sup>90</sup>, on May 2012, there were only three known.<sup>91</sup> However, at the time of research (on November 7, 2013), owing to the incomparable improvement of access to the CoM activities, 165 different documents can be found in cases against twenty-four different CoE Member States.<sup>92</sup> The number is impressive, however, after a closer look, not that much, if not to say, a few, concern the QPJ/PJs, neither issuing nor implementation.

Sharing the opinion of Elisabeth Lambert-Abdelgawad, the author draws attention to the imperfections of Rule 9's formulation. In particular, the CoM "*shall be entitled to consider any*

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<sup>88</sup> *ibid* OSJI Briefing paper, p.20;

<sup>89</sup> *ibid* L. Van Den Eynde, abstract;

<sup>90</sup> *ibid* Rules of the Committee of Ministers;

<sup>91</sup> *ibid* OSJI Briefing paper, p.20.

<sup>92</sup> Information from NGOs and National human rights institutions available at

<http://www.coe.int/t/cm/System/WCDsearch.asp?ShowRes=yes&FilingPlan=fplCM->

[Supervision9\\_2&Language=lanEnglish&ShowBreak=yes&SortBy=Geo&Sector=secCM&ShowFullTextSearch](http://www.coe.int/t/cm/System/WCDsearch.asp?ShowRes=yes&FilingPlan=fplCM-Supervision9_2&Language=lanEnglish&ShowBreak=yes&SortBy=Geo&Sector=secCM&ShowFullTextSearch=yes&ResultTitle=Information%20from%20NGOs%20and%20National%20human%20rights%20institutions)

[h=yes&ResultTitle=Information%20from%20NGOs%20and%20National%20human%20rights%20institutions](http://www.coe.int/t/cm/System/WCDsearch.asp?ShowRes=yes&FilingPlan=fplCM-Supervision9_2&Language=lanEnglish&ShowBreak=yes&SortBy=Geo&Sector=secCM&ShowFullTextSearch=yes&ResultTitle=Information%20from%20NGOs%20and%20National%20human%20rights%20institutions)

*communication from non governmental organisations”*,<sup>93</sup> which pulled back the status of Rule 9’s submissions to non-compulsory consideration. Aiming to restrain such discretion and to ensure submissions’ consideration, civil societies group are recommended to combine their strengths and submit joined Rule 9’s observations, focusing more on the actual information about Respondent State’s implementation than on lobbying for legislative changes.<sup>94</sup> Despite all the flaws and imperfection, in the opinion of the author, in the light of PJP application and further execution of PJs, Rule 9’s submission can gain new life and increase its utilization.

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<sup>93</sup> *ibid.* Rules of the Committee of Ministers;

<sup>94</sup> *ibid.* OSJI briefing paper, pages 21;

### 1.3 General remarks

The first chapter was devoted to the theoretical and legal framework of PJP and raised the range of arguable issues: first of all, examining the origins of PJP, the primary reason of the PJP institution was recognized a Court's backlog of repetitive cases as a result of the Member State failure to implement the Court's judgements; then was distinguished three PJP aims: Court-oriented, Member-State oriented and applicants – oriented.

Secondly, the stages of PJ have been analysed separately based on the PJ practice so far. In particular, attention was paid to the problematic status of adjournment of the similar cases. Next, at the stage of issuing PJ was stressed that attention should be paid to the role of other actors in the identification of systemic problems both by European bodies and by non-governmental organization, national and international. Following this, Member-State consent as the preliminary stage of the PJP as one of the determinants of successful execution was emphasized. At the stage of execution the need for 'middle ground' sanctions for State disobedience to execute Court's judgments was raised. In particular, fines directly linked with HRTF's funding were mostly recommended. Such fines will ensure disbursement of State funds on resolving structural problems in general and not only to just satisfaction compensation of separate events.

And finally, the author argued that the Court's *prima facie* review and *infringement procedure* are signs of new remedial competence in the hands of the Court.

## Chapter II: Success of first PJ *Broniowski* and further development of the legal nature of PJP

*Broniowski* PJ became the first major work the Court has written in the role. The case concerned very delicate question of the ownership rights in post-socialistic era and compensation for their deprivation during USSR epoch. In June 2004, after identifying systemic nature of the problem, the Court issued PJ against Poland, stressing the urgent necessity to ensure proper compensation to the polish citizens whose property had been expropriated.

### 2.1 The success of first Pilot Judgments “*Broniowski v Poland*”

In October 2008, the Court Registry delightedly announced the successful conclusion of the first PJP application, brought to life by *Broniowski* PJ. Exactly one year after the issuing of *Broniowski*, complying with the Court’s dictum, the national compensation system had been settled. As a consequence, the Court, satisfied with the effectiveness of the system, struck out the remaining pending ‘clone’ cases<sup>95</sup> and closed the PJP.<sup>96</sup>

From the first glimpse, the procedure was so effective and practical that it seems to have been a ‘panacea’ healing the plague of the XXI century – systemic violation. As a result, PJP became a desirable tool to bring changes to all post-Soviet East European countries. However, the conducted research demonstrates that significant success of the first pilot judgment is not a panacea's effect of PJP, but is a joint result of the below presented determinants of PJP success.

First of all, the deep historical background of the Polish situation gives us grounds to argue this. The Ribbentrop-Molotov Pact concluded at the beginning of Second World War, led

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<sup>95</sup> HUDOC *Wolkenberg and Others v. Poland*, (no. 50003/99) and *Witkowska-Tobola v. Poland* (no. 11208/02),

<sup>96</sup> HUDOC Press release issued by the Registrar *First “pilot judgment” procedure brought to a successful conclusion Bug River cases closed*, No691 of 6.10.2008;

to the forced replacement of some 1,240,000 polish citizens, who consequently were deprived of their real property.<sup>97</sup> After the collapse of the USSR, Polish authorities had been puzzled with the obligation to compensate for expropriated land to nearly 80,000 polish citizens. With the Court's help, *Broniowski* became a means of national adjustment to a historical unfairness, which occurred during the soviet era.

Following this, the deep historical roots of the “Bug River” cases fostered genuine political will and enhanced civil society participation. Thus, Poland had not only the national government with strong will to act but also high public awareness about the Court and willingness to change traditional thinking.

Another determinant of *Broniowski* success was the status of the Convention in the national legal system. The Constitution amendment of 1997 affirmed the Convention as a part of the national legal order, which should be applied directly. Moreover, in 2003, the Constitutional Court, interpreting relevant articles of the Constitution, underlined that domestic law must be harmonised with the ECHR. Following this and *Broniowski*, the compliance test with Convention standards of the draft law was introduced.<sup>98</sup>

And finally, the most decisive for the successful implementation is the presence of the well-institutionalized and solid implementation structure including legislative, judicial and administrative components. OSJI, in its report of 2013, stressed the importance of the executive level of the implementation mechanism. Although parliament with its legislative power and national high courts as implementers played their appropriate roles, when it comes to the administration of the implementation process, managing ministers are indispensable to its success. Since “the fewer steps in the communication ladder” more likely implementation gets

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<sup>97</sup> *ibid.* Wolkenberg, para.5;

<sup>98</sup> Ms. Dominika Bychawska, Project Coordinator, Polish Helsinki Foundation for Human Rights, [in *ibid.* OSJI Briefing paper p.21];

political priority.<sup>99</sup>

In this sense, Poland is a good example since it has all three components: strong OGA, executive ministries and inter-ministerial committee.<sup>100</sup> To begin with, the implementation process is the immense responsibility of the Polish Government. The latter is realized through centralized institution - the Office of Government agent, who has appropriate level of political standing. And the third component is the Inter-Ministerial Committee for matters concerning the European Court of Human Rights, Polish liaison common body created for better cooperation amongst the involved ministries with a Government Agent as chairman.<sup>101</sup>

Thus, the presence of the abovementioned favourable conditions created the predisposition to the successful PJP application. Still, in less fertile ground the mutual understanding of the need for changes can be definitely achieved through continuing dialogue between the parties. In this direction, the group of ECHR specialists, such as Weber,<sup>102</sup> Balcerzak<sup>103</sup> and Wołosiewicz,<sup>104</sup> have developed the idea of cooperation in the concept of “Legal peace” in PJP. The main idea of the latter is the co-operation between the Respondent state, the Court and the Commissioner for HR prior to the PJ. The main reasoning of the concept is that the systemic nature identified by the Court in PJ is usually notorious and, de-facto, well-known by the parties. Consequently, it can be agreed that the reciprocal beneficiary brought the Court the most successful PJs, such as the Polish *Broniowski*.

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<sup>99</sup> *ibid.* OSJI From the Rights to Remedies, pages 30-37;

<sup>100</sup> *ibid.* OSJI From the Rights to Remedies, p. 34;

<sup>101</sup> Ilchenko, Ivanna “*The implementation of the 1950 European Convention on Human Rights and the case-law of the European Court of Human Rights: Ukraine’s and Poland’s Governments practice*”, III Warsaw- Torun’s colloquium on Human Rights and International Humanitarian Law journal 2010, p.18;

<sup>102</sup> *ibid.* Weber, Anna, *Responding to Systemic Human Rights Violations: an Analysis of ‘Pilot Judgments’ of the European Court of Human Rights and their impact within national system. Paper at Pilot Judgments Seminar - Strasbourg*, 14 June 2010.;

<sup>103</sup> Balcerzak [in *ibid.* Wołosiewicz J. Pilot Judgment Procedure in the European Court of Human Rights, at 31.];

<sup>104</sup> *ibid.* Wołosiewicz, p 8;

### 2.1.1. Effectiveness of ‘Broniowski Law’

Poland had the above drawn predisposition for success, however its implementation was not quite so smooth. Three major problems of the ‘Broniowski Law’ had to be overcome: the effectiveness of the electronic Register, the discretion of the local governor and the more technical obstacle of the verification of the documents.

‘Broniowski Law’ adopted on 22 July 2005, previews compensation for the properties left beyond the present borders of Poland in the amount up to 20% of their original value. To start with, Poland rapidly launched an electronic centralized Register of ‘Bug River’ claimants. Obviously, during the first two years the system experienced some deficit in technical and logistic infrastructure. Mostly because, the Government had never previously maintained nor centralised the register, nor had a consistent procedure for claims’ registration.<sup>105</sup> Later, facing problems with the transfer of the claims to the centralized Register from the regional ones, the latter was supplied with compatible software.

Furthermore, to facilitate the access of citizens and increase their awareness about the on-going process, the State Treasury created a website disseminating all needed information for the compensation.<sup>106</sup> It is worth noting that at the time of writing Ukraine does not have even initiation of such, keeping folder archives of non-enforcement cases pending in the Court.

Next, Poland, the same as the Russian Federation, had bottlenecks in the implementation process at the regional level. In this context, it is worth being reminded, that Poland is divided into 16 wojewodships, when Russia has 83 federal subjects and Ukraine - 24.

Thus, owing to the gap in the Broniowski Law, the dispute raised between regional governor –wojewoda and the Ministry of State Treasury over the authority of the appeal jurisdiction. The key issue lay behind wojewoda’s discretion in awarding claimants a certificate, after consideration of their presented documents confirming land ownership. The

<sup>105</sup> *ibid.* Wolkenberg, para.70-71;

<sup>106</sup> *ibid.* Wolkenberg, para. 23;

appeal against the governor's decision could be lodged before the local judge or to the State Treasury. For instance, in the course of appeal, the State Treasury upheld only 61 applications from 254 appeals against the negative decision of the regional governor to grant a certificate.<sup>107</sup> From another side, in the opinion of the author, bearing in mind the Ukrainian experience with false national court decisions, to bring the dispute of the certificate granting before a judge is legitimate way of dispute resolution.

