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NON-ENFORCEMENT OF DOMESTIC JUDGMENTS AS A HUMAN RIGHTS VIOLATION IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS: TACKLING SYSTEMIC PROBLEMS IN MOLDOVA, RUSSIA AND UKRAINE

by Daria Pistriak

LL.M Thesis
Professor: Jeremy McBride
Central European University
1051 Budapest, Nador utca 9,
Hungary

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EXECUTIVE SUMMARY

The present thesis is dedicated to the question of effectiveness of the pilot judgment procedure developed by the European Court of Human rights to tackle systemic problems. To try to answer this question it examines three 2009 pilot judgments – against Moldova, Russia and Ukraine – regarding the violations of Articles 6 (1) and 13 of the Convention as well as Article 1 of Protocol 1 on account of the non-enforcement of domestic judgments.

The thesis, first, provides an analysis of the development of the Court's jurisprudence regarding the right to enforcement of a judgment and how it was influenced by the accession to the Convention of the Central and Eastern European states. Further, it examines in detail the three pilot judgments, focusing on the Court's orders in respect of general measures and their execution by the respondent Governments. Based on this analysis it will show that, while the pilot judgment procedure can be effective in some cases, in other cases it has limited impact which is highly dependent on the nature of the problem at stake. In particular, it is better suited to tackle more straightforward violations rather than complex and multifaceted ones. Moreover, its application, while having a good intention of helping a State to cope with a human rights problem, can "backfire" on the populations.

The thesis will conclude that out of three counties under scrutiny only one – Moldova – can be said to have successfully implemented the pilot judgment. This will illustrate the problem that where the respondent State fails to implement a pilot judgment, the authority of the Court and the effectiveness of the whole Convention system are severely undermined. Clearly, the pilot judgment procedure has a potential, but there is a need in constant improvement and more experience in the coming years to ensure its effectiveness.

LIST OF ABBREVIATIONS

The Convention, the ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms

The Court, the ECtHR – the European Court of Human Rights

The Committee of Ministers – the Committee of Ministers of the Council of Europe

INTRODUCTION

The Convention system is a unique mechanism for the protection of human rights due to the functioning of the European Court of Human Rights which task is to ensure that the High Contracting Parties observe their engagements. While it is competent to interpret and find violations of the Convention based on the individual complaints, the significance of the Court's findings often goes beyond an individual case. The more the Court deals with the cases that raise systemic problems the more the domestic legal order at large is implicated. In particular, faced with the growing number of the repetitive applications evidencing the existence of a systemic problem in a particular country the Court developed a special mechanism – the pilot judgment procedure – through which to address these issues.

The primary purpose of the pilot judgment procedure is, in the words of the Court itself, "to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the Convention right in question in the national legal order"[1]. To achieve this end, in a pilot judgment the Court will order the respondent state to take individual and general measures to resolve the problem. While the Court will not order *particular* measures to be implemented, the pilot judgment procedure still goes well beyond the settled practice of adoption of the declaratory judgments. Thus, in the pilot judgment procedure, the pressure on the respondent State is much bigger than in the regular procedure as, accordingly, is the Court's intrusion into the domestic affairs. This has a profound effect on the respondent States' eagerness or willingness to implement the Court's judgments, especially those exposing long-present, deep-rooted and often costly systemic problems.

While it is hard to say in precise numbers how many pilot judgments were implemented and how many were not (for, in the first place, the pilot judgment procedure itself is multifaceted encompassing different types of judgments), it can reasonably be

[1] See, *Hutten-Czapska v Poland*, application no. 35014/97, judgment of 19 June 2006, § 234.

contended that the pilot judgment procedure is not a panacea. It is for this reason that in the recent years the effects and the implementation of the ECtHR pilot judgments have attracted increasing interest among practitioners and the academics alike. The core question of the respective studies, as well as of the present research, is as follows: "Can the Court effectively address systemic problems and what are the limitations?"

To try to answer this question, the present thesis focuses on the three 2009 pilot judgments – against Moldova, Russia and Ukraine – regarding the violations of Articles 6 (1) and 13 of the Convention as well as Article 1 of Protocol 1 on account of the non-enforcement of the domestic judgments. This particular example is a very telling one for several reasons. First, the countries under consideration have a pretty similar general political and economic background. Secondly, the underlying problems giving rise to the non-enforcement complaints in all the three countries connected to the social rights. Thirdly, the time-frames are very close (but still distinct): while all the three pilot judgments were adopted in the same year, the time-frames for their implementation vary considerably. And fourthly, the follow-up measures taken by the respondent Governments have many similarities. This allows establishing parallels and making effective comparisons between the cases.

The thesis proceeds in three chapters. The first is dedicated to the question of how the Court arrived at the decision to include the right to enforcement of domestic judgments into the scope of protection of Article 6 of the Convention supplying currently, under the fairness and the length of proceedings head, most of the violations found by the Court**.** It is in the length of proceedings cases that the present thesis will trace first articulations of the right to enforcement of judgments. It will show how the scope of the length of proceedings cases has been substantially widened since the adoption in the early 1990th of the first judgments where the Court dealt with the issues of non-enforcement. In those cases the Court acknowledged that when determining the overall length of the proceedings for the purposes of Article 6 of

the Convention the length of the enforcement stage shall also be taken into account. These early cases did not provide for the separation of the enforcement-related issues from the length-of-proceedings violation and it was not coupled with the violations of Article 13 and Article 1 of Protocol 1. The shift seems to come with the adoption of the *Hornsby v Greece* judgment[2], in which the right to enforcement – something not evident from the text of Article 6 – was acknowledged as an element of the right to a fair trial requiring specific protection. A cardinal change, however, came with the accession to the Convention of the Central and Eastern European (mainly post-Soviet) states inheriting major systemic problems from the previous regimes. Since then, Albania, Moldova, Poland, Romania, Russia, Ukraine and some other countries have been holding first places in the numbers of judgments finding the violations on account of the non-enforcement of domestic judgments. Thus, the chapter will conclude by looking into the reasons and the scale of this problem and how the Court's functioning was affected by this enlargement. This will prepare the ground for the comparative study of the three pilot judgments adopted by the Court in 2009 in respect of those countries that were the source of the most of the non-enforcement complaints: Moldova, Russia and Ukraine which will be included into the second Chapter.

As the nature of the pilot judgment procedure has already been analyzed in the rich academic literature, Chapter II will start only with a short overview of the basic information on the pilot judgment procedure. Further, in the three country-specific sub-chapters Chapter II will provide a comparative analysis of the pilot judgments and, most importantly, the follow-up measures taken and their critical assessment. Each sub-chapter will have a similar structure, first outlining the underlying problems leading to non-enforcement, then describing the Court's findings and orders, highlighting differences and similarities in the Court's approaches. Such structure will be used to emphasize the pretty similar political and

[2] See *Hornsby v Greece*, application no. 18357/91, judgment of 19 March 1997.

economic background in the countries under scrutiny. Namely, emerging from the Soviet past these States faced major political and economic turbulences: instable and populist governments, corruption, and transformation from the planned economy to the capitalist system. In this period of political and economic stagnation a Soviet legacy of the massive socially oriented legislation would become a major problem: in Moldova it will be the legislation providing for the right to social housing for numerous categories of persons, while in Russia and Ukraine this will be all sorts of social payments and benefits ranging from maternity leave payments to pensions. Unable to ensure the availability of funds necessary to cover the respective expenses and thus creating huge amounts of indebtedness due to thousands of creditors, the Governments in Moldova, Russia in Ukraine will find their actions challenged not only before the national courts but before an international body. Other reasons, except for the lack of funds, that played the role in the occurrence of this problem, will also be addressed.

The country-specific sub-chapters will than focus on the measures adopted in response to the pilot judgments and the achievements and failures that have taken place throughout the more than 7-year long period that has passed since their adoption. Using the memorandums and decisions of the Committee of Ministers, information from the NGOs, national human rights institutions and other sources the thesis will examine in detail the measures adopted by the Governments and their effectiveness. At this point it seems that the only successful example is Moldova: the remedy law adopted by the Parliament was welcomed by the Committee of Ministers and the Court finds non-enforcement complaints against Moldova inadmissible on account of the existence of the (effective) domestic remedy. However, as we shall see, this success is not without qualification. The situation in Russia and Ukraine seems to be much more complicated, with non-enforcement rooted not only in

the financial possibilities of the State but also in deficient legislation and administrative practice and thus requiring a complex approach.

All three examples will nevertheless show how the efforts of the respondent Governments to comply with the pilot judgments depend upon 1) the nature and limitations of the pilot judgment procedure and of the international jurisdictional setting in general; 2) economic situation in the country and 3) political will. With the latter considerations in mind, the final Chapter of the present thesis will look into the lessons that one can learn from the comparative study done and provide, – if not a clear answer –at least the points of departure to answer the core question of this research.

Thus, in Chapter III it will be shown that, while the pilot judgment procedure – designed specifically to tackle systemic problems in the Member States – can be effective in some cases, in other cases it has limited impact which is highly dependent on the nature of the problem at stake. In this context, it will consider the question of the effectiveness of dealing with systemic violations through the prism of the individual complaint procedure. The individual complaint procedure is what makes the European system of human rights protection so successful. But when it comes to tackling systemic problems its disadvantages and limitations become apparent. Using the States experiences in implementing remedial measures within set time-limits, it will also be shown that the Court's time-limit orders in the pilot judgment procedure, though a necessary tool, appeared to be ineffective in practice. Consequently, some suggestions on how to overcome this problem will be advanced. Finally, in the context of execution of the pilot judgments the question of the relationship between remedial (compensatory) measures *per se* and root-cause elimination measures will be addressed. The Court, being governed by the principle of subsidiarity, does not and cannot prescribe certain measures to be adopted, and thus it accepts both purely compensatory measures as well as those aimed at elimination of the root-causes of the violation should the

State opt for one or another. Based on the analysis of the pilot judgments it will be contended that in the case of non-enforcement problem in the countries under consideration the final resolution of the problem is (almost) inconceivable without abolition of the social rights that give rise to the indebtedness and non-enforcement. As two of the three countries opted for this way (with some peculiarities in the Ukrainian case) the question whether the justice has indeed been done to the population arises.

CHAPTER I DEVELOPMENT OF THE ECtHR CASE LAW ON THE ENFORCEMENT OF DOMESTIC JUDGMENTS

A. Introduction

This chapter will look into the issues of the enforcement of domestic courts judgments in the context of the Convention and the case law of the ECtHR. As the right to enforcemet of a court judgment is not on the face of Article 6 of the Convention, the intention is to trace the origins of this right from its first articulations in the reasonableness of the length of proceedings cases and up to its emergence into a separate element of the right of acces to court and, thus, a separate Convention violation. Further, this Chapter will show how the Court's functioning was affected by the accession to the Convention of the Central and Eastern European states and the emergence of the non-enforcement into a strutural problem leading to the adoption of the first pilot judgments. Overall, the Chapter will try to demonstrate the link of the right to enforcement to democracy and the rule of law and its importance for human rights protection.

1. Reasonable time requirement as a fair trial guarantee under Article 6 and the enforcement proceedings

Article 6 is currently the most popular article of the ECHR in terms of the numbers of applications lodged as well as judgments delivered. According to the summary of statistics in the Overview 1959-2014 prepared by the Court, more than 42% of all the violations of the Convention concern Article 6, whether on account of the fairness or the length of proceedings.[3] Fairness is an overarching requirement[4] of Article 6 (1) according to which: "[i]n the determination of his civil rights and obligations (…) everyone is entitled to a *fair*

[3] Overview 1959-2014 prepared by the European Court of Human Rights, February 2015, p. 5. Available at: http://www.echr.coe.int/Pages/home.aspx?p=reports&c=.
[4] Doobay, Anand, "The Right to a Fair Trial in Light of the Recent ECtHR and CJEU Case law," *ERA Forum* Volume 14, no. Issue 2 (July 18, 2013), p. 252.