These problems were resolved after the proper setting up of the centralized Registry operation, which enabled fast verification of the presented claimants' documents and disbursal of the awarded compensation.

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<sup>107</sup> *ibid.* Leach *et al*, p.52-54;



## 2.2 Legal nature of the PJP: subsidiarity and judicial law-making

Facing “implementation crises” within its Member-states, the Court’s reformation triggered a shift of powers within Convention mechanism by shifting the responsibility back to the primary safeguards of Convention rights protection – Member States.<sup>108</sup> Thus, PJP assessment as a form of judicial law-making in tension with ECHR’s subsidiarity principle gained the significant importance for the present research.

The institution has its meagre basis in the ECHR itself, namely Art 46 (1) due to which Member-State are obliged to “*undertake to abide by the final judgement of the Court*”. In addition, the Court invokes Art 1 as general obligation on MS to respect HR, the foundation of *principle of subsidiarity*, and Art. 19 as the purpose of the Court functioning - to ensure Member-State’s compliance with the Convention.

Thus, since the ECHR is a supervisory system based on the principle of subsidiarity, the national authorities are given the primary responsibility to protect right ensured by the Convention. A great number of repetitive applications demonstrate the malfunctioning of the subsidiary principle. As was mentioned earlier, the primary failure of the Member State to comply with their obligations caused jurisprudential shifts for the “embeddedness” of the Convention.<sup>109</sup> The aim of the PJP is to reassert Member States' position as first-line defenders. Therefore, it can be argued that the “embeddedness” of the Convention is in favour of the subsidiarity principle, and the PJP is the way to reinforce this principle. Thus, the weakness of the PJP legal nature was wisely turned into its strength.

Despite the substantial justification of subsidiarity principle of PJP, the PJP features of constitutional judicial law-making gives ground for discussion. The failure of the Court’s

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<sup>108</sup> OSJI Report *From Right to Remedies: Structures and Strategies for Implementing International Human Rights decisions* published by Open Society Justice Initiative in 2013;

<sup>109</sup> Keller, Helen, Fischer, Andreas and Kühne, Daniela, *Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals*, European Journal of International Law; 2010. Nov, Vol. 21 Issue 4, p1025-1048;

initiative to introduce the Convention-based PJP by including it in Protocol 14 led to the poor legal base for PJP. In this sense, pre-Interlaken PJP application was limited to Art. 46(1) Convention reference and citing of CoE Recommendation (2004)3. In *Broniowski*, the Court extended interpretation of Art.46 by imposing on Member State obligations “to put an end to violation found by the Court and to redress so far as possible the effects.”<sup>110</sup> It is debateable extension since the Court went beyond its mandate under Art. 32, limited to an interpretation and an application of the Convention. As a consequence, the PJP legality started-up in *Broniowski*, nor in any other PJ delivered before PJP codification by Protocol 14 (March 2011), including *Burdov* and *Ivanov*, cannot be left beyond doubts.

From the very beginning the Polish Government Agent, Wołosiewicz, pointed out that the Convention does not give grounds for such a broad interference into the State’s internal affairs.<sup>111</sup> Markus Fyrnys further elaborates the evidence of expanding Court’s competence. Fyrnys rightly pointed out that applying PJP, the Court goes far beyond the individual case adjourning thousands of ‘clone’ cases and jointly considering hundreds of WECL cases by the Committee of three judges without and as consequence of successful adoption of domestic remedy, striking out the rest of repetitive applications. Above-mentioned make PJP nothing less than a form of judicial law making.

Later, the author, sharing Fyrnys’s views, argues that PJ has procedural and substantive part. Procedural is identifying a structural problem and a request to adopt legislation, when a substantial part, in its turn, is “programmed law-making obligation” imposed on domestic authorities to amend national legislation. Fyrnys rightly points out that the Court, despite the absence of appellate jurisdiction, supremacy of the Convention, nor *erga omnes* effect of its judgments, managed to oblige Member-States to follow its instructions for reform of the national legal system. The way to this is de-jure *evolutionary interpretation* of the Convention.

<sup>110</sup> *ibid.* *Broniowski* para 194 (the same *Scozzari and Ginta v Italy*, 13 July 2000);

<sup>111</sup> *ibid.* Wołosiewicz, J. *Pilot Judgment Procedure in the European Court of Human Rights*, p.31;

As a conclusion, PJ in comparison to ordinary Court's judgement has de-facto *erga omnes* effect.<sup>112</sup> The Court was not created with such jurisdiction but slowly moved forward over the years of judicial instruments application that had slowly been straining the autonomy of Member-State.<sup>113</sup> No one doubts that it was barely predictable by the Member-State in the moment of ratification that contemporary Court would have such a wide competence.

Therefore, there was no surprise that such practice created tension between the CoE bodies and national authorities. The latter led to the vital importance of interaction between the CoE bodies and the respondent state, beginning from the favourable preliminary State consent to the PJP initiation, to the collective efforts of CoM and the Government to develop national measures of effective PJ execution.

The next phase of PJP's development and application is *post-Interlaken*. The codification of the PJP into Rule 61 provided at least some legal framework for the institution. However, the issues of an excessive flexibility, discretion of the formulation of Rule 61 and sufficiency of such legal basis for PJ institution remain.

Thus, the formulation of the Rule creates gaps and uncertainties in its application. For example, PJP "may be initiated by Court on its own motion or request one of the parties"<sup>114</sup>, which does not provide the guidelines by which composition of the Court, ordinary Chamber (within one of the five Sections) or Grand Chamber should initiate PJ and what the grounds of such variety. Later a similar expression the "Court *may* set time limits" or "*may* adjust similar application" give the grounds for arguing excessive discretion of the formulation of Rule 61.

However, John Darcy, from the Court Registrar, rightfully characterized the procedure as "judicial management"<sup>115</sup> which should be flexible and adoptable. The Convention is itself the most prominent example of flexibility and the space for interpretation supported by the

<sup>112</sup> Note by the Jurisconsult *Interlaken follow-up: principal of subsidiarity*, section "B: Impact of the Court's judgment";

<sup>113</sup> *ibid.* Fyrnys, M. ps. 1244-1250;

<sup>114</sup> *ibid* Rules of the Court, Rule 61 para 2 (b);

<sup>115</sup> Darcy, J. [in *ibid.* Leach, p.13];

provisions of Art.31 of Vienna Convention on the Law of Treaty. Consequently, in case of consistent and transparent application of PJP and PJ's case-law, the interpretation would fulfil the gaps and uncertainties of the formulation of Rule 61.

The overview of interaction between the subsidiarity principle and features of judicial law-making shows that they are not contradictable but are complimentary components of joint aim - compliance with the Convention. In this sense, it is unsubstantial to argue the vitality of clashes between the subsidiarity principal and PJP as a form of judicial law-making.

## 2.3 The PJP Case-Law: Full PJ, the Quasi-Pilot and other Judgements Addressing Systemic Issues

Comparative analyses have been done on the basis of the existing practice of PJP. The comparative analysis confirms the mentioned “confusion” by Leach *et al*<sup>116</sup> to distinguish PJP and the difficulties to explicitly divide them in three tiers: full PJ, the Quasi-Pilot and other Judgements Addressing Systemic Issues. Such “*confusion*” was caused by the inconsistencies of the Court, excessive flexibility and discretion of PJP application. Unfortunately, on January 2013 this confusion was degraded by the submitted specialized report on the research matter and held speech before PACE by the Ukrainian representative Serhii Kivalov.<sup>117</sup> Alongside other inaccuracies, the most outstanding flaw was the amount of presented PJ on marital time (November 2012). Thus, in the report 29 PJ were listed. Surprisingly, eight full PJs were show as separate, which unveiled the same structural problem in the same country. For example: non enforcement: *Racu v. Moldova*, *Lungu v. Moldova*, *Gusan v. Moldova*, *Olaru v. Moldova*<sup>118</sup>, when even in the Court factsheet we can find *Olaru and others* as one PJ.<sup>119</sup> Such situations are evident of the misunderstanding and unclearness of PJP even by the specialized reporter from the country that recognized as first official failure of PJ.

### 2.3.1 Common Features of PJs: “structural nature”

The former President of the Court, Pr. Wildhaber,<sup>120</sup> presented eight features of PJ. However, the author based his summarizing on the first PJ, *Broniowski*, and only fragmentally presented in the following PJs. Thus, the examination was concentrated on the principal ones.

<sup>116</sup> *ibid.* Leach et al, p. 14-15.

<sup>117</sup> Kivalov, Serhii (European Democrat Group) Report at the PACE, Committee on Legal Affairs and Human Rights Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties, Novembre 2012, Appendix II: List of 29 pilot judgments delivered by the Court (Data as of 12 November 2012), p.24 ;

<sup>118</sup> *ibid.* *Olaru*

<sup>119</sup> *ibid.* Court Factsheet – Pilot judgments;

<sup>120</sup> Wildhaber L. [in *ibid.* Buyse, A.] pages 2-8;

The common denominator of PJs is the *structural nature* of the violations. In accordance with the notion of PJP prescribed by Rule 61 “*the Court may initiate a PJP [author] ... where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction*”. “Systemic or widespread” was the indigenous characteristic of PJP mentioned in the very first PJ, *Broniowski*, in comparison to “*structural violations of Human rights*” which appeared only in the middle of 2009, in *Olaru v Romania*. A few months earlier in 2009, the configuration of “*persistent structural dysfunction*” was firstly used in *Burdov*.

As pointed out Registry senior lawyer, Pavlo Pushkar, the structural problem is a wholly separate issue<sup>121</sup> and deserves special attention since it triggers the PJP. The formulation of Rule 61 does not give us clear understanding of the PJP's selection criteria of pending cases to be chosen for PJ. From the very beginning, the PJP “*pick and choose approach*” was vague, obscure and as a result, widely criticized.<sup>122</sup> In other words it could be argued that the Court's PJP violates its own requirement of “legal certainty” as a safeguard against arbitrariness even from the side of the credible ECHR. The Interlaken conference finally identified, as of vital importance, clear and predictable selection criteria.<sup>123</sup> However, the exited practice of PJP outlines main three determinates of ‘structural nature’: the number of applications submitted to the court, including potential flow of applications;<sup>124</sup> the number of judgments in which the Court has found the same violation, which can varies from 80 (“*Manushaqe Puto and others v. Albania*” on 31 July 2012) to a few thousand, for example: 2,500 cases in “*Greens and M.T. v. United Kingdom*” of 23 November 2010; or 2,000 cases in “*Yuriy Nikolayevich Ivanov v. Ukraine*”; and finally, the presence of the interim measures against a particular State and the

<sup>121</sup> *ibid.* Interview with Pavlo Pushkar;

<sup>122</sup> Council of Bars and Law Societies of Europe (CCBE) Comments on the Pilot-Judgment Procedure of the European Court of Human Rights of 24.06.2010, page 3.

<sup>123</sup> *ibid.* Interlaken Declaration, para 7 b p. 4;

<sup>124</sup> *ibid.* Annual report 2012 p. 100;

compliance state with them.<sup>125</sup> From above mentioned and on the base of comparison research, can be summarised two elements for the indication of the structural nature of HR violations: quality and quantity.