(...) hearing (…) by (…) [a] tribunal*"*[5]. It is further developed in a number of specific requirements which must be met for the trial to be considered fair. The fairness requirement holds a prominent place in the Court's case law being referred to as one of the cornerstones and fundamental principles of a democratic society.[6] The overarching nature of this requirement is also shown by the fact that the Court considers the proceedings in their entirety and apart from finding a violation of a specific requirement of Article 6, e.g., the right to counsel (Article 6 (3)), the Court would also find a violation of Article 6 (1).[7]

The length of proceedings is one of the specific aspects of fairness. Article 6 (1) refers to the length of proceedings requirement by stating that the determination of civil rights and obligations shall be made via fair hearing before the court *"within a reasonable time"*. The reasonable time rule under the Convention emphasizes the need for administering justice without delays. In its case law the Court has repeatedly underlined that the practice of States not in line with this requirement "might jeopardize the effectiveness and credibility of justice".[8] Thus, it is incumbent upon the States to organize their legal systems so that they meet this requirement. In this context the reasonable time rule is not only an individual right, but also a general interest**.**[9]

[5] Article 6 (1) ECHR (emphasis added).
[6] See, for example, *Stanev v. Bulgaria*, application no. 36760/06, judgment of 17 January 2012[GC], § 231 and *Pretto and Others v. Italy*, application no. 7984/77, judgment of 8 December 1983, § 21.
[7] See, for example, *Iglin v Ukraine*, application no. 39908/05, judgment of 12 January 2012 (violation of Article 6 (1) in conjunction with Art 6 3 (b) and (c) of the Convention).
[8] See, for example, the judgments in the cases of *H. v. France*, application no. 1003/82, judgment of 24 October 1989, § 58; *Scordino v. Italy* (no. 1), application no. 36813/97, judgment of 29 March 2006 [GC], § 224.
[9] Brems, Eva, "Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms," *Human Rights Quarterly* 27, no. 1 (2005), p. 325-326. Analyzing the conflict between the right to equality of arms and the reasonable time requirement in the *Wynen v Belgium* case where the applicant was not allowed to submit any documents within two months from the date of the registration of the criminal case (a legislative provision aimed to deal with the backlog of cases in the Court of Cassation) the author notes that: "if the judicial system is to function adequately, the backlog of cases must be restricted and protracted procedures must be avoided. Because every protracted procedure contributes to increasing the judicial backlog in particular before a court that is the only one of its kind, such as the Court of Cassation there is an indirect impact on the rights of many other persons: those who are at that time involved in a procedure before the Court of Cassation or who will be in the future".

Couched with reference to reasonableness, which is a vague term in itself, the length of proceedings requirement acquired its scope and current understanding in the case law as well as in a number of scholarly and practice documents[10]. It is a common position that the reasonable time requirement does not set a term or concrete maximum/minimum time limit. Rather it is an "operational and interdepartmental instrument susceptible to settle a measurable «target» for the length of proceedings".[11] When considering whether or not the reasonable time requirement has been violated in a particular case the Court will take into account three major sets of factors: the complexity of the case, the conduct of the parties (the applicant as well as the court and other authorities), and what was at stake for the applicant, i.e., the importance of the dispute for the applicant.[12] These elements shall be assessed in the light of the circumstances of the concrete case and in respect of the entirety of the proceedings.

In the latter context it is crucial to establish the extent of the period to be taken into account. Its starting-point is the moment the suit is brought before the court, with some exceptions in cases where an administrative authority is involved prior to the court proceedings.[13] In the latter case the period to be considered will also include such preliminary administrative procedure. However, for the purpose of the present research, the ending-point of the relevant period is of the major interest. As it was established by the Court, the whole of the proceedings shall be covered up until the final disposal of a dispute, including any appeals.[14] Notice, however, that assessing the reasonableness of the length of proceedings the

[10] See, for example, the Compendium of "best practices" on time management of judicial proceedings prepared by the European Commission For The Efficiency Of Justice, CEPEJ(2006)13, available online.
[11] Roghină, George Eduard, "Fair Trial In An Optimum And Foreseeable Time» Council Of Europe's Recommendation Through European Commission For The Efficiency Of Justice And Express Legal Provision In The New Romanian Code Of Civil Procedure," *Juridical Current* Vol. 15, Issue 2 (2012), p.51.
[12] See the Courts settled case law, for example, *Silva Pontes v. Portugal*, application no. 14940/89, judgment of 23 March 1994, § 39; *Comingersoll S.A. v. Portugal*, application no. 35382/97, judgment of 6 April 2000 [GC], § 19 and *Frydlender v. France*, application no. 30979/96, judgment of 27 June 2000 [GC], § 43.
[13] See, for example, *Poiss v. Austria*, application no. 9816/82, judgment of 23 April 1987, § 50 and *König v. Germany*, application no. 6232/73, judgment of 28 June 1978, § 98.
[14] Ibid.

Court would also take into account those stages in which the substance of the dispute is not resolved, but which are *subsequent* to the judgment on the merits. Such stages are aimed at finally settling the dispute and are in connection with it, and might even entail the adoption of a separate decision without amending the judgment on the merits of the dispute. Thus, the rule is that the period to be taken into account does not stop running until "the right asserted in the proceedings actually becomes effective".[15]

The first examples of the Court's case law where it considered the stage of proceedings subsequent to trial as falling into the period to be assessed for the purposes of establishing the reasonableness are the Portuguese cases *Guincho v Portugal*[16], *Martins Moreira v Portugal*[17] and *Silva Pontes v Portugal* (cited above), dating back to late 1980th-early 1990th. In these cases the applicants were entitled under the domestic courts judgments to certain payments, but under the national law their precise amount was to be determined within the procedure of the "execution" of judgments. While the respondent Government contended that the initial judgments delivered in the applicants' favour were "*final decisions*" for the purposes of Article 26 of the Convention and the enforcement proceedings could not be regarded as a second stage of the declaratory proceedings, being rather separate proceedings, the applicants argued, on the contrary, that their claims for damages could be ultimately resolved only after the payment was done in the enforcement proceedings. [18]

[15] See, for example, *Estima Jorge v. Portugal*, application no. 24550/94, judgment of 21 April 1998, § 36.
[16] *Guincho v. Portugal*, application no. 8990/80, judgment of 10 July 1984.
[17] *Martins Moreira v Portugal*, application no. 11371/85, judgment of 26 October 1988.
[18] A remark shall be made here, as at the material time was no consensus among the legal writers as to the nature of the execution (or enforcement) proceedings under the Portuguese legislation. According to Article 4 of the Code of Civil Procedure of Portugal provided in translation in the *Silva Pontes* judgment there were two types of actions: declaratory and enforcement actions. While declaratory actions aim at assessing, ordering or creating a right, enforcement actions ensure the effective reparation for the violation of the right. In subsequent enforcement proceedings the court may also determine the nature or the amount of the reparation if initially the information available is insufficient.

The Court stated that the moment of determination of a civil right (i.e. of the final decision for the purposes of Article 26) has to be established on the basis of the Convention and not of the national law.[19] The Court further found that:

> "(…) if under national law the proceedings consist of two stages – one determining an obligation to pay (declaratory proceedings) and another fixing the amount owed (enforcement proceedings) – it is reasonable to consider that, for the purposes of Article 6 para 1, a civil right is not "determined" until the amount has been decided. The determination of a right entails deciding not only on the existence of that right, but also on its scope or the manner in which it may be exercised, which would evidently include the calculation of the amount due".[20]

With this in mind the Court concluded that, as the enforcement proceedings were not limited to the actual payment of a pre-established amount but involved the determination of elements of the debt itself, they shall be considered as the second stage in the totality of the proceedings. Applying the already mentioned reasonableness of length criteria (the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant), the Court found a violation of Article 6 (1) in all the tree cases.

These cases are important landmarks in the development of the Court's case law under the length of proceedings head becoming a precondition for the establishment of the right to enforcement as of a separate element of the right of access to court under Article 6 ECHR. With the adoption in 1996 of the judgment in the case of *Di Pede v Italy*[21] (where, importantly, the nature of enforcement proceedings at issue was less controversial) the Court's jurisprudence seems to have been settled. In particular, in this case the applicant complained of the lengthy enforcement of a judgment prescribing his neighbours to demolish their unlawfully erected building. Under the Italian law in force at the material time, restated in the judgment, a creditor wishing to have a judgment enforced should have applied to the

[19] See, *Silva Pontes v Portugal*, § 29.
[20] Ibid., § 30
[21] See, *Di Pede v Italy*, application no. 15797/89, judgment of 26 September 1996.

magistrate to determine the means of enforcement.[22] Based on this, the Italian Government advanced an objection similar to the one of the Portuguese Government's that the enforcement proceedings could not be regarded as a second stage of the proceedings, but were new and separate proceedings.[23] Referring to its findings in the *Silva Pontes* case the Court rejected the Government's objection and considered the enforcement proceedings as the second stage of the overall proceedings.[24] Having found that the length of the proceedings in their entirety constituted more than 8 years, for most of which the State was responsible, the Court concluded that it was not reasonable.[25]

Interestingly enough, the *Di Pede* case is distinct from the previous cases in that it combined the violation of Article 6 under the reasonable length head (with enforcement proceedings a constitutive part of it) and the assertion of a violation of Article 1 of Protocol 1 on account of the infringement of the right to the peaceful enjoyment of possessions.[26] Although in this case the Court did not consider it necessary, in particular in the view of its finding of violation of Article 6 (1), to determine whether there has been a breach of Article 1 of Protocol 1, it was probably the first manifestation of what later will become a trend in this category of cases.

To sum up at this point, by the mid-1990s the Court's case law on the issue became settled so that the length of the proceedings was to be assessed in their totality, including any stages subsequent to the judgment on the merits which contribute to the final resolution of the dispute. When resolving the latter issue the Court would not be too rigid and formal, but would rather look if the right at stake in the proceedings actually became effective. With this in mind, in the following cases the Court would always take into account the length of the

[22] Ibid, § 16.
[23] Ibid., §20.
[24] Ibid, § 24
[25] Ibid, § 32.
[26] As compared to the cases where the violation of Article 6 (1) on account on the length of proceedings not involving the enforcement stage was coupled with the alleged violation of Article 1 of Protocol 1, for example, *Zanghi v Italy* (application no. 11491/85, judgment of 19 February 1991).

enforcement stage. However, already in 1996 the Court will find the non-enforcement of the domestic courts judgments as a separate violation of Article 6 under the fairness requirement rather than one of the factors leading to the violation of the reasonable time requirement.[27]

2. Non-enforcement as a separate violation: *Hornsby v Greece* and beyond

The wording of Article 6 (1) of the Convention seems much focused on the adjudicatory part of the proceedings, – that is limited to the process of the resolution of a dispute and establishment of the rights and obligations of the parties.[28] The cases analyzed above showed the change in the approach, at least in what concerns the assessment of the length of proceedings, proving that it "has exceeded the narrow borders of the courtroom".[29] However, the shift wasn't completed until the landmark *Hornsby* judgment. It is only with the adoption of this judgment that the right to enforcement, which is not on the face of Article 6, was acknowledged and acquired separate protection. It is, therefore, important to see into the facts of the case and the reasoning of the Court.

The applicants, Mr and Mrs Hornsby, both British nationals and teachers of English, resided in Greece. In 1984 Mrs Hornsby applied to the respective local authorities to set up a foreign language school, but her claim was rejected as the domestic law in force did not permit foreign nationals to open schools. In 1988 the relevant legislation was found by the Court of Justice of the European Communities to be contrary to the EEC Treaty and later that year the applicants lodged their applications anew. They were, however, again rejected for the same reasons as in 1984. The applicants appealed. In its judgments of 9 and 10 May 1989 the Supreme Administrative Court found in the applicants' favour. Notwithstanding these

[27] See, *Hornsby v Greece*, cited above. Conclusions on the separateness of the violation can be found, *inter alia*, in Stauskienė, Egidija, and Vigintas Višinskis. "Problems of Forced Execution Of Resolution To Impose Fine In The Republic Of Lithuania." *Visuomenės Saugumas Ir Viešoji Tvarka (4)*: 204 and Uzelac, Alan. *Privatization of Enforcement Services – A Step forward for Countries in Transition*. Intersentia, 2010, p. 84.
[28] Uzelac, Alan, "Establishing Common European Standards of Enforcement: Recent Work of the Council of Europe as regards Enforcement Procedures and Bailiffs." *Rencontres de Procedure*. Hrvatska znanstvena bibliografija i MZOS-Svibor, 2002, p. 2.
[29] Ibid.

judgments and a number of follow-up proceedings, the applicants were not granted a permission to set up a school.

Before the Court the applicants alleged, referring to Article 6 (1) of the Convention, that the refusal by the education authorities to comply with the Supreme Administrative Court's judgments of May 1989 violated their right "to effective judicial protection of their civil rights".[30] In their observations before the Court the Government of Greece contended that the applicants' complaint was not covered by Article 6, as it "guaranteed only the fairness of the "trial" in the literal sense of that term, – that is the proceedings conducted before the judicial authority alone"[31]. They further maintained that the question of the delay in complying with the final judgment by the administrative authorities was different from the question of determination of the existence of the rights and, as it fell within the sphere of public law it could not be covered by Article 6.[32]

For the first time confronted with the question of enforcement out of the context of the reasonableness of the length of proceedings but in the wider context of fairness, the Court chose to analyze the issue in the light of the Article 6 (1) concept of the "right to court" with the right of *access to court*, that is "the right to institute proceedings before courts in civil matters"[33], as its integral part.

The Court's reasoning in this case is without doubt of historical significance:

"However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 (1) should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. … Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the

[30] See, *Hornsby v Greece*, cited above, § 38.
[31] Ibid., § 39.
[32] The Government's argument essentially supports the understanding of Article 6 ECHR as limited to adjudicatory stage of the proceedings only, which was described earlier in this section.
[33] See, *Hornsby v Greece*, cited above, § 40.

purposes of Article 6; moreover, the Court has already accepted this principle in cases concerning the length of proceedings".[34]

Relying on the above principles, the Court found that more than 5 years delay by the authorities to comply with a final judgment "deprived the provisions of Article 6 (1) of the Convention of all useful effect". [35] It is important to note that the Court made a reference to its previous length of proceedings cases – in particular the *Di Pede* case, mentioned above, – for two different reasons. First, it is very much in line with the precedent nature of the Courts case law and the interpretation of the Convention as a "living instrument" corresponding to the modern conditions. Such interpretation, "purposive, autonomous, and at times creative"[36], widens the scope the rights and enhances their protection to make sure that they have practical effect. It also adds to the continuity of the Court's case law.

On the other hand, the wording of the respective part of the cited paragraph emphasizes the contrast between the new (separate fairness violation) and the old (length of proceedings violation) approach. As rightly put by Kinsch, "…the reasoning of the court is self-sufficient and coherent: a State cannot be said truly to offer 'access' to its courts if it subsequently refuses or neglects to enforce the judgments rendered by those courts; in such a case access to the courts for the purpose of effectively adjudicating disputes does not exist. Therefore the State will in essence violate its very obligation, which lies at the heart of Article 6's fair trial guarantee, to provide procedures for the adjudication of civil disputes." [37]

In the following cases the Court developed the right to enforcement in more detail, in particular, widening it so as to cover not only court judgments, but also notarial deeds. Thus,

[34] Ibid.
[35] See, *Hornsby v Greece*, cited above, § 45.
[36] Wildhaber, Luzius, "The European Court of Human Rights: The Past, The Present, The Future." *American University International Law Review* 22, no. 4 (2007), p. 524.
[37] Kinsch, Patrick. "Enforcement as a fundamental right". University of Luxembourg Law Working Paper No. 2014-07, p.5 and *Nederlands Internationaal Privaatrecht*, no. 4 (2014).

in *Estima Jorge v Portugal*[38] the Court has recognized that enforcement has an independent value[39], that is, Article 6 is applicable irrespective of the nature of the enforcement document.

In *Immobiliare Saffi v Italy*[40], where the enforcement of an order for possession of an apartment was delayed for eleven years as a result of legislative intervention, the Court acknowledged that the State may intervene in enforcement proceedings but only in exceptional circumstances and if such intervention does not prevent execution, invalidate or unduly delay it, or undermine the substance of the decision. Therefore, the Court found in this case that the regulation adopted by Government depriving the owner of the possibility of the recourse to police assistance in enforcing the repossession of his apartment for eleven years, constituted not only the violation of Article 6 on account of the reasonable time requirement, but also of the right of access to court.[41] Importantly, the Court also found that in this case the balance between the property right protection and the public interest had not been struck and concluded accordingly, that there was a violation of the right to property under Article 1 of Protocol No. 1 to the Convention.[42] This finding is of great importance. As mentioned above in the context of the *Di Pede* judgment, this combination of violations will at certain point become a general practice. At this stage it is enough to underline, that apart from being the sign of the new trend in the case law, this approach essentially acknowledges that a failure to enforce a final judgment constitutes not only a violation of a procedural right, but also of a substantive right.[43]

To sum up, through the successive case law, the Court widened the scope of protection afforded by Article 6 of the Convention so that to include the requirement of effective enforcement of domestic judgments without undue delay. Departing from the right

[38] See, *Estima Jorge v. Portugal*, cited above.
[39] See, Uzelac, cited above, p.3.
[40] See, *Immobiliare Saffi v. Italy*, application no. 22774/93, judgment of 28 July 1999.
[41] Ibid., §s 70-75.
[42] Ibid., § 59.
[43] See, Uzelac, cited above, p. 3.

of access to court, which is central to the concept of fair trial, the Court based its findings on the principle of the rule of law as it "sets a minimum standard for the effective protection of the right to a fair hearing".[44] Thus, access to court (with the right to enforcement as an integral part of it) is the minimum guarantee of fair trial.

3. Accession of the Eastern European states to the ECHR and the growing number of (non-enforcement) cases

Starting in 1989 and throughout the following decade the Council of Europe experienced a process of continuous enlargement. From being an organization with 23 Member states in 1989 it expanded to include as of now 47 States with the population of more than 800 million "stretching from Azerbaijan to Iceland and from Gibraltar to the Bering Straits, across an area that is significantly vaster than Europe itself".[45]

Scholars estimate that throughout the first 30 years of its functioning the Court had been receiving annually only around 800 individual complaints, but by late-2000s this number was 50 times more than the annual average of the early years. [46] Indeed, according to the data available [47] in 1998 the Court received a total of 18,200 applications with this number being almost tripled in 2006 (a total of 51,300 applications). Bearing in mind that most of the new accessions took place from 1993 to 1995 (a total of 15 States joined the Convention in this period) and it took several more years for the States to ratify the Convention, mid-2000s is precisely the moment to best describe the input the newly admitted States made to the Court's workload.

[44] Lautenbach, Geranne. *The concept of the rule of law and the European Court of Human Rights*. n.p.: Oxford: Oxford University Press, 2013, p. 153.
[45] Provost, René "Teetering on the Edge of Legal Nihilism: Russia and the Evolving European Human Rights Regime". *Human Rights Quarterly* no. 2 (2015), pp. 324-325.
[46] Greer, Steven, and Williams, Andrew. 2009. "Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?" *European Law Journal* 15, no. 4, p. 464.
[47] See, the earliest Analysis of Statistics (2006) prepared by the European Court of Human Rights in July 2007, available at http://www.echr.coe.int/Documents/Stats_analysis_2006_ENG.pdf

In this context, especially telling are the figures of the Court's Overview 1959-2014[48], compiled by country. The total number of applications allocated to a judicial formation from 1959 to 2014 for some of the "founding fathers"[49] is not exceeding 30 000 (the United Kingdom, France and Germany) with the only exception of Italy having the largest number in this group – more than 40 000. At the same time, such countries like Russia, Ukraine, Poland, Moldova, Czech Republic, Croatia and Bulgaria have generated – for a much shorter period! – an increase in the number of applications from around 11,000 to almost 130, 000. No wonder that some researches allocate most of the above states to a group with "poor" or "satisfactory" human rights records.[50] Only Poland and Czech Republic are currently considered to fall into the high compliance group.[51] Thus, a handful out of 47 Member States is responsible for the most of the Court's workload.[52]

On the other hand, it is sometimes contended that the Court is a victim of its own success that is, having widened the scope of the Convention protection and having accepted many new elements to the rights set out by it, the Court is itself responsible for such a high and permanently growing number of applications.[53]

The most dramatic change was, however, not in the numbers. After the collapse of the Soviet Union and the beginning of democratic transitions in the new independent states the European human rights system faced both an unprecedented promise of success and also a

[48] Overview 1959-2014, cited above, p.8.
[49] Here, under the notion of "founding fathers" the countries that became parties and ratified the Convention before 1989 (a total of 23 countries) are meant.
[50] Greer, Steven C. *The European Convention on Human Rights: achievements, problems and prospects*. n.p.: Cambridge, UK; New York: Cambridge University Press, 2006, pp. 119-120.
[51] Ibid.
[52] In the literature this phenomenon became known as national concentration of applications: see, Provost, René, cited above, p. 328. The essence of the phenomenon is that at particular periods a limited number of states (e.g., Russia, Turkey, Ukraine and Italy in 2015) is responsible for the most of the applications submitted compared to all other states taken together.
[53] This assumption, i.e. that there is a connection between the scope of the rights and the Court's position and case load, was rebutted: see, Brems, Eva, and J. H. Gerards. *Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of human rights*. n.p.: Cambridge: Cambridge University Press, c2013. The authors, having conducted a thorough analysis, have arrived at the conclusion that there is no direct connection between the Court's growing workload and previous widening of the scope of the rights (see, p. 93).

massive challenge. In the view of many scholars[54], in the early years of its functioning the Court, which is at the core of the system, was dealing with well-established democracies and thus was rarely confronted with massive or outrageous violations of human rights. Its judgments were few and dealt with issues less fundamental in nature as those envisaged for it. As Sadurskii puts it, "[r]ather than a watchdog set up to prevent severe breaches of human rights, the Court settled on a role of a legal fine-tuner, acting at the boundaries of rights…"[55] He further contends that the accession of the Central and Eastern European countries brought the Court from the boundaries to the very center of the human rights protection. The Court had to deal with the applications raising fundamental human rights issues as the populations of those states approached the Court hoping to find protection and relief from the domestic injustices which they could not otherwise receive. "*Democracy-building*" rather than "*defense of pluralist democracy*" had then become the main task of the Court and the Council of Europe.[56]

One of the ways that the Court was called to take up this role was through addressing systemic problems as evidenced by the repetitive applications. One of such problems was the non-enforcement of domestic judgments. Although by the year 2000 the Court's approach to the non-enforcement complaints had already been settled, up until the mid-2000s they were sporadic and non-enforcement was "never an issue"[57] for the Court. In the mid-2000s the situation changed dramatically. Ovey and White contend that: "[n]on-execution of civil judgments appears to be an *endemic problem* in much of the Eastern Europe – particularly in

[54] See, for example, Sadurskii, Wojciech. "Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments [article]." *Human Rights Law Review* no. 3 (2009): 397 and Leuprecht, Peter. "Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement [article]." *Transnational Law & Contemporary Problems* no. 2 (1998): 313.
[55] See, Sadurskii, cited above, p. 408.
[56] See, Leuprecht, cited above, p. 326.
[57] See, Meleshevich, Andrey and Khvorostyankina, Anna, "Ukraine" in Hammer, Leonard M., Frank Emmert, and Petra Bard. *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe*. n.p.: The Hague: Eleven International Publishing, 2012, p. 576.

cases where the State is the judgment debtor – and there have been many judgments finding violation of Article 6 on this ground".[58]

The first country to open the "race" was Ukraine. In the 2001 case *Kaysin and others v Ukraine*[59] the applicants, State-owned mine workers, complained about the lengthy non-enforcement of the local court's judgment acknowledging their right to pension and awarding them respective amounts to be paid by the State. This case was *the first* in three categories:

1) the first Ukrainian case considered by the Court; 2) the first Ukrainian non-enforcement case and 3) the first (and the only) non-enforcement case closed by a friendly settlement.