To start with quality, Andrea Saccucci used the negative form for the definition for “**structural violations**” as those that are not episodic, accidental or isolated but which are taking their origins from the systemic problem.<sup>126</sup> Saccucci as well as Dmytro Tretyakov divide the systemic violations of legislative character and of an administrative character dysfunction. The latter is an endemic defect of the application, practice or widespread malfunctioning, malpractice.<sup>127</sup>

The quantity in the definition of “structural nature” unveils the amount of clone or repetitive cases that stated the same violation. First of all, it is the recognised approach that found violation concerns **an entire group of individuals** as a consequence of shortcomings or deficiencies in national law and practice.<sup>128</sup> Secondly, a more debatable trend that this group of individuals has already created the flow of pending applications in Court or potentially may give rise to the flow of well-founded applications or the numerous jointed applicants in one judgment. The latter can also be called “table” judgment, which are based on WECL and delivered by the Committee of three judges. However, PJP gave the possibility to initiate it not only by finding systemic violation, but also by the *potentiality*, of structural problems revealed by “*the facts of an application*.”<sup>129</sup>

From one side, the potentiality of the flow seems a discretionary perception in the hands of the Court. However, PJP practice has not proved any abuse of such discretion. In 2005, firstly the potentiality threat of applications overload was successfully taken into consideration in *Hutten-*

<sup>125</sup> *ibid.* Keller, Helen *et al*, page 1045;

<sup>126</sup> Saccucci, Andrea *Accesso ai rimedi costituzionali, previo esaurimento e gestione "sussidiaria" delle violazioni strutturali della CEDU derivanti da difetti legislativi*, Diritti umani e diritto internazionale : rivista quadrimestrale (DUDI), vol. 6, n. 2 (2012), p. 263-291;

<sup>127</sup> *ibid* Saccucci, pages 266-267;

<sup>128</sup> *ibid* Broniowski para 189;

<sup>129</sup> *ibid* Rules of the Courts Rule 61, para 1;

*Chapska*, where 100,000 landlords were potentially concerned.<sup>130</sup> The second major time is the recent PJ of *Kurić and Others*, where 13,426 “erased” people can potentially apply to the Court since they still did not have a regulated status in Slovenia. Due to up-to-day issuing of the very PJ the evaluation of potential hazard cannot yet be made.

Another distinctive feature is ***general measures***, which should be taken by the respondent state. In particular, Wildhaber, together with the Brighton Conference, came to the conclusion of the importance of the Court’s guidance of general measures for the effective execution of PJ. In addition, the retrospective nature of such general measures was presented as a strict requirement to the Member-State. As emphasized by Wildhaber, using the operative part to impose the obligations to carry legal and administrative measures is quite questionable since art 41 limited to the just satisfaction and as shows us practice, the Court are extremely courteous to explicitly express its demands. The example of exceptions is found violation of unlawful detention, which obviously should be followed by the immediate release. However, after remembrance of PJ as a form of judicial law-making, the imposition of such obligation logically can be accepted as a principal feature of PJ.

The last and first underlined by Wildhaber, is the obligation to inform organs of CoE, such as CoM, Parliament Assembly, CoE HR Commissioner, about the structural problem and PJ issued to deal with it. This feature bears a double function. As far as it is an addition to be considered, as PJ’s feature, it also emphasises that PJP involves other than the three main parties: the Court, applicants and respondent State.

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<sup>130</sup> *ibid.* Hutten-Czapska, para.19;



### 2.3.2 The Quasi-Pilot and other Judgements Addressing Systemic Issues: PJP as a ‘continuum’

Antoine Buyse proposes a tenable solution for the abovementioned “confusion” to distinguish PJs and divide them into types – he considers PJP practice as a “*continuum*”. The author commences his PJP “continuum” from 1979 with the example of *Marcxk*<sup>131</sup> as a judgment that underlined a broader issue of particular violation. In comparison to full *Broniowski*, which has all the features presented by Wildhaber, *Marcxk* can be seen as the third pillar of PJP. He argues that the core of PJ can be limited only to a couple of components: identification of systemic problem and guidance of general measures.<sup>132</sup> The presence of all other features depends on the nature and the complexity of the systemic violation. However, in the frame of the research and for better understanding the differences between QPJ and “judgements addressing systemic issues” comprehensive analysis was conducted.

**Quasi-pilot judgments** (hereafter - QPJ) are also known as “Article 46 judgments”. In contrast to “full” pilot-judgments, the Court in general does not prescribe general measures in the operative part of the QPJ and similar cases are not adjourned. QPJ seems more as a precaution from the side of the Court. The Court identifies the systematic dysfunction and reminds the Respondent State to remedy the systemic violation. The following groups of QPJ were examined. The first group concerns the excessive length of proceedings (Art.6.1): *Faimblat v Romania*<sup>133</sup>, *Lukenda v Slovenia*<sup>134</sup>, *Ramadhi and others v Albania*<sup>135</sup>, *Scordino* (which followed *Bottazzi v Italy*<sup>136</sup>) and *Kudla v Poland*<sup>137</sup> (firstly in conjunction with Art.6.1 the Court found violation of the right to effective remedy) etc. The second group is devoted to

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<sup>131</sup> HUDOC *Marcxk v Belgium*, judgment of 13 June 1979;

<sup>132</sup> *ibid.* Buyse, A. pages 7-8;

<sup>133</sup> HUDOC QPJ *Faimblat v Romania* of 13 January 2009;

<sup>134</sup> HUDOC QPJ *Lukenda v Slovenia* of 06 October 2005;

<sup>135</sup> HUDOC QPJ *Ramadhi and others v Albania* of 13 November 2007;

<sup>136</sup> HUDOC QPJ *Bottazzi v Italy* of 28 July 1999;

<sup>137</sup> HUDOC QPJ *Kudla v Poland* of 26 October 2000;

the right to compensation for expropriated property: *Driza v Albania*<sup>138</sup>, *Katz v Romania*<sup>139</sup>, *Viasu v Romania*<sup>140</sup> etc.

Following the examination, it can be stated that the complexity of dysfunction, the depth of its roots and as a result small chance of success, make the Court vigilant and postpones the delivery of full PJ in the present cases. In addition, the attitude of some respondent states, explicit example is Italy, seems to suggest that authorities prefer to pay executive just satisfaction to applicants rather than reform the whole system. For instance, the Court disregards the failure of Pinto law and the systemic violation of excessive length of the proceedings in Italy. Buyse supports this avenue as well, namely, he notes that in the beginning of 2006 in all cases concerning Italy, *Botazzi*, *Scordino* et al, the Court discussed their systemic nature of violations in the merits part of judgment but never took the courage to put general measures in operative parts of its judgments.<sup>141</sup> The attitude to this kind of ruling from the side of Government is not consistent. Poland, for example, is in favour,<sup>142</sup> as the Polish Government agent mentioned.

Following this analysis, the main common feature of third tier of PJP - **the other judgments addressing systemic issues** - such as an absence of article 46.1 reference, can be underlined. To this category of PJ can be subscribed, *Matko v Slovenia*<sup>143</sup>, *Silih v Slovenia*<sup>144</sup>, and *Sejdovic*. For instance, the latter concern the right to a fair trial in Italy, in particular the trial in absentia and the absence of effective remedy. The court revealed in merit part of its judgment that the deficiencies of legislation caused the violation, however, because of the immediate reaction of the Italian authorities to it and amendments made, the Court limited to

<sup>138</sup> HUDOC QPJ *Driza v Albania* of 13 November 2007;

<sup>139</sup> HUDOC QPJ *Katz v Romania* of 20 January 2009;

<sup>140</sup> HUDOC QPJ *Viasu v Romania* of 09 December 2008;

<sup>141</sup> *ibid* Buyse, p. 8;

<sup>142</sup> *ibid* Wołosiewicz, *Pilot Judgment Procedure in the European Court of Human*, p.6;

<sup>143</sup> HUDOC *Matko v Slovenia* judgment of 02 November 2006;

<sup>144</sup> HUDOC *Silih v Slovenia* judgment of 09 April 2009;

this.<sup>145</sup>

The examination of Court's case-law in particular to distinguish judgments addressing systemic problem leads to the verification of Buyse's concept of "*continuum*" and of PJP as indigenous practice of the Conventional system. Thus, far before the establishment of the PJP institution we can find judgments that address systemic issues. This is why there have not been found substantial grounds for formation of an explicit group of "judgments addressing systemic issues" as a type of PJ. It is worthy to emphasize them as just ordinary judgments of the Court, which address some particular systemic violation and can in the future, be used as the basis for the initiation of PJP.

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<sup>145</sup>*ibid* Leach et al, p.96;

## 2.4 General remarks

The second chapter of the present paper is dedicated to the success of the first PJ *Broniowski* and PJP legal nature, developed through further PJP application. The results of research demonstrate the following conclusions.

Until now, first PJ *Broniowski* remains to be the most successful PJP application. However, behind such a remarkable success not PJP panaceas healing but rather favourable predisposition to its success is lies. Thus, the author concentrated attention on the examination of the factors shaping such a predisposition. First was the enhancing civil society participation and genuine political will boosted by historical injustice. Second circumstance was the existence of the well-structured and solid implementation mechanism with political standing of the Office of Government Agent. And the third ingredient of Polish success was the Inter-Ministerial Committee. Although, Poland had all the necessary predisposition factors, national authorities putted in a lot of effort to overcome the flaws and drawbacks of the new domestic remedy system. The launch and further improvement of the unified electronic Registry of claimants is to be considered as the most decisive achievement.

Next, analyzing the adjusting nature of PJP, its alleged contradiction with the Court's subsidiary principle has been dispensed. In particular, the research shows that subsidiarity principal and PJP as a form of judicial law-making are not contradictory but are complimentary components of a joint aim - compliance with the Convention.

And finally, the present PJs case-law has been traced, paying special attention to PJs' distinctive features: indication of 'systemic nature' and stipulation of general measures. Analyzing differences between the QPJ and other Judgements Addressing Systemic Issues, the author did not find substantial grounds for formation of an explicit group of "judgments addressing systemic issues" as a type of PJ. In addition, Buyse's concept of PJP as a "continuum" of an indigenous practice of the Conventional system was found to be reasonable.

## **Chapter III Russian Pilot Judgement *Burdov* and the failure of Ukrainian Pilot Judgement *Ivanov***

Panacea' effects of the first PJ *Broniowski* encouraged the Court to extend adoption of PJP to more complex problems as the non-enforcement (or delayed enforcement) of national court's decisions. The first country honoured was the Russian Federation with *Burdov v. Russia* (no. 2) of 15 January 2009 and shortly after, Ukraine with *Yuriy Nikolayevich Ivanov v. Ukraine* of 15 October 2009.

Thus, firstly in PJP application *the complexity of national legal dysfunctions* included systemic violation of three fundamental rights: the right to fair trial (Article 6 of Convention), the right to peaceful enjoyment of one's property (Article 1 of Protocol No. 1 of Convention) and the absence of effective domestic remedy, either preventive or compensative, which could provide adequate redress for the mentioned violations (Article 13 of Convention). Both countries faced difficulties enforcing PJs delivered against them. Despite a lot of similarities, these two PJs brought different outcome to their countries. Russian PJ *Burdov* considered being acceptable experience, when Ukrainian *Ivanov* PJP was terminated owing country failure to execute it. Thus, present paper is devoted to the discussion of the complex legal dysfunction raised by *Burdov* and *Ivanov* PJs and the particularities of their execution.