By the end of 2005 there were almost 100 Ukrainian non-enforcement cases, with *Voytenko v Ukraine*[60], among them, as the first judgment on the merits finding the violations of Articles 6 (1) and 13 as well as Article 1 of Protocol 1. Together with the admissibility decision in the case of *Skubenko v Ukraine*[61] these cases became precedents that have been further widely used by the Court when dealing with – but not limited to – Ukrainian non-enforcement complaints[62].

Year 2002 brought the first judgment against Russia which was also a non-enforcement case.[63] The applicant, Mr. Burdov, was entitled to certain payments under domestic law having been exposed to radiation at the site of Chernobyl Nuclear Power Plant disaster, but was unable to receive them despite of the national courts judgments. The Court found that by failing for a long time to comply with the final judgments adopted in the favour of the applicant the national authorities "deprived the provisions of Article 6 § 1 of all useful

[58] Ovey, Clare, White, Robin C. A. and Jacobs, Francis Geoffrey. *Jacobs and White, the European Convention on Human Rights*. n.p.: Oxford: Oxford University Press, 2006, p. 158 (emphasis added).
[59] See, *Kaysin and others v Ukraine*, application no. 46144/99, decision of 3 May 2001.
[60] See, *Voytenko v Ukraine*, application no. 18966/02, judgment of 29 September 2004.
[61] See, *Skubenko v Ukraine*, application no. 41152/98, decision of 29 November 2005.
[62] See, Meleshevich and Khvorostyankina, cited above, p. 577.
[63] See, *Burdov v Russia*, application no. 59498/00, judgment of 4 september 2002.

effect"[64] and "prevented the applicant from receiving the money he could reasonably have expected to receive"[65] (violation of Article 1 of Protocol 1). In 7 years the very same applicant will again challenge the Russian Government's actions and cause the Court to adopt a pilot judgment.

In 2003 the first Lithuanian and Romanian non-enforcement judgments were adopted as well as two further judgments against Greece[66], but in 2004 the Court literally exploded with the non-enforcement judgments. Greece, Russia, Romania, Ukraine as well as – for the first time –Albania, Bulgaria and Moldova were found by the Court in breach of the respective provisions of the Convention.[67] In particular, the Court adopted its first judgment against Moldova in the case of *Prodan v Moldova.*[68] This judgment became the first in the line of some 30 cases concerning the payment of compensation for the property nationalized during the Soviet regime.[69] Afterwards came the Moldovan judgments concerning the non-enforcement of judgments awarding compensation of the inflation-related losses[70] and the cases as to the failure to enforce judgments ordering allocation of social housing.[71] The latter category of cases would eventually lead to the adoption of a pilot judgment.[72]

Generally, if statistics were to be believed, as of 1 January 2006 the Court found Article 6 (1) violations on account of non-enforcement in a total of 332 cases, while as of 1

[64] Ibid., § 37.
[65] Ibid., § 41.
[66] See, European Court of Human Rights, Annual Report 2003, Registry of the European Court of Human Rights Strasbourg, 2004, p. 83 Available online at: http://www.echr.coe.int/Documents/Annual_report_2003_ENG.pdf.
[67] See, European Court of Human Rights, Annual Report 2004, Registry of the European Court of Human Rights Strasbourg, 2005, p. 93 Available online at: http://www.echr.coe.int/Pages/home.aspx?p=echrpublications&c=#n 1422522510547076010254 1_pointer.
[68] See, *Prodan v Moldova*, application no. 49806/99, judgment of 18 May 2003.
[69] For the list of further judgments under this head see, Gribincea, Vladislav, Hriptievschi, Nadejda and Chicu, Mariana, "Moldova" in in Hammer, Leonard M., Frank Emmert, and Petra Bard. *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe*. n.p.: The Hague: Eleven International Publishing, c2012, 2012, p. 334.
[70] Ibid.
[71] Ibid., p. 335.
[72] See below, Chapter II, Section 2.2.

January 2009 this number grew to 513.[73] Thus it is no surprise that flooded by the repetitive applications coming from the three major "perpetrators" Moldova, Russia and Ukraine the Court in 2009 decided to apply the pilot judgment procedure against these states.

B. Conclusion

The right to a fair trial under Article 6 is fundamental to the whole structure of the Convention and is the cornerstone of the principle of the rule of law. Being an overarching requirement it needs detailed interpretation on the case-by-case basis. Thus, although the right to enforcement of a final judgment was not clearly stated in the Convention, the Court in a line of successive judgments came to the conclusion that it is an independent right inherent in the concept of the access to court, rather than just a stage to be taken into account in the reasonable time assessment. This development became possible due to the interpretation of Article 6 in line with the rule of law principle which departs from the premise that "if individuals are denied the assistance of public power, they are denied justice, and this leads to distrust in the law and ultimately to lawlessness".[74]

The granting of the Convention protection to the right to enforcement led in the mid-2000s to the massive increase in the Court's workload as the non-enforcement problem was one of the major systemic problems of the newly admitted Central and Eastern European States. Eventually, by 2009 the Court was so dramatically overloaded with the repetitive non-enforcement complaints that it was forced to use the pilot judgment procedure against the three countries being the major "source" of the applications: Moldova, Russia and Ukraine. The next Chapter will look into these judgments and their execution by the respondent States in detail.

[73] The numbers according to the data of the HUDOC database: http://hudoc.echr.coe.int/.
[74] Lautenbach, Geranne. *The concept of the rule of law and the European Court of Human Rights*. n.p.: Oxford: Oxford University Press, 2013, p. 148.

CHAPTER II PILOT JUDGEMENTS AGAINST MOLDOVA, RUSSIA AND UKRAINE

A. Introduction

As it has already been shown in the previous Chapter, the delays in enforcement of domestic judgments for which the State is responsible produced an extreme number of repetitive applications. Moldova, Russia and Ukraine made the most considerable contribution to this category of cases. In 2009 the ECtHR, flooded by the respective complaints and confronted with these States' reluctance to take measures to resolve the root-causes of the non-enforcement problem, delivered three pilot judgments calling the respondent Governments to urgently and effectively put an end to the violations of the Convention rights.

The nature of the pilot judgment procedure is not the focus of the present thesis, being developed in the rich academic literature. Therefore Chapter II will provide only some general background information on pilot judgment procedure, in particular in the context of non-enforcement cases. Further, in the three country-specific sub-chapters this Chapter will provide a comparative analysis of the pilot judgments and, most importantly, remedies adopted and their critical assessment. Each sub-chapter will have a similar structure, first outlining the underlying problems leading to non-enforcement. Then the Court's findings and the measures to be adopted will be addressed, highlighting differences and similarities in the Court's approaches. Finally, each of the country-specific sub-chapters will look in more detail into the execution of the pilot judgments by the respondent Governments and the achievements and failures that have taken place throughout this more than 7-year long period.

1. The pilot judgment procedure: an overview

As it has already been noted above, the rising tide of the applications to the ECtHR originated in the accession to the Convention of the Central and Eastern European countries.

Emerging from the Soviet past they faced not only the profound changes in the worldview, but also major political and economic turbulences. Instable and populist governments, deep-rooted and all-penetrating corruption, transformation from the planned economy to the market-oriented capitalist system are only some of the factors that marked the life in these countries in the mid-1990s. Upon this background, the socially oriented legislation providing for different social payments and benefits, as a part of the Soviet legacy, would become a major problem as a result of governments being unable to ensure sufficient funding to cover the entitlements provided for by the law.

These deficiencies of the democratic institutions, rule of law and human rights protection caused the citizens of the post-Soviet countries to seek justice elsewhere. This is why by early 2000s the ECtHR was flooded by the repetitive applications revealing the systemic nature of violations alleged. And this is when, to keep itself "afloat amid the swelling flood of cases"[75], the Court through the cooperation with the Committee of Ministers and the governments[76] developed the pilot-judgment procedure. It was for the first time applied in 2004 in the seminal Polish case of *Broniowski*[77] related to the failure of the State to ensure compensatory payments to those who lost their property after the World War II. Even though this case was the first and the only case raising this issue considered by the Court at that point in time, in the view of 80,000 potential claimants the Court called the Polish Government both to eliminate the root-cause of the violation found and to prevent future violations by providing a remedy for those who had already suffered a damage. This

[75] Sainati Tatiana, "Human Rights Class Actions : Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights," *Harvard International Law Journal* 56, no. 1 (winter 2015) (n.d.), p.148.
[76] For more details on the origins of the pilot judgment procedure see: Wildhaber Luzius, "Pilot Judgments in Cases of Systemic or Systematic Problems on the National Level," ed. Rüdiger Wolfrum, Ulrike Deutsch (The European Court of Human Rights overwhelmed by applications : problems and possible solutions, Berlin; Heidelberg ; New York : Springer, 2009, 2007), p. 70; and Fribergh Erik, "Pilot Judgments from the Court's Perspective," in *Reforming the European Convention on Human Rights : A Work in Progress : A Compilation of Publications and Documents Relevant to the Ongoing Reform of the ECHR* (Strasbourg : Council of Europe Publishing, 2009), pp. 521–22.
[77] See, *Broniowski v Poland*, application no. 31443/96, judgment of 22 June 2004.

practice was characterized as "both looking forward and backward"[78] as it offers redress to past injustices as well as requires remedying the problem underlying the violation. Since the *Broniowski* case the Court has adopted dozens of pilot and quasi-pilot judgments[79] and, in the words of Antoine Buyse "[t]he trickle of fresh water caused by the first pilot procedure turned into small stream (…)"[80].

As noted earlier, the primary purpose of the pilot judgment procedure is to ensure the most speedy and effective resolution of a problem affecting the protection of the Convention right at the national level. To achieve this end, the Court would put the respondent State under an obligation to take both individual and general measures. The latter will be highly dependent on the nature of the violation and its root-cause and may require the adoption and/or amendment of the legislation, changes in administrative practice, etc. Ruling on the basis of subsidiarity, the Court would not indicate a particular measure to be adopted, leaving it for the Government together with the Committee of Ministers to decide on the appropriate measures.[81] However, the Court would generally set a time-limit for the Government to implement these measures.

In the three pilot judgments to be examined below, the ordering and implementing of general measures will be considered in detail. However, the individual measures, without prejudice to their importance, will not be in the ambit of the present thesis. Nevertheless, some remarks about them are thus warranted at this stage. While the general measures would aim primarily at resolving the core of the systemic problem, individual measures would relate

[78] See, Buyse Antoine, "The Pilot Judgment Procedure at the European Court of Human Rights : Possibilities and Challenges," in European Court of Human Rights : 50 Years, Athens Bar Association (Athens: Athens Bar Association, 2010), p. 84.

[79] The quasi-pilot judgments is a distinct category of the Court's judgments, in which the Court also notes the existence of a systemic problem, but unlike in the "regular" pilot-judgments does not require specific remedies to be implemented or adjourn similar applications (see, for example, *Scordino v. Italy* (*no. 1*) [GC], application no. 36813/97, judgment of 29March 2006).

[80] Ibid., p. 81.

[81] For more on the Court's competences in the pilot-judgment procedure see: Haider, Dominik. The pilot-judgment procedure of the European Court of Human Rights/by Dominik Haider. Leiden: Boston, Mass.: Martinus Nijhoff Publishers, 2013, Part Five "The Court's Competences".

to the mode of disposing with the similar cases already pending before the Court or anticipated. The possibility of adjournment of their consideration is regarded as a "key feature"[82] of the pilot judgment procedure, especially in the non-enforcement cases. By "freezing" the similar cases for a period set for the implementation of general measures the Court aims both at giving the respondent Government an additional impetus to act promptly and diligently as well as seeks to clearing its own docket.[83] Should the Government fail in implementing general measures, the Court would resume the consideration of the adjourned cases.

Within the adjournment procedure the Court might also opt for the *ad hoc* solutions. It may envisage that the examination of the complaints submitted after the delivery of the pilot judgment would be adjourned for a certain period while the applications already pending before the Court would be processed with the use of the friendly settlement or unilateral declaration procedures within the same time-frames.[84] In practical terms it means that the Court would provide the Government with the details of the applications which raise particular complaints, e.g., of non-enforcement. The Government would then be expected to grant adequate and sufficient redress to the applicants in line with the Court's case law. In non-enforcement cases this means that the periods to be considered as excessive for the purpose of the assessment of the length of enforcement and the amounts proposed shall be comparable to those identified by the Court in the previous cases.

To sum up, while the pilot judgment procedure was declared to be designed by the Court to tackle systemic problems, more practical considerations lay in the basis of this practice. The most obvious and very practical aim was to reduce the inflow of repetitive

[82] Factsheet "Pilot judgments" prepared by the Press Unit of the ECtHR, July 2015, p. 1. Available online at: http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=#n1347890855564_pointer.
[83] See, Sainati, cited above, pp. 149 and 171.
[84] For the details of the procedures, Articles 37 or 39 of the Convention and Rules 62 and 62A of the Rules of Court (as of 1 January 2016) (available online at: http://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules&c=#n1347875693676_pointer); for the examples of its application see the relevant sections of the *Olaru, Ivanov* and *Burdov* cases.

applications and the resources (especially time) spent processing them. Related to these, the pilot judgment procedure was also grounded on the need for better priority-setting. As pointed out by Wildhaber, the former President of the ECtHR, it was not right to invest the Court's energies in deciding – over and over again – on the, say, length of proceedings or non-enforcement, when there were ill-treatment and forced disappearances cases waiting in the docket: "there should be a better recognition and acceptance of priorities".[85] Thus, on the overall, the pilot judgment procedure seeks to reconcile three interests: those of the applicants, the State and the Court.[86] With this, the pilot-judgment procedure was repeatedly recognized as both innovative and most effective response to tackling systemic problems. However, it was also on many occasions acknowledged that it has many inherent problems, most notably as regards the execution of the judgments adopted.[87] Below, in the context of the non-enforcement pilot judgments, the present thesis will address some of the problems of the pilot-judgment procedure focusing mainly on the issues of execution.

2. Moldova: a story of success?

For many years non-enforcement of domestic judgments has been one of the Moldova's major problems in terms of its Convention commitments. Statistically, as of July 2009 more than 300 applications raising the issues of non-enforcement were pending before the Court.[88] As mentioned above, the Moldovan non-enforcement cases can be grouped into three major categories according to the nature of the award: 1) the cases concerning the recovery of property or payment of compensation in lieu of it for the victims of Soviet repressions; 2) cases of the failure to provide or compensate for the social housing for certain categories of persons entitled to it under the law; and 3) cases of the State's failure to pay

[85] See, Wildhaber, cited above, p. 91.
[86] See, Fribergh, cited above, p. 522.
[87] See, for example, Sainati, cited above; Vajic and Dikov, cited above; Haider
[88] See, *Olaru and others v Moldova*, applications nos. 476/07, 22539/05, 17911/08 and 13136/07, judgment of 28 July 2009, § 53.

compensation of inflation losses on Savings Bank deposits.[89] Although distinct, these categories of cases are joined by the single reason for their non-enforcement, namely, the lack of funds.[90] For the two first categories of cases this lack of financial resources was caused by the fact that respective powers (i.e., to recover nationalized property or provide social housing) were vested with the local authorities which had no financial support from the central government and alone were unable to satisfy the needs of the vast categories of persons claiming their rights under the law. The cases of failure to provide social housing or pay compensation in lieu of it constituted the most numerous group (around 50%) of all non-enforcement cases.[91] With the view to this fact and the systemic nature of the problem on 28 July 2009 the ECtHR adopted a pilot judgment.

The *Olaru and others v Moldova* case originated in 4 applications by the Moldovan nationals raising the questions of non-enforcement of domestic judgments awarding them social housing (or respective compensation) in 4 types of situations of provision of housing:

- for the police officers (application no. 476/07 by Vasile Olaru);
- for acting judges and members of their families (application no. 17911/08 by Artur, Corina and Olivia Lungu);
- for the persons evicted from the recovered property (application no. 22539/05 by Vera Gusan); and
- for the internally displaced persons who were forced to leave their homes due to the military conflict in Transdnistria (application no.13136/07 by Simion Racu).

The applicants in these situations represented four categories out of a total of 23 categories of persons who were according to the domestic legislation in force at the material time entitled to social housing, the others being, *inter alia*, prosecutors, penitentiary system

[89] For the list of cases falling under each of the three groups see Gribincea, Hriptievschi, and Chicu, cited above.
[90] Ibid., p. 335; and the case of *Prodan*, cited above, § 29 (regarding the restitution of property nationalized during Soviet regime) and *Luntre and others v. Moldova*, application no. 2916/02, judgment of 15 June 2004, § 24 (regarding the compensation by the State of the inflation losses on deposit accounts).
[91] See, *Olaru and others v Moldova*, cited above, § 54.

personnel, military forces personnel, etc.[92] All of the applicants had judgments delivered by the national courts in their favour which remained unenforced from 3 to 11 years due to, as acknowledged by the Government, the "high number of similar unenforced judgments and of lack of funds on the part of the local public authorities".[93] Based on this and without going into much detail and simply referring to its previous case law, e.g., the *Prodan* and *Luntre* cases, the Court found violations of Article 6 (1) and Article 1 of Protocol 1 in these cases.

However, when applying Article 46 procedure the Court went into analyzing the situation and its causes. It noted that "[t]he problem appears to have its origin in *socially-oriented legislation* enacted by Parliament or the Government, which bestows social housing privileges on a very wide category of persons at the expense of the local governments" [94], thus expressly acknowledging that it was because of the deficient legislation that the problem occurred and, on the overall, the situation was "not particularly complex".[95] Further, comparing this category of cases to other Moldovan non-enforcement cases, which usually concerned small amounts of money, with enforcement delays not especially prolonged and which were usually closed by a friendly settlement or a unilateral declaration, the Court underlined, that the social housing cases were "*very rarely enforced*, because of chronic lack of funds on the part of local governments." [96] The above considerations led the Court to conclude that there was "a persistent systemic dysfunction [in the Moldovan legal system] and that the present situation must be qualified as a practice incompatible with the Convention"[97]. While the Court did not – and could not, as explained in the previous sub-chapter, – indicate a particular measure to be introduced, still the approach it adopted in the present case by hinting that the abolition of the deficient legislation would resolve the

[92] Ibid., § 31.
[93] Ibid., § 39.
[94] Ibid., § 54, emphasis added.
[95] Ibid., § 57.
[96] Ibid., § 55, emphasis added.
[97] See, Olaru and others v Moldova, § 56.

problem was a step, called "unusual" in the literature.[98] The Court also addressed the question of the lack of effective domestic remedies against non-enforcement of court judgments. Noting that respective violations had been fund in the previous cases dating back to the years 2003-2005 and that no information on introduction of any effective remedy had been received since then, the Court ordered that the Government together with the Committee of Ministers provides within *six months* of the date on which the pilot judgment becomes final for a remedy that will have to comply with the Convention's requirements of effectiveness.[99]

In this context it shall be noted that by then no requirements designed specifically for the non-enforcement situations had been developed. However, the Court and the Council of Europe had set out recommendations on the effective remedy as to the length of proceedings cases which can, in the view of the intrinsic connection between non-enforcement and length of proceedings cases shown in Chapter I, be justifiably applied to the former. These recommendations can be found originally in the Court's judgment in the case of *Scordino v. Italy (no. 1)*[100] as well in the Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2010)3.[101] Their provisions can be summarized so as to require the following:

- prevention should be the primary consideration;
- the remedy shall be in place, it shall cover all arguable claims at all stages of the proceedings;
- the remedy shall be effective, adequate and accessible, e.g., the rules regarding legal fees should not put an excessive burden on the applicant;

[98] Leach, Philip. "Responding to systemic human rights violations: an analysis of pilot judgments of the European Court of Human Rights and their impact at national level," / edited by Philip Leach, Helen Hardman, Svetlana Stephenson, Brad K. Blitz, Oxford : Intersentia, 2010, p. 20.
[99] See, *Olaru and others v Moldova*, § 58.
[100] See, *Scordino v. Italy (no. 1)*, cited above, §§ 195-207.
[101] Recommendation of the Committee of Ministers of the Council of Europe to member states on effective remedies for excessive length of proceedings CM/Rec(2010)3, available online at: https://wcd.coe.int/ViewDoc.jsp?id=1590115.

- the procedure for compensation must be fair;

- the action must be examined within reasonable time, but faster than the usual procedure for compensation of damage;

- the amounts of compensation shall be reasonable and shall correspond to the just satisfaction awarded by the ECtHR in similar cases and cover pecuniary as well as non-pecuniary damage;

- the compensation must be paid promptly, i.e., no later than six months from the date on which the decision awarding compensation becomes final.

Facing both the problems of non-enforcement and length of proceedings[102] Moldova opted to kill two birds with one stone: the draft remedy Law proposed by the Government aimed at providing the remedy both for the prolonged non-enforcement of the court judgments as well as for the lengthy court proceedings. Before we go into the details of the remedy it shall be noted, however, that the way to this Law was not easy: the deadline set out by Court was to expire in April 2010 and although the Government promptly prepared the respective draft law, due to the dissolution of the Parliament there was no possibility for its adoption.[103] Thus, the Government asked for an extension and one was granted for another year, till 15 April 2011.[104] Finally, a week after the extended period had expired the Law *On Compensation by the State of Damages Caused by the Violation of the Rights to Trial or to Enforcement of Court Judgment within Reasonable Time*, was adopted on 21 April 2011 and became final on 1 July 2011.[105]

[102] According to the HUDOC database, by July 2009 14 judgments finding a violation of Article 6 of the Convention on account of unreasonable length of proceedings had been adopted by the Court.

[103] See, the letter of the Moldovan Agent for the Government before the ECtHR of 5 November 2010 no. 06/7937, available at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1772851&SecMode=1&DocId=1664526&Usage=2.

[104] See, the letter of the Section Registrar of the European Court to the Secretary of the Committee of Ministers of 23 November 2010. Available online at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1772851&SecMode=1&DocId=1664526&Usage=2.

[105] See, the *Law On Compensation by the State of Damages Caused by the Violation of the Rights to Trial or to Enforcement of Court Judgment within Reasonable Time* of 21 April 2011 no. 87. Available in Romanian and Russian online at: file:///C:/Users/Daria/Documents/CEU/Thesis/Moldova/Law%2087.html.

The Moldovan remedy Law entitles any natural or legal person to claim pecuniary or non-pecuniary damages for the breach of the reasonable time requirement in the framework of trial or enforcement proceedings.[106] All claims shall be submitted to the Buiucani Court of Chişinău against the State, with the Ministry of Justice being the representative of the respondent.[107] The claims regarding the prolonged enforcement of the court judgment can be filed during the enforcement proceedings as well as within 6 months after their termination. The claims shall be considered by the first instance court within a maximum of 3 months from the date of receipt.[108] When deciding on the claims the domestic courts are required to apply the law in line with the national legislation, the Convention requirements and the Court's case law.[109] The compensation awarded shall be payable at the expense of the State budget by the Ministry of Finance with the creditor submitting only his bank account details.[110] Although the remedy Law itself provides for no specific time-limit for the Ministry of Finance to conduct the actual payment, it refers to the deadlines set out by the *Law on the Budget System and Budget Process*.[111] According to Article 7 of the Law all applicants who have their non-enforcement complaints pending before the Court (and the Court has not decided neither the admissibility nor the merits of the complaint) may within 6 months of the entry into force of the remedy law go back to national courts to claim compensation.