### 3.1 Russian Pilot Judgement *Burdov*

Russian Federation was the first post-soviet country to which the Court applied PJP. In the opinion of the former Russian judge at the Court, Anatoly Kovler, shared by the author, a contributory reason for the Court's determination became Russia's prolongation of the Protocol 14's ratification and the unfavourable attitude to the further Convention system reform. Evidently, the Court reached its target since one year after *Burdov*, on 18 February 2010, Protocol 14 was actually signed and entered into force on 1 June 2010.

Another *Burdov's* distinctive difference pointed out by judge Kovler is that *Burdov* was the so-called 'Pavlov's dog' reflex owing to the repetitive nature of violation, which hundreds of times before *Burdov* was found by the Court in cases against Russia.<sup>146</sup> In point of fact, the mere case PJP been applied, *Burdov* (**No2**), not mentioning another 700 similar cases pending and more than 200 cases judgements had been delivered, constituted the same systemic violation.<sup>147</sup> Thus, Court used piecemeal policy, training the Respondent State to get ready to "digest", to reflect on the delivered cases. An utter PJP's application became the spectacular ending of Court's piecemeal policy.

Bearing in mind the arguable failure of Russian PJ, the author sees important to identify the Russian constructive pre-PJ efforts and preliminary consent. Providing further examination, the author unveiled their role as determinants for the more positive *Burdov* PJ's execution, rather than arguable failure.

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<sup>146</sup> *ibid.* Leach, p. 350-351;

<sup>147</sup> Information Note on the Court's case-law No. 115, para Article 46, p.2;

### 3.2.1 Pre-PJ *Burdov* general measure and preliminary state consent

The Russian Government had been introducing various national measures addressing the resolution of the non-enforcement and before *Burdov*'s issuing. For instance, in the pre-PJ conditions, referring to the *Burdov (No1)* <sup>148</sup>, the Constitutional Court of the Russia Federation triggered the change to the Federal Budgetary Code, requiring authorities to pay redress for procedural delays if the fixed time limits were settled. In addition, by the amendment of April 2007 the Federal Treasury's control over budgetary institutions accounts was extended. <sup>149</sup>

Russian Supreme Court in its turn decreed a few times on the matter of the right to trial within reasonable time, referring to the principles of Article 6 of the Convention. Thus, after its following decision of 26 September 2008, the draft of the constitutional law on the compensation by the State of damage caused by violations of the right to judicial proceedings within a reasonable time and of the right to execution within a reasonable time of judicial decisions that have entered into legal force (hereafter - "Compensation Act") was submitted to the State Duma. <sup>150</sup>

It is worth highlighting that Compensation Act drafting was initiated in pre-PJ conditions as a general measure of *Burdov* (No1) execution. On 4 May 2010, exactly one year after the *Burdov* PJ became final, Compensation law No'68-FZ' <sup>151</sup> and its contributory one Law No'69-FZ' <sup>152</sup> amending relative to the Compensation law acts, entered into force. Thus, the Russian

<sup>148</sup> *ibid*, *Burdov* para 136;

<sup>149</sup> Committee of Ministers, Interim Resolution CM/ResDH(2009)43, Execution of the judgements of the European Court of Human Rights in 145 cases against the Russian Federation relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy;

<sup>150</sup> *ibid* Leach et al, pages 353-356;

<sup>151</sup> Federal Law № 68-ФЗ On the Compensation by the State of damage caused by violations of the right to judicial proceedings within a reasonable time and of the right to execution within a reasonable time of judicial decisions that have entered into legal force [O kompensatsii za narushenie prava na sudoproizvodstvo v razumnij rok ili prava na ispolnenie sudebnogo akta v sudebnyj rok];

<sup>152</sup> Federal Law N 69-ФЗ On the amendments to some Federal Laws of Russian Federation concern adoption Federal Law on the Compensation by the State of damage caused by violations of the right to judicial proceedings within a reasonable time and of the right to execution within a reasonable time of judicial decisions that have entered into legal force [O vnesenie izmenenij v otdelnye zakonodatelnye aktu Rossijskoj Federacii v sv'jazi s priyatiea federalnogo zakona "O kompensatsii za narushenie prava na sudoproizvodstvo

authorities managed to set up the required Law within the settled time limits. A range of administrative changes was launched. For example, the Ministry of Finance introduced a new system of monitoring the enforcement of national judicial decisions delivered against the State. Moreover, on 5 October 2007 the new Federal law on Enforcement Proceeding was introduced.

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To make a long story short, CoM has been simultaneously evaluating general measures following their adaptation.<sup>154</sup> In particular, the Government's measures concerning Chernobyl victims were seen as successful: changes to legislation on social insurance of Chernobyl and money awards to more than 5,000 of Chernobyl's victims.<sup>155</sup> However, the rest of the Government's efforts were considered insufficient so far as creating adequate preventive remedies,<sup>156</sup> and to ensure the effectiveness of compensatory ones.<sup>157</sup> CoM's critical assessment gave the Court first keystone for the application of PJP against Russia.

Another aground for solid PJP application became State preliminary consent. The initial evidence of Russian consent was the mere fact of Protocol 14's ratification on March 2010,<sup>158</sup> which finally opened the path for further reform of the ECHR's control mechanism. Moreover, from the side of high-rank officials, namely the President of the Russian Federation, Medvedev, who was not once heard being occupied by the great number of non-enforced national decisions, acknowledged 'the execution of court decisions is still a huge problem'<sup>159</sup> of the national legal system. Further, he stressed the necessity to generate the compensation

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v razumnij rok ili prava na ispolnenie sudebnogo acta v sudebnyj rok"].

<sup>153</sup> *Ibid.* Leach *et al.*, p.136;

<sup>154</sup> Committee of Ministers' CM/Inf/DH(2006)45 of 1 December 2006 and CM/Inf/DH(2006)19rev3 of 4 June 2007.

<sup>155</sup> *Ibid.* Burdov, para 10 or Resolution ResDH(2004)85;

<sup>156</sup> Parliamentary Assembly Resolution 1516 (2006) on implementation of the European Court's judgments, adopted on 2 October 2006, and the report of the Committee on Legal Affairs and Human Rights, the rapporteur [in *ibid.* Burdov para. 43-44];

<sup>157</sup> *ibid.* Burdov, para 101-117;

<sup>158</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention <http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>

<sup>159</sup> President of Russia Dmitry Medvedev address to the Federal Assembly of the Russian Federation on November 5, 2008 available at

[http://archive.kremlin.ru/eng/speeches/2008/11/05/2144\\_type70029type82917type127286\\_208836.shtml](http://archive.kremlin.ru/eng/speeches/2008/11/05/2144_type70029type82917type127286_208836.shtml)



mechanism for damages led from the non-enforcement or delayed enforcement of court decisions.<sup>160</sup> And finally, the number of decisions which had been delivered by the higher courts of the Russian Federation and Congress of Judges, the actions of the Commissioner for Human Rights of the Russian Federation<sup>161</sup> gave us the proof to argue about their support. Thus, it is legitimate to state that Court regarded the preliminary stage of PJP application - the acknowledgment of structural dysfunction in the country and political will to resolve it, if not of the entire Government, at least those ‘forces’ in favour of the Pilot judgment.

Surprisingly, when it came to the application of PJP, the systemic nature of the violation vanished due to Respondent Government submissions, which desperately started “to run against an almost undisputed recognition at both domestic and international level of the existence of structural problems in this field”.<sup>162</sup>

Despite these groundless denials of the presence of systemic nature, the Court’s clever move with *Burdov’s (No1)* and its follow-up pre-PJ general measure created the fertile soil for PJ *Burdov* issuing. The latter is reasonable to be considered as the first one that faced such complexity of the structural dysfunction within the biggest Member-State of CoE, deteriorated by the continuous transitional post-communist period.

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<sup>160</sup> *ibid.* *Burdov* para 38;

<sup>161</sup> *ibid.* *Burdov* para 25,

<sup>162</sup> *ibid.* *Burdov* para 132;

### 3.2.3 PJ *Burdov* implementation and its following assessment

Bearing in mind its courageous steps in an identification of systemic nature, turning to the *general measures of PJ*, the Court followed its usual reserved position and stayed away from any specification of general measures. Hence, the Court acknowledgement that “the process raises a number of legal and practical issues which go, in principle, beyond the Court’s judicial function”<sup>163</sup> and left the facilitation of enforcement to the controlling machinery of the Committee of Ministers.

In this manner, the Court followed the recommendation of one of the PJP’s founding resolutions Res(2004)3:

*to identify in its judgment ... what is considers to be an underlying systemic problem and the source of that 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.*<sup>164</sup>

Welcoming the mentioned above draft of the Compensation Act, the Court noted that neither the assessment of the on-going reform, nor the guidelines for its further developing belong to the Court’s competence. Thus, despite pre-PJ efforts and initiation of Compensation Act adoption, the Court imposed general measure on the Respondent State, which could ensure “genuinely effective redress” for its State’s failure to honour judgments debts.<sup>165</sup>

Consequently, the Court, remained restricted to settling the habitual timetable for the adoption of general measure in six months and the usual one-year term for the redress for all communicated cases. In addition, the Court decided to adjourn all similar newly lodged cases, which alleged solely violations of very systemic violations.<sup>166</sup>

Turning to the adoption of the prescribed general measures, which had been assessed both by the CoM and by the Court, *prima facie* authority in its post-PJ decisions can be investigated

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<sup>163</sup> *ibid.* *Burdov* para 137;

<sup>164</sup> *ibid.* Resolution Res(2004)3;

<sup>165</sup> *ibid.* *Burdov* para 139-141;

<sup>166</sup> *ibid.* *Burdov* para 142-146;

in the following way.

The dialogue between the State and CoE organs was drafted from the first *Burdov* case, namely, from the Memorandum of 2006,<sup>167</sup> in contrast to the Ukrainian one<sup>168</sup> impressed by its large-scale and detailed presentation of the measures taken by the Russian authorities. Moreover, two high-level round-tables had been organized in October 2006 and in June 2007.<sup>169</sup>

### 3.1.3A The assessment of the introduced national remedies by the CoM

Two Interim Resolutions had been adopted in the process of *Burdov* PJ execution. Thus, on December 3, 2009, CoM in its first Interim resolution ‘strongly urged and encouraged’ the Respondent Government to take the required measures, pointing out the expired deadline, November 4, 2009, for domestic remedy.<sup>170</sup>

Later the dialogue continued in the form of a round table on “Effective remedies against non-execution or delayed execution of domestic court decisions”, which took place in Strasbourg on 15-16 March 2010.<sup>171</sup> During the round table, recognising the importance of the Court’s PJP, the participants agreed to continue the reformation of the Bailiff’s Service to speed up the execution of the Court’s judgments.