Being in compliance with many of the requirements as to effectiveness noted above, the procedure suggested by the Law no. 87 was welcomed by the Committee of Ministers[112]

[106] Article 2 (1).
[107] Article 2 (7).
[108] Article 4 (4).
[109] Article 1 (2).
[110] Articles 2 (4) and 6.
[111] According to the study of execution by Moldova of the ECtHR judgments in 2013-2014 prepared by the Legal Resources Centre from Moldova, "according to art. 36-1 of the Law *On the budget system and budget process*, the Ministry of Finance has six months to execute the enforcement warrant. Otherwise, the bailiff may proceed to forced execution, which, apparently, happens seldom" (see, Vladislav Gribincea, Pavel Grecu, Nadejda Hriptievschi, Sorina Macrinici, *Execution of judgments of the European Court of Human Rights by the Republic of Moldova: 2013-2014* (Chișinau, 2015), p. 105, available online).
[112] See, the decisions of the Committee of Ministers adopted at the 1108th (10 March 2011, even before the adoption of the draft as a Law) and 1115th meeting (8 June 2011, after the adoption). Available online at:

and the Court alike. The latter, in its inadmissibility decision in the *Balan v Moldova*[113] case stated that it "accepts that Law no. 87 was designed, in principle, to address the issue of delayed enforcement of judgments in an effective and meaningful manner, taking account of the Convention requirements."[114] Further, noting that even though the domestic courts had not yet settled their practice due to the limited time that had passed since the adoption of the remedy Law, there was still no reason for the Court to consider that "the new remedy could not afford the applicant the opportunity to obtain adequate and sufficient redress for his grievances or that it could not offer reasonable prospects of success".[115] With this in mind the Court decided that the applicant shall make use of the remedy introduced by the Law no. 87.

At the national level there was, however, less excitement about the new procedure. The two reports by the Legal Resources Centre from Moldova, already referred to earlier, point to the deficiencies in the practical implementation of the remedy Law. In particular, even with the Law already in place, the possibility of delivery of the new similar judgments was not completely excluded. The 1997-2012 report provides information that in August 2012 a recommendation appeared on the official web-site of the Supreme Court of Justice of the Republic of Moldova stating that "judges, who at the moment of revocation [of the provision providing the right to social housing] were not provided with the housing, are entitled, within three years from the moment of revocation of the law, to request housing from local public authorities"[116], although the Law no. 90 itself contains no provisions to that effect. Further, this report notes that in early 2012 there were more than 800 writs of enforcement concerning the obligation to provide social housing pending before the national

https://wcd.coe.int/ViewDoc.jsp?id=1718797&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679 and at https://wcd.coe.int/ViewDoc.jsp?id=1718797&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679 respectively.

[113] See, *Vasile Balan v Moldova*, application no. 44746/08, decision of 24 January 2012.

[114] Ibid., § 19.

[115] Ibid., *in fine*.

[116] See, Vladislav Gribincea, European Court of Human Rights, and Centrul de Resurse Juridice din Moldova, *Execution of judgments of the European Court of Human Rights by the Republic of Moldova: 1997-2012* (Chișinau: Imprint Plus, 2012), p. 159, available online.

bailiffs' service, 700 of which referred to Chișinău. Although no information on the exact number of judgments enforced was available to the authors, they contend that only "several" judgments were enforced.[117] Even in the absence of the exact figures, these numbers in themselves not only question the State's financial capability to enforce all the judgments in the first place, but also question the payment of compensation for the delay should the creditors use the Law no. 87 procedure.

Additionally, in the most recent research of 2013-2014 the Legal Resources Centre from Moldova referring to the report of the Moldovan Ministry of Justice notes that as of June 2012 under the new procedure 634 applications were submitted, constituting about 1% of all civil actions submitted to the courts that year.[118] Even though in the following years the number had been decreasing comprising in 2014 around 480 cases submitted and 140 cases left by the end of the year[119] they are still evidencing that measures other than purely compensatory shall be put in place.

Additionally, the Legal Resources Centre from Moldova identified a number of other concerns related to the operation of Law no. 87, including the length of examination of the respective cases, as well as the amounts of compensations awarded.[120] So far these concerns have been addressed neither by the Committee of Ministers nor by the Court. Nevertheless, with the adoption of the *Balan* inadmissibility decision and the Committee transferring the *Olaru and others* case from enhanced to standard supervision procedure[121] Moldova, as it

[117] See, *Execution of judgments of the European Court of Human Rights by the Republic of Moldova: 1997-2012*, cited above, p.159.
[118] Ibid, p. 105.
[119] Ibid.
[120] More than 262 cases were examined during the research, of which 119 concerned the non-enforcement of domestic judgments. For more detail see Gribincea, European Court of Human Rights, and Centrul de Resurse Juridice din Moldova, *Execution of judgments of the European Court of Human Rights by the Republic of Moldova*, pp. 105-112 and the LCRM Policy document "The mechanism for compensation of damages caused by the violation of reasonable time requirement — is it efficient?, September 2014, available at: http://LRCM.org/wp-content/uploads/2014/09/Document-de-politici-nr1-web.pdf.
[121] See, the decision of the Committee of Ministers adopted at the 1136th of 8 March 2012, available online at: https://wcd.coe.int/ViewDoc.jsp?id=1882943&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679.

will be shown below, can be said to be the only country that executed its pilot judgment on non-enforcement problem. The possibility of the ECtHR reviewing its position, however, remains being conditional upon the compatibility of the domestic practice under the remedy Law with the Convention requirements, a fact which is emphasized in the *Balan* decision itself.[122]

3. Russia: stuck in the middle

"Pity poor Anatoliy Burdov!" This is how – with sad irony – Philip Leach started his article on the Russian pilot judgment.[123] It is indeed remarkable that the *Burdov v Russia (no.2)*[124] judgment, featured also as a pilot judgment, was the second judgment in the applicant's case evidencing once again the deeply-systemic nature of the non-enforcement problem in Russia. Mr Kovler, the former Russian judge in the Court, is cited saying that this case was "symbolically selected as the pilot case to remind Russia of the repeated nature of its violations".[125] Since 2002, when the first *Burdov* judgment (being, as noted earlier, the very first Russian judgment) was adopted, the non-enforcement of domestic court decisions has been a leading issue in the Russian applications to the Court. As estimated, by 2007 non-enforcement complaints comprised around 40% of all admissible applications to the ECtHR from Russia[126] and in the period between May 2002 and March 2009 the Court delivered more than 200 judgments finding a violation on account of the failure of the Russian authorities' to enforce judicial decisions against the state.[127]

[122] See, *Vasile Balan v Moldova*, cited above, § 27.
[123] Philip Leach, Helen Hardman, and Svetlana Stephenson, "Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia," *Human Rights Law Review* 10, no. 2 (2010), p. 346.
[124] *Burdov v Russia (no.2)*, application no. 33509/04, judgment of 15 January 2009.
[125] See, Provost, cited above, p. 314.
[126] See, Memorandum prepared by the Department for the execution of the European Court's judgments (Application of Article 46 of the ECHR) *Non-enforcement of domestic judicial decisions in Russia: general measures to comply with the European Court's judgments,* CM/Inf/DH(2006)19 rev3, 4 June 2007, p. 4. Available online at: http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=burdov&StateCode=&SectionCode=.
[127] See, Philip Leach and coauthors, cited above, p. 348.

In the first *Burdov* case, described earlier, the judgment delivered in the applicant's favour remained unenforced for years with the domestic authorities repeatedly citing the lack of funding as the reason for non-enforcement.[128] Although the amounts due to the applicant were eventually paid, it had not happen until his application was communicated by the Court to the Russian authorities.[129] Despite the Government's claims of the loss of victim status by the applicant the Court, referring to the prolonged non-enforcement of the judgments delivered in the applicant's favour, found violations of Article 6 (1) and Article 1 of Protocol 1 to the Convention.

The applicant, Mr Burdov, however, represents only one category of persons affected by the non-enforcement problem. There were many more of those who were unable to receive social benefits and payments guaranteed to them under the law (e.g., pensions, child allowance, compensation for damage to health, etc.), and at the time of adoption of the *Burdov no. 2* judgment around 700 cases concerning similar facts were pending before the Court.[130] Underfunding of social expenditures was not, however, the only reason for non-enforcement complaints. As summarized in the Memorandum prepared by the Committee of Ministers in 2007, there were also the following contributing factors:

- the deficiencies in the functioning of the bailiffs' service;
- lack of coordination between the enforcement agencies;
- lack of clarity in the judgments (e.g., identification of a debtor);
- lack of debtor's funds (other than for social payments);
- lack of clarity as to the requirements of the enforcement procedure (e.g., what documents were to be submitted to the Ministry of Finance).[131]

[128] For the facts of the case, see *Burdov*, cited above, §s 7-23.
[129] Ibid., § 31.
[130] See, *Burdov no. 2*, cited above, § 133.
[131] See, Memorandum *Non-enforcement of domestic judicial decisions in Russia: general measures to comply with the European Court's judgments*, cited above, p. 4.

Additionally to the lack of funds and bureaucratic deficiencies Rene Provost offers decentralization of the judiciary as another reason underlying the non-enforcement problem.[132] With this in mind, the Russian non-enforcement problem was rightly labelled by the commentators as being "complex"[133] and "immense and multi-dimensional"[134]. The Court having analyzed the situation pointed out to the two-fold nature of the reasons for non-enforcement problem in Russia. On the one hand there were legislative deficiencies that hindered proper enforcement and, on the other – administrative issues, e.g., the lack of funds, the relations between the federal and local governments, deficient practices in enforcement proceedings, etc. With this in mind the Court mandated the respondent Government to implement "comprehensive and complex measures, possibly of a legislative and administrative character, involving various authorities at both federal and local level"[135].

It shall be pointed out at this stage that since the first *Burdov* judgment (and other non-enforcement judgments) the Russian authorities showed (some level of) awareness and willingness to address the underlying problems.[136] A number of measures were taken, including the implementation of the special procedure of enforcement of judgments against the State, partial payment of outstanding debts, improvement of budgetary procedures, introduction of indexation of payments (which, ironically, will be precisely the matter in the *Burdov no. 2* case), civil and criminal liability for non-enforcement for State officials and even the drafting of the constitutional law on compensation by the State of damage caused by

[132] See, Provost, cited above, p. 312
[133] See, *Burdov no. 2*, § 136.
[134] See, the Report of the European Commission for the Efficiency of Justice (CEPEJ) *Examination of problems related to the execution of decisions by national civil courts against the state and its entities in the Russian Federation*, CEPEJ(2005)8, adopted by at 6th plenary meeting (7 – 9 December 2005), § 7. Available online at: https://wcd.coe.int/ViewDoc.jsp?id=1031447&Site=CM.
[135] See, *Burdov no. 2*, § 136.
[136] For example, in his Address to the Parliament in November 2008, the President of the Russian Federation Dmitry Medvedev noted that almost half of the civil judgments remain unenforced and that that the execution of court decisions was a huge problem. He also acknowledged the necessity to establish a compensatory mechanism for the damages caused by violations of the a reasonable time requirement (the full text of the speech is available in Russian at: http://archive.kremlin.ru/text/appears/2008/12/210020.shtml, and it cited in Provost, above, p. 302 and Leach, above, p. 352.

lengthy court proceedings or judgments enforcement[137]. However, for the Court and the Committee alike these measures were far from complete and effective, and the Court, noting the complexities of the issues at stake and the ongoing cooperation between the Russian authorities and the Committee of Ministers left the question of further measures to be settled within this cooperation.[138]