<sup>167</sup> Information documents CM/Inf/DH(2006)19 rev3 4 June 2007 Non-enforcement of domestic judicial decisions in Russia: general measures to comply with the European Court’s judgments available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH%282006%2919&Ver=rev3&Language=lanEnglish&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>;

<sup>168</sup> Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights Case of Yuriy Nikolayevich Ivanov against Ukraine, and Group of cases of Zhovner against Ukraine, CM/Inf/DH(2012)29 of 19 September 2012;

<sup>169</sup> Interim Resolution CM/ResDH(2009)43 of 19 March 2009 *Execution of the judgements of the European Court of Human Rights in 145 cases against the Russian Federation relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy (Timofeyev Group)* available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResDH%282009%2943&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

<sup>170</sup> Interim Resolution CM/ResDH(2009)158 *Execution of the pilot judgement of the European Court of Human Rights in the case Burdov No. 2 against the Russian Federation relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy*, available at <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%7B%22fulltext%22%3A%22Burdov%22%2C%22documentcollectionid%22%3A%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22%3A%22001-97146%22%7D>

<sup>171</sup> Ministers’ Deputies Information documents CM/Inf/DH(2010)15 22 March 2010 available at <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH%282010%2915&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>;

Two years after the first interim resolution, on 2 December 2011, CoM adopted the second one. On the one hand, CoM welcomed the adoption of the Compensation Act, which in spite of some flaws pointed out by the Duma's Committee on Constitutional legislation, such as the side effects of prolongation of compensation process and lack of time limits,<sup>172</sup> satisfied the requirements of the Court. Since the latter, in contrast to the Ukrainian analogue, previewed the retrospectively of claims releasing the Court from applications already lodged to the Court.

However, on the other hand, CoM considered the already existing remedies in the national legislation<sup>173</sup> to be inadequate and insufficient. In particular, the CoM recommended increasing the coordination between the various institutions, aiming to stop the applicants from being "caught in a vicious circle in which different authorities send them back and forth".<sup>174</sup> Further, the CoM noted the need to enhance both state liability and individual responsibility of civil servants, since, even in the known two cases, the charges were dropped due to the accused's active repentance.<sup>175</sup> At the same time, was stressed the mistake to link the finding of civil servant's fault to the compensation, making it conditional.

Consequently, CoM did not find an effective mechanism which could prevent further application to the Court in this matter and called for real actions from the Russian authorities to fulfil their claims of political will and speed up with the adoption of the Compensation Act.

No further interim resolution against Russia has been adopted, however two new texts have been issued by the Parliamentary Assembly on this matter, namely Resolution 1856(2012) and Recommendation 1991(2012) as a follow-up of the Interlaken process. In particular, Parliamentary Assembly called "for an effective parliamentary oversight of Court's judgments

<sup>172</sup> *ibid.* Leach et al, article, p.356-357;

<sup>173</sup> Chapter 25 and Section 208 of the Code of Civil Procedure, Chapter 59§4 of the Civil Code, Article 315 of the Criminal Code [in *ibid.* Russian Memorandum of 2006];

<sup>174</sup> Interim Resolution CM/ResDH(2011)293 of 2 December 2011 *Execution of the judgment of the European Court of Human Rights Burdov No. 2 against the Russian Federation regarding failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy* (Application No. 33509/04, judgment of 15/01/2009, final on 04/05/2009) available at [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#\\_ftn1](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#_ftn1)

<sup>175</sup> *ibid.* Russian Memorandum of 2006, para 103;

implementation<sup>176</sup> and to “reinforce without delay, by legislative, judicial or other means, the interpretative authority (*res interpretata*) of the judgments of the European Court of Human Rights.”<sup>177</sup>

### **3.1.3 B The assessment of the introduced national remedies by the Court**

The Court, in its turn, presented its earlier opinion in two inadmissibility decisions of September 2010: *Nagovitsyn and Nalgiyev*<sup>178</sup> and *Fakhretdinov and Others*. Where the Court found the Compensation Act to be designed in ‘effective and meaningful manner’ according to PJ’s requirements, despite the absence of its stable practice. Thus, in both cases the Court declared the applications inadmissible requiring exhausting the new domestic remedy. However, the Court reserved the possibility to review its position in the future depending on the consistent national court’s application of the Compensation Act.<sup>179</sup>

In its latest decisions of 2012<sup>180</sup>, the Court expressed its concerns about the limitations of the Compensation Act. The Act previews redress only for the non-enforcement or delayed enforcement of the awarded sum from public funds, excluding a wide category of other State’s obligations in favour of retired military personnel, like housing, its maintenance or repair services, supplying disabled with a car etc.

Unfortunately, further interpretation of the Law by the Supreme Court, ruling of 23 December 2010, supported the exclusion,<sup>181</sup> leaving the Court no other choice but to conclude that the Russian authorities did not settle the mechanism, which could provide the

<sup>176</sup> PACE Resolution 1856(2012) *Guaranteeing the authority and effectiveness of the European Convention on Human Rights* para.4 available at <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=18060&lang=EN>

<sup>177</sup> PACE Recommendation 1991(2012) *Guaranteeing the authority and effectiveness of the European Convention on Human Rights* available at <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=18059&lang=en>;

<sup>178</sup> HUDOC *Nagovitsyn and Nalgiyev v. Russia*, decision as to the admissibility of 23/09/2010;

<sup>179</sup> HUDOC *Fakhretdinov and Others v. Russia* decision as to the admissibility of 23/09/2010, para 31-32;

<sup>180</sup> HUDOC *Ilyushkin and Others v. Russia* (5734/08) Judgment 17.4.2012 [Section I] and *Kalinkin and Others v. Russia* (nos. 16967/10);

<sup>181</sup> The Supreme Court of RF and the High Arbitrary Court RF Ruling of 23 December 2010 ‘*On some issues, appearing during consideration of the cases awarding compensation for the judicial proceedings within a reasonable time and of the right to execution within a reasonable time of judicial decisions that have entered into legal force*’ available at [http://www.vsrfr.ru/Show\\_pdf.php?Id=6968](http://www.vsrfr.ru/Show_pdf.php?Id=6968);

compensation for the non-enforcement of such kind of State obligations, whose beneficiaries are forced to defend their rights at the Court. As a result, the Court constituted violations in the present cases and prioritized the whole category, around 500 pending cases, to deliver a ruling.<sup>182</sup> It is worth noting that, at the time of research and eighteen months after the some of these cases, for example *Gerasimov and 14 other applications*<sup>183</sup>, had been communicated, the Court has not delivered its ruling on them yet.

In the process of settlement of the adjourned ‘clone’ cases, Russian authorities faced a habitual impediment – lack of consent of the applicants with the proposed sums.<sup>184</sup> However, in its post-PJ *Burdov* cases, the Court took the side of authorities considering the sums to be adequate and comparable with ones awarded by itself.<sup>185</sup> As a result such applications were struck from the list of pending.

To conclude, the author would like to underlined that from September 2010, when the Court gave the Russian remedy law positive assessment, the non-enforcement applications from the Russia has been considered as inadmissible due to the non-exhausting of domestic remedy and no further action has been taken regarding Remedy Law limitation on other State’s obligations than simple payments from the public funds.

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<sup>182</sup> Press Release of the Court ECHR 170 (2012) 17.04.2012, *New legislation did not resolve the problem of failure to enforce judgments ordering the provision of housing to members of the Russian armed forces; launch of a pilot-judgment procedure*

<sup>183</sup> State Communication on case on 10 April 2012 is available at [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22fulltext%22:\[%22Gerasimov%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22,%22DECISIONS%22,%22COMMUNICATIONEDCASES%22\],%22itemid%22:\[%22001-111038%22\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22fulltext%22:[%22Gerasimov%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22,%22DECISIONS%22,%22COMMUNICATIONEDCASES%22],%22itemid%22:[%22001-111038%22]})

<sup>184</sup> HUDOC *Popov and 12 other applications*, decision of 28 May 2013;

<sup>185</sup> HUDOC *Rodnischchev*, decision on inadmissibility of 28 May 2013;

### 3.3 Ukrainian Pilot Judgement *Ivanov*

Inspired by progress with the Russian execution of *Burdov* and threatened by the increasing flow of Ukrainian ‘clone’ application, the Court went ahead to the delivery of full PJ against Ukraine, omitting the possibilities of QPJ or, as in the case of Russia, *Burdov* (No1).

This section gives a short case brief of the Yuriy Nikolayevich Ivanov case and a fast walk through the stipulation of the systemic nature and pre-*Ivanov* attempts at adoption of the general measures. Further, the author traces the contributory reasons of the Ukrainian negative experience with *Ivanov*’s PJ implementation.

#### 3.3.1 The stipulation of ‘systemic nature’ and Pre-PJ *Ivanov* general measures

Yuriy Nikolayevich Ivanov was a former military officer. On 22 August 2001, the Regional Military Court confirmed the Army’s debts and adjudicated *Ivanov* a lump-sum retirement payment. Similarly to the Russian situation, owing to the post-USSR transition period, both national Armies were de-facto the ex-USSR army, which did not see proper funding from the time of the USSR’s collapse. Consequently, *Ivanov* could not get the national court’s decision in his favour to be enforced due to the lack of funding. After four years, as the case originated in Strasbourg, in November 2008, the Court qualified it as being suitable for PJP applications<sup>186</sup> due to the justifiable suspicion of systemic problems in the Ukrainian legal system.

As was presented in the previous chapter, the issuing of PJP is conditioned by the explicit ‘existence of a structural or systemic problem’ and by favourable preliminary consent of the Respondent State. Referring to the earlier examined determines the structural nature of the violation, it is worth noting that the Court took into account both qualitative and quantitative indicators, based on the number of pending and delivered cases, interim resolutions of CoM.

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<sup>186</sup>ibid. *Ivanov*, para 5

Before PJ issuing, Ukraine had already three hundred judgments constituting the same violation and 1,600 pending cases. Turning to interim resolutions, only one has been adopted by the CoM. In the beginning of 2008, CoM drew the attention of the Ukrainian authorities to the increasing amount of similar applications relative to the State's failure to honour its debts, in particular 232 of them.<sup>187</sup> CoM noted with satisfaction that a range of adopted general measures addressing particular groups in problem sectors like educational sector employees, special budgetary line for the "Atomspetsdud" employees has been adopted. However, the most of promised legislative changes remain just drafts. For instance, the Government presented as argument the draft law aimed at abolishing the moratorium on the forced sale of property in which the state holds 25%.

The moratorium was and continues to be one of the Laws that forbid the sale of state and state-related property. On 31 May 2013, on this matter, the former Minister of Justice, Oleksander Lavrenovych, courageously and surprisingly clearly expressed his opinion just days before he was substituted. The former Minister regretfully pointed out that Ukraine was a unique country where there existed three valid Laws prohibiting the execution of national judicial decisions concerning State debts. The mentioned one on the Moratorium was adopted in 2001, excluding the State-related companies listed on the State Energetic Register from forced sale of their property in case of bankruptcy and debts owed to employees. Right after this one more appears, extending the exclusion to companies not listed on the Registry. And finally, the last drop seems to be the adoption of the law, which with the same effect concerns State-related companies with "special significance".<sup>188</sup> The majority of the draft initiatives alongside other measures loudly pronounced by the State before the CoM had still never been

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<sup>187</sup> Interim Resolution of the Committee of Ministers on the execution of the judgments of the European Court of Human Rights in 232 cases against Ukraine relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy, 6 March 2008;

<sup>188</sup> Ukraine is a unique country, where are the Laws prohibiting the execution of court decisions, 31.05.2013, [Ukraina – edinstvennoe gosudarstvo, gde est' zakony, zapreschajuschie ispolnjat reshenija sudov] interview in available in Russian at: [http://zn.ua/UKRAINE/ukraina-edinstvennoe-gosudarstvo-gde-est-zakony-zapreschajuschie-ispolnyat-resheniya-sudov-123207\\_.html](http://zn.ua/UKRAINE/ukraina-edinstvennoe-gosudarstvo-gde-est-zakony-zapreschajuschie-ispolnyat-resheniya-sudov-123207_.html);



adopted.

The Court wisely used those pre-PJ attempts and promises as favourable preliminary consent of the Respondent State to deal with the structural problem and went ahead with PJP application. However, when the time came to stipulate the structural nature, alike the Russian authorities, the Ukrainian Government started to argue the absence of it. In particular, they argued that cases have different causes of non-enforcement: shortcomings in national legislation, maladministration or lack of budgetary allocations. Finally, in the present case, the Government considered the omission of the State bailiff's office as the main reason for the constituted violation.<sup>189</sup>

Following the examination, on the one hand, no one argues the presence of the complexity of the national dysfunction with deep historical roots, the resolution of which looks like a chimera, degraded by the reluctance of the authorities. On the other hand, as was fairly stated by the Court, the national “*authorities hold fully responsibility for this state of affairs*”.<sup>190</sup> Despite the degrading conditions of the Ukrainian structural dysfunction, such a state of affairs could not be carried out any longer, neither by the Court with thousands of similar applications, nor, and most importantly, by the citizens of the country.

That is why, on 15 October 2009, the Court issued *Ivanov* pilot judgment against Ukraine, where ordered to implement a new domestic remedy with respect to the excessive length of enforcement proceedings and to provide *ad hoc* basis redress to all clone applications lodged with it before the delivery of the pilot judgment, which the Court decided to adjourn. One year was settled as the timetable for both tasks.

To make a long story short, in course of *Ivanov* execution CoM, been unsatisfied by the taken measures, adopted three Interim Resolutions: CM/ResDH(2010)222, CM/ResDH(2011)184 and Interim Resolution CM/ResDH(2012)234. And still in its Annual

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<sup>189</sup> *Ivanov* para 77;

<sup>190</sup> *Ivanov* para 55;

Report on 2013, CoM recognized the Ukrainian PJ *Ivanov* “as main problem so far”.<sup>191</sup> Moreover, according to the last information from the CoM, the PJP in *Ivanov* has been “terminated on the account of the failure to resolve the situation”.<sup>192</sup> In this context, the author considers it especially important to trace the contributory reasons of the Ukrainian negative experience as regards the question whether *Ivanov* can be considered a failure of PJP application.

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<sup>191</sup> 6<sup>th</sup> Annual Report of the Committee of Ministers 2012 (published April 2013), Supervision of the execution of judgments and decisions of the European Court of Human Rights, para 15-16;

<sup>192</sup> Steering Committee for Human Rights, CDDH report on the advisability and modalities of a “representative application procedure” CD DH(2013)R 77 Addendum IV of 21 March 2013; para 13-14, available at [http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH%282013%29R77\\_Addendum%20IV\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH%282013%29R77_Addendum%20IV_en.pdf)

### 3.3.2 The failure of Pilot Judgment *Ivanov*’s execution

The introduction of ineffective new domestic remedy became the first shortcoming of national authorities. On 5 June 2012 the Ukrainian Parliament adopted a new Law “*On State guarantees concerning execution of judicial decisions*” (“the Remedy law”) <sup>193</sup>, introducing the compensation procedures under which pecuniary debts under domestic decisions may be met by the State Treasury where the debtor State bodies, State companies, or companies with a ban on the sale of property fail to pay them in due time. The Act also provides for compensation when the authorities delay payments under those procedures.

In the light of the abovementioned, the effectiveness of the new Remedy law requires special attention. The Law just recently entered into force, and, moreover, has been amended on 19 September 2013.<sup>194</sup> Obviously, the Court has not given yet any reaction on the Amendments of the Remedy Law. However, the Court has provided its *prima facie* assessment of the Remedy Law, in its first post-*Ivanov* judgment, *Kharuk and others v Ukraine*. In particular, in *Kharuk* the Court stated that despite the earliness of a concluding opinion, the mere legal frame of the new Remedy Law “*do[es] not provide for compensation for the delays in the enforcement of domestic decisions which have already taken place*”.<sup>195</sup> The retrospectively of the domestic remedy is a indispensable requirement to the general measures taken by the Member State, which was developed from the very beginning of PJP. Otherwise, PJ would not achieve the Court-oriented aim – to deal with Court backlog.

***The second contributory reason*** of *Ivanov*’s failure is the fact that, unfortunately, Ukraine has failed not only the Court-oriented aim but also the applicant-oriented aim – to

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<sup>193</sup>Law of Ukraine “*On State guarantees concerning execution of judicial decisions* [Pro garantiji derzhavy shodo vukonannay sudovuh rishen] entered into force on 1 January 2013; <http://zakon2.rada.gov.ua/laws/show/4901-17>;

<sup>194</sup> Law of Ukraine on Amendments to some Laws concerning execution of judicial decisions of 19 September 2013[Zakon Ukrayiny pro vnesenya zmin do deyakyh zakoniv Ukrainu shchodo vukonannya sudovyh rishen’] <http://zakon2.rada.gov.ua/laws/show/583-18/paran17#n17>;

<sup>195</sup> HUDOC *Kharuk and others v Ukraine* [Committee], no. 703/05 and 115 other applications, judgment of 26 July 2012, para 18

provide the applicant with speedy redress. The Ukrainian Government, among other respondent Member States, during PJs execution met some difficulties to secure friendly settlement with the applicants of similar applications, including frozen ones - by this prolonging the already excessive length of the proceedings or non-execution as in the case of *Ivanov*.

Despite several granted extensions of the time-limits settled by the Court (which was 15 January, 2010) and CoM assistance, the Ukrainian Government has not succeed to deal with the list of about seven hundred communicated ‘frozen *Ivanovs*’ from the general amount of two thousand five hundred cases pending in the Court. Moreover, since 1 January, 2011, the situation deteriorated by the flow of new category *Ivanov* applications on the unpaid Afghanistan and Chernobyl social benefits and pensions, around one thousand of which have been lodged. Thus, no other choice was left for the Court than to “de-freeze” the adjourned cases<sup>196</sup>, on 21 February 2012. Otherwise, the Court would undermine its own requirement of reasonable time case consideration.

The possibility of de-frozen was explicitly mentioned by the Court in the earlier stage of PJP formation. In particular, in *Alisic and others* the Court explicitly stated that:

*If, however, the respondent State fails to adopt [general] measures following a pilot judgment and continues to violate the Convention, the Court will have no choice but to resume the examination of all similar applications pending before it and to take them to judgment in order to ensure effective observance of the Convention.*<sup>197</sup>

Following the resumption of the consideration of the suspended cases, the Court decided to reject the established practice of compensation by accounting 30 euro per month of non-enforcement, usually proposed by the Government in the unilateral declarations. In the post-*Ivanov* Committee decision *Kharuk and others v Ukraine* (116 applications), the Court launched a new practice of just satisfaction by unifying the sums in two groups: EUR 3,000 for

<sup>196</sup> Press Release ECHR 086 (2012) 29.02.2012 Court decides to resume examination of applications concerning non-enforcement of domestic decisions in Ukraine;

<sup>197</sup> HUDOC PJ *Alisic and others v Bosnia and Herzegovina* of 06 November 2012, para 97;

non-enforcement delays exceeding three years and EUR 1,500 for shorter delays.<sup>198</sup> The latter is quite understandable, since, as mentioned by S. Siroyezhko, the proposed Government compensation sum becomes too automatic and lost its aggregated approach,<sup>199</sup> causing a divisive effect on the applicants.

*The third determinant* of *Ivanov* failure is the storm of *Ivanov* new generation cases regarding other problem groups of non-enforcement - social aid beneficiaries: ‘Afghantzi’ (former military of Afghan war and their families) and ‘Chernobyltzi’ (involved in Chernobyl nuclear plant tragedy and their families). Thus, from November 2012, every month the Court has been receiving over 250 of those people, who having a valid court decision in their hands cannot get the payments they are entitled to.<sup>200</sup> Following this, the author would speculate that the current post-*Ivanov* cases arise not only from post-soviet roots, but also from modern populist promises of the authorities. The system of social aids used to swell before regular Parliament elections. The latter in conjunction with the flourishing corruption created the phenomena of the abuse of social payments and existence of a bulk of ‘fake’ Chernobyl’s liquidators – workers certificates, the same problem was suspected regarding the deceased Afghan warriors descendants.

A similar point of view was expressed by the former Minister of Justice of Ukraine, Oleksander Lavrenovych, underlining that the chronic non-enforcement problem was created not only by the existence of Laws prohibiting the execution, but also by swelling archaic system of social benefits and aids governed in Soviet traditions.<sup>201</sup>

Last but not least, the lack of public awareness and Mass media coverage contributes to the reluctance of the Ukrainian authorities in the course of *Ivanov* execution. Except for a hundred lawyers and service bailiffs directly dealing with PJP execution, neither politicians,

<sup>198</sup> *ibid.* Kharuk and Others; para 23-26;

<sup>199</sup> Interviews with Michael Siroyezhko from the Department for the Execution of Judgments of the ECtHR DGI – Directorate, Strasbourg, March, 2013;

<sup>200</sup> Interviews with Ganna Boichenko, Court’s Registry, lawyer responsible for the *Ivanov* cases filtration, Strasbourg, March, 2013;

<sup>201</sup> *ibid.* Interview with O.Lavrenovych;

bureaucrats of high-level rank, nor the Media actually know the ‘where the shoe pinches’ in the situation with *Ivanov*’s execution. On this matter, as the Director of the Ukrainian Helsinki Human Rights Union, Volodymyr Yarorskij, expressed the Government does not do a lot to publicise the *Ivanov* Judgment.<sup>202</sup> Obviously, in contrast to Polish Government, Ukrainian authority do not have any intention to inform a few million other potential Court’s applicants about the possibility to get at least individual compensation (1,500 or 3,000 euros). It should be noted that the media coverage and press discussion has increased since the last events such as the de-frozen cases and exceeding of budget finding for execution of Court’s decisions.

To sum up, taking into account the failure of the Ukrainian government on all three dimensions of PJP, no effective domestic remedy, no speedy redress of frozen cases and the flow of a new generation of *Ivanov* cases, brings us to the conclusion that the national authorities failed to address the structural problems of non-enforcement of domestic judicial decisions highlighted by the Court in its pilot judgment.

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<sup>202</sup> Interview with Volodymyr Yarorskij [in *ibid* Leach e et, p.146];

### 3.4 The Consequences of *Ivanov* PJ failure and its positive impact on Ukraine and further development of PJP

It is common sense to look for a penalty as a consequence of any failure. Thus, referring to the earlier described possible sanctions for State disobedience, Interim resolution or initiation of infringement proceedings should be waiting for the Ukrainian Government. Indeed, CoM adopted three Interim Resolutions concerning *Ivanov* PJ execution. However, as earlier argued they turned out to be ‘bite-less’ and the State continued to fail *Ivanov* PJ.

The next option was the initiation of *infringement proceedings*. However, the procedure is conditioned by the presence of an explicit ‘refusal’ to abide by a final judgement on the side of the State.<sup>203</sup> Consequently, its application to Ukraine is impossible since its Government have never refused to abide by a Court order. Moreover, “*rigorously committing itself to*” the full and timely enforcement, showing “*seriousness of the intentions of Ukraine and evidences the consistency and consecution of the steps it takes in this respect*”.<sup>204</sup>

However, the Court found a way out and brought to life one of the earlier discussed alternative approaches of the ‘middle ground’ sanction, imposing a financial burden on the failure – the State.