The Court's approach to Article 13 as regards the implementation of the effective remedy in this is unusual, but somewhat similar to the one in the Moldovan case. The applicant did not refer to this Article in his application, and the Court took this issue up on its own motion. The analysis of the remedies available in the domestic legislation at the material time led the Court to conclude that they do not constitute – either separately or in conjunction – an effective domestic remedy as required by the Convention. The Court grouped the remedies available in to two categories: those of preventive nature and those of compensatory nature. As for preventive measures the Court recalled that, based on its previous case law, there were virtually no such measures in the domestic legal order in respect of the judgments delivered against the State, as, in particular, the bailiff had no powers to force the State to pay a court award.[139] Other measures advanced by the Government, e.g., the criminal responsibility of State officials for non-enforcement and the procedure of declaring the State officials' actions in respect of enforcement unlawful were also found ineffective as they did not bring the creditor any closer to the actual enforcement of the judgment.[140] As regards the compensatory measures, in particular the possibility to obtain the pecuniary and non-pecuniary damage compensation, being conditional upon the acknowledgment of the debtor's

[137] For the summary of the measures implemented see the *Burdov no. 2* judgment, §§ 23-24, 27-30 and 34.
[138] Ibid., § 137; for the summary of the measures adopted see also Leach, cited above, pp. 348-349 as well as the Committee of Ministers Interim Resolution CM/ResDH(2009)43 adopted by the Committee of Ministers on 19 March 2009 at the 1051st meeting. Available online at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResDH(2009)43&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.
[139] Ibid., § 101.
[140] Ibid., §§ 102-104.

fault (which is virtually impracticable where the State is a debtor) and applied rarely and inconsistently by the national courts, they were likewise rejected.[141]

Based on the totality of the above factors the Court saw them as indicative of a "persistent systemic dysfunction"[142] and a practice incompatible with the ECHR. It ordered that the Russian Government introduces a remedy, which will "secure genuinely effective redress for the violations of the Convention on account of the State authorities' prolonged failure to comply with judicial decisions delivered against the State or its entities"[143]. It was in this judgment that the Court for the first time in the history of the pilot judgment procedure prescribed particular time-limits for the implementation of the measures required – individual (1 year) as well as general (6 months).

It was not before a couple of interim resolutions by the Committee of Ministers[144] and an intense cooperation between it and the Russian Government that the remedy Law required by the Court was drafted and adopted. On 4 May 2010 the Law *On Compensation for Violation of the Right to Trial within a Reasonable Time or the Right to Judgment Enforcement within a Reasonable Time* entered into force.[145] As it is evident from the title of the Law, the Russian Government, just like its Moldovan counterpart, opted for a complex approach dealing simultaneously with the questions of length of proceedings as well as execution of judgments. Thus the Law contains provisions not only on the compensation of damage caused by the prolonged trial and/or enforcement of judgment but also on the mechanisms for speeding up judicial and enforcement procedures. The law was accompanied by a number of further legislative amendments, administrative documents (e.g., ministerial

[141] Ibid., §§ 106, 109-116.
[142] See, Burdov no. 2, § 134.
[143] Ibid., § 141.
[144] See, for example, Interim Resolution CM/ResDH(2009)43, cited above.
[145] The text of the Law is available in Russian at: http://pravo.gov.ru/proxy/ips/?docbody=&nd=102138001 or in English in the submission of the Russian Government to the Committee of Ministers at: https://wcd.coe.int/ViewDoc.jsp?id=1799517&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

orders) as well as judicial practice (e.g., the decisions of the Plenums of the Supreme Courts of the Russian Federation and of the Supreme Commercial Court of the Russian Federation related to the consideration of cases under the remedy law*).*[146]

The remedy Law provides that the parties to the respective proceedings may in the case of violation of the terms of enforcement of judgments delivered in their favour apply to the court to receive compensation.[147] Such applications may be filed before the end of the enforcement proceedings in respect of the judgment at stake, but not earlier than 6 months from the expiry of a time-limit set by the federal law, or not later than six months after the completion of the enforcement proceedings.[148]

The compensation shall be awarded if the violation occurred for the reasons beyond the control of the applicant. However, the violation of the time-limits set by the legislation of the Russian Federation for the execution of a judicial act shall not, as such, constitute a violation of the right to trial within a reasonable time or the right to judgment enforcement within a reasonable time.[149] As it appears, this would require the proof of the unlawfulness of the violation of the time-limits, which may be an additional burden on the applicant. The positive side is, however, that the finding of the violation and the award of the compensation shall not depend on the presence or absence of guilt of a respective authority (e.g. courts, bailiffs, etc.)[150], which is one of the most important provisions of the remedy Law. As importantly, the remedy law envisages that when determining the amount of the compensation the domestic court shall, apart from the circumstances of a particular case, requirements of reasonableness and justice, take into account the case law of the ECtHR.[151] The award of the compensation shall not preclude the possibility to obtain other forms of

[146] See, the Government's submission cited above.
[147] Article 1 (1) of the remedy Law.
[148] Article 3 (8).
[149] Article 1 (2).
[150] Article 1 (3).
[151] Article 2 (2).

redress, for example, the non-pecuniary damage, which shall be, however, sought in separate proceedings under civil legislation.[152]

The compensation shall be payable from the federal budget funds, budget funds of a constituent entity of the Russian Federation or the local budget depending on the nature of the respondent, and the authority responsible for the payment shall be either the Ministry of Finance or the relevant local body respectively.[153] Article 4 (4) provides, a bit confusingly, that the judgment awarding the compensation for the violation of the right to trial or to execution of judgment within a reasonable time shall be enforced *immediately*. The precise time-limit is, however, set out by Article 5 (1) providing that the judgments shall be enforced within 3 months from the date of their submission for execution.

According to the statistical information provided by the Russian Government in 2011[154] by the end of June 2011 the Russian courts examined 287 applications submitted under the remedy Law, 186 of which related to the violation of the right to execution of judgment within a reasonable time. Out of 186 cases, in 100 cases the violation was found and the compensation awarded, while the rest 86 cases were dismissed. In the Government's view this data evidenced "the successful practical implementation of the Law on Compensation by the Russian courts"[155]. However, bearing in mind that with the adoption of the *Burdov no. 2* judgment more than 1100 non-enforcement complaints pending before the Court were suspended and were now to be dealt with by the Government, it is hard to speak about a "success".

Another question is that of funding. As the Government contends in its submission to the Committee, the necessary funds are allocated in the federal budget, the budgets of constituent entities of the Russian Federation and the local budgets. They noted that

[152] Article 1 (4).
[153] Article 5 (2) and (3).
[154] See the Government's submission cited above, p. 4.
[155] Ibid.

according to the Ministry of Finance of the Russian Federation, by the end of June 2011 the Ministry (as a defendant) received 86 writs of execution for the total amount of about RUB 3,471,890. Out of these, 70 court judgments were enforced in full, 16 were returned due to mistakes in the bank account details specified by the applicants or their quashing or amendment by the superior courts.[156] However, no information on enforcement of judgments by local financial bodies is available which, in the light of the background problems for non-enforcement described above, is one of the most important issues.

Although at the material time the Committee refrained from providing any substantive commentaries on the progress achieved by the Russian Government[157], limiting itself to "noting" the information provided, the most important development came from the side of the Court. As early as in September 2010 it adopted an admissibility decision in the case of *Nagovitsyn and Nalgiyev*[158] where, having considered the measures introduced after the pilot judgment, the Court declared the application inadmissible requiring the applicants to first use the domestic remedies available to them.[159] The Court noted that the remedy Law was designed to resolve the problems of delayed enforcement of judgments "in an effective and meaningful manner, taking account of the Convention requirements".[160] The fact that the domestic courts have not objectively been able by that time to settle their practice did not, in the Court's view, constitute a reason to believe that the applicants were altogether deprived of the opportunity to obtain compensation: there was, in the Court's words, "[a] reasonable prospect of success"[161].

[156] Ibid., p. 5.
[157] See, the Resolution of the Committee of Ministers adopted at its 1120th meeting on 14 September 2011, available online at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2011)1120/10&Language=lanFrench&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383
[158] See, *Nagovitsyn and Nalgiyev Russia*, application No. 27451/09, decision of 23 September 2010.
[159] Ibid., § 37 and 44-45.
[160] Ibid., § 30.
[161] Ibid.

In 2011, based on the totality of the above factors the Committee decided to terminate the examination of the implementation by the Russian authorities of the domestic remedies for non-enforcement or lengthy enforcement of domestic judgments. Consideration of the general measures to combat the root-causes of the non-enforcement was, however, transferred under the scope of *Timofeyev* group of cases.[162] Thus the Court and the Committee were satisfied with the measures suggested by the Government, considering them proper and effective even notwithstanding the fact that the non-enforcement complaints still reach the Court. In this context one of the latest non-enforcement judgments, *Gerasimov and others v Russia*[163], is especially telling. In this case the Court, having considered the applicants' complaints of the prolonged non-enforcement of non-monetary awards under the domestic judgments (e.g., obligations to take certain actions), reaffirmed its support to the remedy introduced following the *Burdov no. 2* judgment but called the Russian authorities to take further legislative measures to ensure that the non-monetary obligations are also honored.

In 2010 Donald wrote in her report of the results of the ECtHR's seminar *Responding to Systemic Human Rights Violations* that "[i]n any event, Burdov (No. 2) demonstrates that the three-way relationship between the Court, the Committee of Ministers and national authorities holds the key *to the successful resolution of complex problems* through the pilot judgment procedure.[164] It seems to the author of the present thesis however, that in the Russian case at this point in time with the remedy in place and (properly?) functioning, with (minor) additional amendments to legislation and practice, but with most of the root-causes

[162] See, the Interim Resolution CM/ResDH(2011)293, adopted by the Committee of Ministers at its 1128th meeting on 2 December 2011. The *Timofeyev* group of cases relates to the issues of non-enforcement of domestic judgments.

[163] See, *Gerasimov and others v Russia*, applications nos. 29920/05, 3553/06, 18876/10..., judgment of 1 July 2014.

[164] See, Alice Donald, Responding to Systemic Human Rights Violations: an analysis of 'pilot judgments' of the European Court of Human Rights and their impact within national systems Report of seminar at the European Court of Human Rights, Strasbourg, 14 June 2010, p.4 (emphasis added). Available online at: https://metranet.londonmet.ac.uk/fms/MRSite/Research/HRSJ/Publications%20&%20reports/Pilot%20Seminar%20Report_php.pdf.

still there, the resolution of the problem of non-enforcement of domestic judgments is somewhere half-way to its finish. And while there was an element of cooperation between the Committee and the respondent Government, an unsatisfactory state of execution of the Russian non-enforcement pilot judgment is partially precisely due to the limitations on the competences – of the Court, abilities – of the Committee[165] and willingness – of the Government.

4. Ukraine: the ultimate failure

It has already been noted above, that Ukraine was the first country of the three to open the extensive line of the non-enforcement cases before the Court. Transformation from the planned economy to the market-oriented was painful and the 90th were marked with the economic stagnation. Many companies, especially in industrial sector (mostly State-owned) went bankrupt or had been surviving on the margins of bankruptcy, the unemployment rates were skyrocketing and the State was not able to provide sufficient funding for all budgetary expenditures. The latter especially painfully hit those dependent on the so called "social payments": different types of pensions, disability benefits, work-related payments and benefits, etc. which were in abundance – partially inherited from the Soviet welfare system as well as newly created by the populist laws adopted after the independence.[166] With this in mind, it is no wonder that the first Ukrainian non-enforcement case, the abovementioned *Kaysin and others v Ukraine*[167], concerned the non-enforcement of judgments awarding the applicants, State-owned mine's employees, the payment of pension amounts.

[165] It is worth noting that in the period between the Interim Resolution of 2011 (cited above) and the adoption of the *Gerasimov* judgment and its transfer to the Committee to supervise its execution, the latter had not a single time considered Russian non-enforcement cases giving priority to other categories of cases (e.g., ill-treatment, forced disappearances etc.).