#### 3.4.1 ‘Expedited Committee procedure’ or ‘default judgment procedure’

Thus, the failure of Ukrainian *Ivanov* caused the launch of new procedural tool of the Court - Expedited Committee procedure corresponded to a ‘default judgment procedure’ as it has been latterly called in CDDH draft.<sup>205</sup> The procedure is built upon the PJP and WELK (well established case-law) competence of the Committee of three judges. The new tool was created in *Kharuk*

<sup>203</sup> *ibid.* Rules of the Committee of Ministers;

<sup>204</sup> DH-DD(2013)1051 Communication from Ukraine concerning the case of Yuriy Nikolayevich Ivanov and Zhovner group against Ukraine (Applications No. 40450/04 and 56848/00) of 11/10/2013;

<sup>205</sup> Draft CDDH report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court, Addendum I of 7 June 2013, para 23-33; available at [http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/DH-GDR%282013%29R4\\_Addendum%20I\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/cddh-documents/DH-GDR%282013%29R4_Addendum%20I_EN.pdf)

judgments with the launch of a new two-optional *just satisfaction* system: EUR 1500 or EUR 3000 if non-enforcement exceeds three years. The procedure is highly automated, since it does not preview any summary of individual cases, nor reference to friendly settlement, nor communication with the Respondent State. The Respondent State is invited to head directly to the unilateral declaration. Such judgment turns to be the ‘Table’ with separate lines, each of which represents an application. This is why in the Court the Registry’s lawyers used to call them ‘Table’ Judgments.<sup>206</sup>

In the light of expedited Committee procedure application, CoM, the Court and the Ukrainian Government have reached a ‘working agreement’ to deal with no more than 250 cases per month that do not to undermine the State Budget. Obviously, such an agreement leads to increasing the State Budget line for the Court’s judgments execution. From inaction of the procedure in eight months more than 1,500 cases have been resolved in this manner. However, the successes of the expedited procedure in the light of increase public awareness of *Ivanov* attracted a lot of new clone applications. Only in April 2013, the Court received 1,100 of them.

Following this, the author would stress the threat of further financial incapacity of the Ukrainian Government to provide the Court awarded just satisfaction. Evidence of the latter is the recently adopted, namely 25 July 2013, judgment on Just Satisfaction in the *Agrokompleks case* with a compensation sum of EUR 27 million<sup>207</sup>. The sum of debt literally undermined the execution of the Court’s decisions. The Ukrainian Budget line for the Strasbourg judgement execution in 2013 is only EUR 8 million, which is almost three times less than the mere *Agrokompleks* just satisfaction sum. The Court came close to its own record of compensation, the maximum sum awarded in 1994 to two petrol companies in cases against Greece is EUR 30 million.<sup>208</sup>

Up till 2013 Ukraine had been executing the Court’s judgements diligently in time. However, the cases such as *Agrokompleks* alongside the expedited Committee procedure brought the

<sup>206</sup> Steering Committee for Human Rights, CDDH report on the advisability and modalities of a “representative application procedure” CD DH(2013)R 77 Addendum IV of 21 March 2013; para 13-14;

<sup>207</sup> HUDOC Judgment (Just Satisfaction) *Agrokompleks vs Ukraine*; of 25 July 2013,

<sup>208</sup> *Not a Time for Action* [Delu ne vremja] on-line magazine “Comersant” <http://www.kommersant.ua/doc/2244010> and Court’s judgments on EUR 27 mln compensation and traditional digest, on-line magazine Yurliga article of 01.08.2013 <http://jurliga.ligazakon.ua/news/2013/8/1/95620.htm>;



Ukrainian government to the menacing edge of the non-execution of Strasbourg judgments.<sup>209</sup> For example, one of such summary judgments was *Feya MPP* with a total EUR 17 million of compensation.<sup>210</sup>

### 3.4.2 the Positive Impact on Ukraine and Further Development of PJP

Under the pressure of increasing financial payments and flow of ‘clone’ applications, Ukrainian authorities changed their attitude and finally adopted the amendments to the Remedy Law of 19.09.2013, which came into force on October 16, 2013. According to the Government, they fixed the main flaw of the original Law, the absence of the indispensable requirement of effective domestic remedy, its retrospective effect. The main aim of the amendment was to diminish the current Budget expenses, since, referring to the Broniowski experience, the sum provided through national compensation system is usually sensibly smaller.

Furthermore, on September, 23, 2013, right after the amendments to the Remedy Law, the Ministry of Justice of Ukraine aiming for an optimization of the execution of summary judgments, issued an Order “On adoption of Provisions on interaction of the State Bailiff’s Service of Ukraine and the Office of the Government Agent before the Court during its representation of Ukraine at the Court and the execution of judgments of Court”.<sup>211</sup>

Thus, owing to the wise combination of expenditure Committee procedure and increasing public awareness, the PJP actually reached its point of destination - the adoption of a national remedy, even in the absence of actual political will. In this way, the *Ivanov* execution one more time proves that successful implementation is achieved by constructive dialogue between the European and national bodies and ‘peer supervision’ of Member-States.

For the PJP development *Ivanov* PJ experience had a significant input. Inspired by the

<sup>209</sup> Segij Sedorenko, article ‘Oil versed into euros’ [Neft vulelas v evro] online magazine Kommersant <http://www.kommersant.ua/doc/2241118>

<sup>210</sup> HUDOC *Feya, MPP and others v Ukraine* (Application no. 27617/06 and 126 other applications), judgment of 21 February 2013;

<sup>211</sup> DH-DD(2013)1165 Communication from Ukraine concerning the case Yuriy Nikolayevich Ivanov (pilot case) and the Zhovner group against the Ukraine (Applications Nos 40450/04 and 56848/00) of 29/10/2012;

successful practice of the expedited Committee procedure, the Steering Committee for Human Rights continues its elaborations searching for more ways to optimise the Court's work in the direction of "representative application procedure".<sup>212</sup>

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<sup>212</sup> *ibid.* Draft CDDH report, Addendum I of 7 June 2013, para 28-29;

### 3.5 General remarks

The third chapter was committed to the Ukraine and Russia as countries that faced difficulties enforcing PJs against them. The author looked into the particularities of execution in *Burdov* and *Ivanov*.

The author came to the conclusion that the problem raised in *Burdov* was not entirely resolved, since the non-enforcement continues to be one of the biggest problems in Russia, among others such as the Remedy Law limitation on other State obligations than simple payments from public funds, like housing, its maintenance or repair services, supplying disabled with a car etc. However, the introduced compensation mechanism provides citizens with adequate domestic remedy, embedding subsidiarity principle of the Convention. Moreover, both the Court and CoM were satisfied with the compensation system as a whole, nonetheless keeping reservations about Remedy Law limitations.

As regards *Ivanov*, the author argued that the negative experience with *Ivanov* was the first failure to execute PJ, referring to the following findings. *Ivanov's* failure was caused by the Ukrainian government's mistakes and omissions in its execution, such as the adoption of a new domestic remedy as ineffective and incapability to cope with "de-frozen" the repetitive cases and flow of new *Ivanovs*, which left the State on the edge of being financially incapable to redress. At the same time, despite PJ *Ivanov* shortfalls, the PJP application to Ukraine had positive impacts not only on Ukraine, but also on further development of PJP in the direction of "representative application procedure".

Thus, dealing with common systematic violation – non-enforcement or prolonged non-enforcement of national court decisions, the two countries have now reached opposite points in their PJs execution.

## Chapter IV Synthesis and Conclusions

The conducted research shows that PJP is neither a panacea nor a dead-end for Europe. Yet PJP is definitely the “penicillin” for the plague of the twenty-first century – the systemic violations and structural dysfunctions of the national systems. The author is confident that PJP has the potential to cope with this task since PJP proves to be flexible and adapting. The procedural institution initiated as a response to the structural or systemic problems currently became a start-up for the new Court’s procedures as a default judgment procedure. The extended Court’s remedial competence with prima facie review, default judgment procedure and infringement proceedings combined with success determinants ensure positive PJP application.

### 4.1 *Burdov –Ivanov* PJP application

The conducted research shows that the *Burdov – Ivanov* application of PJP was explorative and innovative due to the following circumstances: To start with, in contrast to previously issued PJs, *Broniowski*, *Lukenda*, *Xenides-Austis* and *Hutten-Czapska* concern either incompatible provisions with the ECHR or flaws in the national legislation, sometimes derogated by the maladministration. Diametrically opposite is the *Burdov* and *Ivanov* PJs, where we can find all together the national judiciary and disrespect for its decisions, Bailiff Service and its inefficiency, lack of clarity between federal and local budgeting and disbursement of monies, and a range of other crucial elements of the complex State’s mechanisms.

The Court itself noted that such legal dysfunctions:

*do not stem from a specific legal or regulatory provision or particular lacuna in Russian Law. They accordingly required, possibly of a legislative and administrative character involving various authorities at both federal and local level*<sup>213</sup>

Following this, the author shares the concerns expressed by the incumbent Ukrainian judge, Ganna

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<sup>213</sup> *ibid.* *Burdov* (No2) Para 136;

Yudkivska, that the PJP is more appropriate for uncomplicated violations caused by uncomplicated legislative shortcomings rather than to “a combination of structural factors” as in the Russian - Ukrainian case.<sup>214</sup>

Moreover, the comprehensive research of the present PJP case practice demonstrates that the complexity of such dysfunctions is attributed only to the Russian PJ, *Burdov* and Ukrainian PJ *Ivanov*. As was noted before, although the Court in QPJ had raised the elements of the common Russian and Ukrainian legal dysfunction before, still, they had only done so separately. Namely, the excessive length of proceedings (Art.6.1) in *Faimblat*<sup>215</sup>, *Lukenda*, *Ramadhi* and *Scordino*; and the right to compensation for expropriated property in *Driza*<sup>216</sup>, *Katz*<sup>217</sup>, *Viasu*<sup>218</sup> and *Xenides-Arestis*<sup>219</sup>.

In addition, if bearing in mind the time when *Burdov* and *Ivanov* were issued, the premature nature of PJP and its pre-codification should be noted. Up till now, such complexity of national legal dysfunction has been embraced only within the Russian and Ukrainian PJs. And still the Russian PJ remains the more complicated example due to the derogation’s enormous size and federation form of the state.

Next, non-enforcement was and continues to be the most grave and widespread problem that the Russian Federation and Ukraine have ever faced. In contrast to other similar widespread and well-recognized systemic problems in some old-signer Member States, such as the excessive length of proceedings, the Court did not lose its nerve and embraced Russian and Ukrainian structural dysfunction. Following this, the Ukrainian - Russian “structural nature’ has common historical roots. Owing to the post-USSR transition period, both countries faced the collision between the promises of modern politicians and remained archaic systems of social benefits and aid.

And finally, in comparison to the first PJ *Broniowski*, which involved an ‘identified class of citizens’, the *Burdov* and *Ivanov* situation is ‘open-ended’ since it affects thousands of other people

<sup>214</sup> Interview with Ganna Yudkivska, 29.01.2010, in Leach et al, p148;

<sup>215</sup> *ibid. Faimblat*;

<sup>216</sup> *ibid. Driza*,

<sup>217</sup> *ibid. Katz*,

<sup>218</sup> *ibid. Viasu*;

<sup>219</sup> *ibid. Xenides-Arestis*;

with decisions adjudicated in their favour against the State. The original Russian-Ukrainian systemic violations concern the former military, however the following post-PJ applications shows application of PJs general measures to other social groups such as ‘Chornobyltzi’ or ‘Afghantzi’.

Thus, Russian and Ukrainian PJs indeed have a lot in common. However, *Burdov* reasonably received a smoother execution owing to a range of circumstances: First of all, the adoption of the Compensation law, alongside a range of other general measures, started far before the issuing of PJ *Burdov*. In contrast, Ukrainian authorities, who not only neglected the preparation of the draft, since the issuing of *Ivanov* was far from being surprising, but exceptionally disregarded the deadline settled by the Court in the operative part of PJ, namely 15 January 2011, and the latest two extensions in six months granted by the Court. Ukrainian Remedy law entered into force on 1 January 2013, with two years delay.

Secondly, the *Ivanov* non-enforcement problem argued to be more widespread and present-day. Compared with the Russian PJ *Burdov*, before which the Court delivered two hundred cases, Ukraine had already 300 judgments constituting the same violation and 1,600 pending. Moreover, taking into account the difference in size of the countries, the situation in Ukraine was clearly worse.

Then, the Russian authorities, assisted by the ‘Pavlov dog’ reflex and pre-PJ general measures adopted in the frame of *Burdov (No1)*, succeeded in setting up a new compensation mechanism within one year after the *Burdov* PJ became final. That still was done with a six months delay, since the Court prescribed for the Russian Government the unusually short term in six months. Moreover, despite the exclusion of the class of obligations like housing, the Russian authorities, integrating the retrospective effect of the Compensation Act as an indispensable element of the effective domestic remedy, ensured its positive assessment from the side of the Court.

Next, the Russian Government, in contrast to its Ukrainian ally, managed to calculate the compensation sums in a complex manner, taking into consideration the particular circumstances of the case, such as the extent and gravity of the violation. Thus, the Court has never rejected sums

proposed by Russian Government in unilateral declarations. In Ukrainian post-PJ decision like *Kharuk and others v Ukraine* (116 applications)<sup>220</sup>, the Court considered the proposed sums lacking individual circumstance assessment and to be too automatic. Consequently, the Court launched new, unfavourable to the Ukrainian Government, practice of just satisfactions.

And finally, alike the Ukrainian PJ *Ivanov*, the Court held with piecemeal policy taking care of a few hundred cases in one category at a time, dividing the backlog and not creating excessive pressure neither on the Court's Secretary, nor on the Respondent State's staff and budget. We should admit that rapid decisions of all similar pending cases would just blow up the annual budget prescribed for the enforcement of the Court's judgments.

To conclude, the conducted research shows that in comparison to the other two jurisdictions under consideration, the Ukrainian experience is reasonably considered to be a 'failure'. Indeed, on one side of the coin, the PJP's "acid test" visualized the weakness of the Ukrainian post-communist legal system, based on empty pre-election promises and continuing budget deficit for their realization. Unfortunately, *Ivanov* made evident the double-face of the national authorities, who initially welcomed the issuing of international assistance in the resolution of the structural problem, in fact it supported it with a range of valid Laws and prolongation with adoption of the effective Remedy law. However, on the other side of the coin, the mere fact of the PJ identification of a systemic problem and the issuing of full PJ creates international political and legal pressure on national politics. Further execution PJP against Ukraine increased public awareness and media coverage of the endemic structural problem and the possibilities to receive justice abroad.

Consequently, under the pressure of increasing payments, the Ukrainian authorities changed their reluctant attitude and actually amended the Remedy Law, which is still to be assessed and observed in practice. Reflecting on this, the author definitely does not recognize the failure of Ukrainian authorities to execute PJ *Ivanov* as a failure of PJP application. Since, the mere application of PJP and its followed-up execution brings the country positive development and

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<sup>220</sup> *ibid. Kharuk and Others*;

pushes it forward.



## 4.2 PJP formula for success

On the basis of the conducted research, two main determinants of successful PJP application can be identified. The first is the historical predisposition and following it the strong political will and enhancing civil society participation.<sup>221</sup> In contrast to the Polish *Broniowski*, history played against *Ivanov* and *Burdov* PJs. If in the case of Poland, the call for historical justice played in favour of *Broniowski* execution, Ukraine and Russia as post-communist States partially kept their archaic rules of the untouchable State and state-related property compounded by the archaic system of social benefits and aid. In addition, the Ukrainian authorities prefer to ‘payoff’ the violation, providing *just satisfaction* to applicants, rather than engage in time-consuming reform of the whole system.

The second determinate is the solid implementation structure. The implementation problems of most countries start from the failure of the basic management rule – ‘everyone’s task is nobody’s task’<sup>222</sup>. In the case of the Russian JP, the Russian public interest lawyer Olga Shepeleva named more than five main authorities from the Supreme Court to the Ministry of Finance entrusted to implement the Convention, however none of them had the leading role. The situation in Ukraine was even worse since the Government Agent before the Court is primary responsible for the execution in fact does not have real power in hands and cannot fully influence the rest of the Cabinet of Ministers. In contrast to them, Poland is where the implementation process is the immense responsibility of the Government.

Thus, the keystone of the effective structure is the existence of a leading powerful political institution responsible for the Convention’s implementation.<sup>223</sup> Stressing authority with real political power, the post-communist tradition of Ukraine and Russian shows us the illusory, created on the paper of Law bill that is far from reality. Although Ukraine belongs to the prudent countries with a separate Office of the Government Agent, the arsenal of the Government Agent’s influence is

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<sup>221</sup> *ibid.* OSJI Briefing paper;

<sup>222</sup> *ibid.* OSJI Report from Right to Remedies, pages 48;

<sup>223</sup> *ibid.* OSJI Report from Judgment to Justice, pages 55-57;

scarce and not sufficient for actual political standing.<sup>224</sup>

Another valuable element of the solid implementation mechanism is a liaison common body, taking for example the Polish Inter-Ministry committee.<sup>225</sup> In contrast to Ukraine, Russia followed this positive experience and formulated upon the President's initiative a working group from the representatives of the principal State bodies.<sup>226</sup>

The third determinate of PJP success is increasing *Amicus curie activity* - participation of NGOs and NHRIs through the Rule 9 submission. From three jurisdictions, the issue is more timely to the last two due to the time of Rule 9 launch. Thus, Ukrainian NGOs had submitted only two and both to the case of the fired Constitutional Court judge *Volkov*.<sup>227</sup> The Russian Federation has 33 submissions, but none of them on the non-enforcement structural problem.

In both countries, the explanation can be seen in the deep distrust to the Governments' actions, owing to the years of their superficial Action Plans and empty promises. However, we should not forget that within the national authorities the 'forces' always exist which are in favour of embracing the problem and do not imitate their efforts. The constructive way is through cooperation with those who wish to work together, like the Government Agent before the Court and the Constitutional Court in the case of Poland or the Commissioner of Human Rights in the case of Ukraine.

In the course of the present research the increasing of *Amicus curie activity* for CoM have been identified, such as the creation of a joint working group with a CoM mandate. In particular, the Open Society Justice Initiative taking part in Drafting group 'E' on the reform of the Court, prepared a briefing paper to the 5<sup>th</sup> meeting of CDDH held on 29-30 October, 2013. The brief included a short observation on the supervision of the execution of Court judgments and minutes of the meeting on working with Civil Society to supervise the execution of ECHR judgements, which

<sup>224</sup> *ibid.* OSJI Report from Judgment to Justice, pages 34;

<sup>225</sup> *ibid.* Ilchenko Ivanna, p.18;

<sup>226</sup> *ibid.* Russian Memorandum of 2006;

<sup>227</sup> HUDOC Oleksandr Volkov against Ukraine, judgment of January 1st, 2013.

took place in Strasbourg, November 16, 2012.<sup>228</sup>

During the above meeting, the country representatives expressed their warmest welcome to rule 9's submissions as a source of objective opinion and reliable statistical information. However, the German Representative rightfully pointed out that "*civil society could make more use of CoM adopted decisions*".<sup>229</sup> The main hindrance for this is the close procedure of the CoM discussion, which requires a unanimous vote to open it to a third party. The permanent access of civil society groups to the exclusively country representatives political body is difficult to imagine. However, it is certainly possible since, in 2001, the European Group of NHRIs gained permanent observer status.<sup>230</sup> The latter includes 40 NHRIs and currently is in the process of further extensions and crystallization. In the author's opinion, an exploration of Rule 9's potential, would endorse NGOs contributions to the Court's judgments execution process.

To conclude, the political will of the national authority is not the one and only determinant of successful PJP application. The Government Agent Office with political standing, spread amicus curie activity and Media coverage enhancing public opinion are decisive in its success or failure as well. The Court with its innovative PJP seems like a 'man far beyond his time'. Hence, favourable politicians and civil society groups are highly recommended to consolidate their forces and catch up with the Court.

In the case of an absence of such successes determinants it is for the European and national bodies to bring to life a concept of "Legal peace" through continuing and constructive dialogue between the parties aiming to build the solid implementation mechanism and increase civil society participation.

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<sup>228</sup> *Ibid.* Appendix to OSJI Briefing paper;

<sup>229</sup> *Ibid.* OSJI briefing paper see above, page 14;

<sup>230</sup> *Ibid.* OSJI briefing paper see above, pages 20;

### 4.3 Concluding remarks

To sum up, the conducted assessment proved that the launch of PJP changed the disposition of powers within the Convention mechanism since the remedial competence. The latter, as part of the judgment's execution, moved from the mere political body, the Committee of Ministers, to the judicial competence of the Court. The codified PJP gave to the Court the power not only to identify the systemic problem but also to give guidelines for compulsory national remedies required to be adopted within a particular period of time. In this way, the remedies and timetable stipulated by the Court got legally binding effect. The execution of which is no longer a subject for political discussion in CoM but is the clear legal order of the Court. That's why such a shift leads to the political reluctance of the respondent Government to execute such an international order, thus putting under threat the execution of PJ itself.

Later, PJP rescuing the Court from its own 'success', case overload, became the Court's de-facto 'time manager' with such new gadgets as 'frozen repetitive application' and 'Table judgments'. And despite the fact that, PJP goes far beyond the individual case to more collective consideration, endangering by that the individuals concerns, PJP primary helped not the Court to deal with its backlog but rather the countries to resolve their national dysfunctions of legal systems.

From the very begging, the PJ *Broniowski* panacea healing tricked the author with the possibility of finding a PJP success formula. As a matter of fact, integrating a comprehensive analyse of the Polish success comparing with more negative Russian and Ukrainian experience of PJP application, gave rise to defining two main determinants of the PJP success formula: historical predisposition and well-structured implementation mechanism.

In the case of lack of such favourable determinants, the author stressed the importance of the collaboration between the European and national bodies to develop them. Thus, although Russia and Ukraine faced problems in the course of PJs' execution and prolonged non-enforcement continues to exist, PJP proved to be flexible and adaptive enough to move countries forward in

resolving their national legal dysfunctions. However, *Ivanov* and *Burdov* had remarkable impact not only on the countries but also on further development of PJP in the direction of “representative application procedure”.

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