[166] For example, the Laws of Ukraine On the Victims of Nazi Persecutions of 2000 and On the Social Protection of the Children of War of 2005 added new – and numerous – categories of persons to benefit from certain social benefits and budgetary payments (e.g., free use of public transport, discounts for the utility services payment, etc.).

[167] See, Chapter I, Section 1.4, p.

The relation of the non-enforcement problem in Ukraine to the payment of various kinds of social benefits is highlighted by the excellent summary of the pre-pilot case law in the Ukrainian non-enforcement cases, prepared in 2007 by the Committee of Ministers Department for the Execution of Judgments of the Court.[168] The Committee discerns two major groups of situations of the failure to ensure the payment of the respective awards (salary debts, disability benefits and other work-related benefits): those involving the **state-owned companies** (e.g., mining companies, housing and public utilities companies and special task companies[169]) and **state authorities** (e.g., police departments, the Army, prisons, courts, educational institutions, municipal authorities, etc.).

Building on the Committee's analysis, there are three main reasons (which apply alone or in combination) for the failure to enforce the domestic court decisions:

- the debtors' lack of funds;
- the moratorium on the forced sale of property of the state-owned or state-controlled companies for the purposes of execution of courts judgments;
- the deficiencies in the enforcement procedures.[170]

Due to the amount of the non-enforcement complaints, the number of persons affected and the systemic nature of the problem, in October 2009 the Court adopted a pilot judgment in the case of *Yuriy Nikolayevich Ivanov v. Ukraine*[171] (the *Ivanov* case). In this case, the applicant, Mr Ivanov, after having retired from the Army, was entitled to certain retirement payments, including the compensation for the uniform, which were not made to him at the

[168] See, *Non-enforcement of domestic judicial decisions in Ukraine: general measures to comply with the European Court's judgments*, Memorandum prepared by the Department for the Execution of the judgments of the European Court (Application of Article 46 of the ECHR), CM/Inf/DH(2007)30, revised 13 June 2007. Available online at: https://wcd.coe.int/ViewDoc.jsp?id=1150185&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

[169] For example, the Atomspetsbud Company, which carried out construction works at the zone of compulsorily evacuation after the Chernobyl Nuclear Power Plant disaster. The virtual bankruptcy of this only company and resulting failure to pay its former employees the outstanding salary arrears produced 144 applications to the Court and 10 judgments finding respective violations (see, for example, *Lopatyuk and others v Ukraine*, application no. 903/05 and 120 other applications, judgment of 17 January 2008).

[170] For more detail, see the Memorandum on Ukraine, cited above, Part I.

[171] See, *Yuriy Nikolayevich Ivanov v. Ukraine*, application no. 40450/04, judgment of 15 October 2009.

time he was leaving. He then instituted the court proceedings to obtain the payments owed to him and in August 2001 the court allowed his claims in full. The debtor managed to pay a part of the award; however, the rest of the amount (compensation for the uniform) remained unpaid. In late November 2002 the applicant was informed by the Ministry of Defense that as the legislative provisions entitling him to the compensation for his uniform were abolished, the budgetary allocations were no longer envisaged for such payments. At the time the ECtHR considered the case, the judgment remained unenforced for about seven years and ten months. The applicant also challenged the actions of the bailiffs claiming that it was their fault that he was now unable to obtain the amounts due to him. These claims were satisfied by the courts and the applicant was awarded pecuniary and non-pecuniary damages to be paid by the bailiffs' service. This judgment remained unenforced for about five years and eleven months.

Analyzing the situation, the Court noted that the delays were caused by "a combination of factors"[172], in particular, the lack of budgetary funds, actions of the bailiffs and the shortcomings in the national legislation which failed to ensure the possibility to have the judgments enforced in the event of a lack of budgetary allocations for such purposes – all of which falling under the control of the State. Referring to its previous case law (e.g., *Voytenko v Ukraine*, mentioned above, as regards the responsibility of the State to ensure that final decisions against its organs, or State-owned or controlled entities are enforced in compliance with the Convention requirements[173]) the Court found violations of Articles 6 (1) and 13 as well as Article 1 of Protocol 1. The Court further noted that it has already delivered judgments in more than 300 non-enforcement cases against Ukraine[174] and, most importantly, that around 1,400 new applications were pending before it, with this number constantly

[172] Ibid., § 55.
[173] Ibid., § 54.
[174] Ibid., § 83.

increasing.[175] Moreover, this case was essentially the same as the very first non-enforcement judgment of June 2004 (the *Voytenko* case).[176] The Court was very direct and clear in showing its anxiety about the State's reluctance to abide by its judgments by stating that "the respondent State has demonstrated an almost complete reluctance to resolve the problems at hand".[177] With this in mind, the Court concluded that the respective violations are not isolated or dependent on the particular circumstances, but are of systemic nature, caused by the "regulatory shortcomings and administrative conduct of the State authorities with regard to the enforcement of domestic decisions for which they were responsible."[178]

The Court therefore identified both general and individual measures to be implemented by the respondent Government within a limited time-period. At the level of general measures, both legislative and administrative reforms were required. The Court pointed out that while the choice of the concrete measures is up to the Government, in cooperation and under supervision of the Committee of Ministers, *a remedy or a combination of remedies* must be introduced within one year at the latest from the date on which the judgment becomes final, that is until January 15, 2011.[179]

Despite this strict deadline, it took the Ukrainian Government 364 days just to *propose* relevant measures and draft the respective law: it was not until January 14, 2011 that the bill, prepared in response to the pilot judgment, was introduced before the Parliament of Ukraine. [180] Aware of the inevitable delay, the Government asked the Committee of Ministers

[175] Ibid., § 86.
[176] Ibid., § 73.
[177] Ibid., § 91.
[178] Ibid., § 88. This statement can be used to illustrate and support the claims for the need to strengthen the preventive effect of the Court's judgments. In the words of Dzehtsiarou and Greene: "[i]deally however, each and every one of its judgments should be a "pilot," which means that the respondent party and effectively all other High Contracting Parties should amend their practice to be in compliance with the ECHR". (see, Dzehtsiarou, Kanstantsin, and Alan Greene. "Legitimacy and the Future Of The European Court Of Human Rights: Critical Perspectives From Academia And Practitioners." *German Law Journal 10 (2011*): pp. 1708-1709).
[179] Ibid., § 94 (emphasis added).
[180] The draft law *On the Guarantees of the State as Regards the Execution of Judgments* (no.7562). The text is available in Ukrainian at: ttp://search.ligazakon.ua/l_doc2.nsf/link1/ JF5U200I.html.

for the extension of the deadline for another year, which was granted partially and the new deadline was set for July 2011.[181] The only argument that can be advanced in the Government's defense is that it opted for the complex approach: the draft Law no. 7562 not only provided for the special enforcement procedure for the judgments for which the State is responsible and compensation for the delays but also envisaged profound amendments to a number laws of Ukraine establishing social payments.[182] Additionally, the moratorium on the forced sale of property of the state-owned or state-controlled companies for the purposes of execution of courts judgments was to be abolished.

In respect of the social payments, according to the draft Law the scope and/or the amounts of such benefits and payments were no longer to be fixed by the respective laws, but to be decided by the Cabinet of Ministers of Ukraine.[183] Such a procedure was intended to address the root-cause of the non-enforcement problem in Ukraine, that is, the lack of budgetary funds for social payments: empowering the Cabinet of Ministers to decide on their amount could ensure that the State's obligations meet its financial resources. On the one hand, this was a courageous decision: rather than keeping the massive malfunctioning system of social payments that had never been fully covered with budgetary allocations and could hardly be covered in the future the Government opted for the cardinal change of the system. On the other hand, however, for tens of thousands of people it meant that they will lose their benefits that, in many cases, were their only income. This was especially painful for such

[181] See, the letter by the Deputy Section Registrar of the European Court to the Secretary of the Committee of Ministers of 21 January 2011. Available online at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1805662&SecMode=1&DocId=1690454&Usage=2.

[182] The amendment to a total of 12 laws were envisaged, e.g., *On Militia, On the Social Protection of the Children of War, On the Status and Social Protection of the Citizens Affected by the Chornobyl Disaster, On the War Veterans and Guarantees of their Social Protection*, etc.

[183] The legal provisions in force at the material time envisaged, as a general rule, the particular scope or sums of the benefits or payments. For example, according to the *Law on Militia*, Article 22, the law-enforcement officers and their family members enjoyed the right to 50%-discount for the utility services payments. The draft Law abolished the direct reference to the scope of a discount, instead providing that the law-enforcement officers and their family members enjoyed the right to a discount for the utility services payments in the amount set out by the Cabinet of Ministers of Ukraine (Section 3 (1) of the Transitional provisions of the draft Law.)

categories of beneficiaries as the victims of the Chernobyl Nuclear Power Plant disaster and war veterans who due to their age and/or state of health could no longer work and earn their living, required costly medical treatment and social support.

This led to the massive protests and civil outrage throughout the country. Although in their letter to the Committee of Ministers of 9 September 2011 the Government stated that the draft law "generated genuine public interest"[184], by mid-autumn 2011 the protests had already grown into the violent opposition.[185] The Government was forced to hold consultations and look for other options, but because of the growing understanding that the only way to somehow resolve the problem (in the absence of the viable hope for better financing) was to cut the social payments, the Law of Ukraine *On the State Budget for the year 2011* (adopted in June 2011)[186] introduced the provisions similar to the ones envisaged by the draft Law no. 7562 by giving the Cabinet of Ministers powers to establish the scope and the amount of social payments. These competences of the Cabinet of Ministers were challenged as unconstitutional before the Constitutional Court of Ukraine. In two consecutive decisions of 26 December 2011 and 25 January 2012 the Constitutional Court of Ukraine upheld the respective provisions and effectively recognized that the Cabinet of Ministers was competent to annually set out the scope and the amount of the social payments based on the financial possibilities of the State.[187]

Considered unlawful by the public as well as by many legal professionals, these decisions virtually abolished the social payments previously existing. Thus, although they did

[184] See, the letter of the Government Agent of Ukraine before the ECtHR of 9 September 2011 no 12.3-23/6357 to the Committee of Ministers. Available online at: https://wcd.coe.int/ViewDoc.jsp?id=1829697&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

[185] To understand the scale of the public disapproval of the measures envisaged see: https://www.youtube.com/watch?v=unS0Q3VtTo4 and https://www.youtube.com/watch?v=DastuILKK6c showing the protests by the Chernobyl victims and war veterans in front of the Ukrainian Parliament in November 2011.

[186] The text of the Law is available in Ukrainian at: http://zakon0.rada.gov.ua/laws/show/3491-17.

[187] The respective resolutions of the Constitutional Court of Ukraine (no. 20-rp/2011 and no. 3-rp/2012) are available in Ukrainian on its official web-site at: http://www.ccu.gov.ua/ in the section "Jurisprudence" under the respective year and date.

not abolish the respective entitlements themselves, the new procedure - upheld by the above decisions - rendered the payments virtually illusory as the rates set out by the Cabinet of Ministers of Ukraine[188] would be much lower than those previously envisaged. For example, before the amendments the victims of the Chernobyl disaster would by the end of 2011receive a state pension amounting minimally to around 6,000 to 10,000 UAH[189] (around 580-590 EUR) and in 2012 after the amendments it would be only 1,800-2,300 UAH (around 170-218 EUR). Upon the background of galloping inflation rate of 99.8 in 2012 to 143.3 in 2016[190] and extremely slow growth of the minimum living wage (from 884 UAH in 2012 to 949 UAH in 2015, without no growth at all in 2014-2015[191]) , the amendments introduced hit painfully on the most vulnerable citizens.

In the Government's view, however, the amendments contributed to – although partial, but considerable – resolution of the non-enforcement problem.[192] Moreover, with the above changes in place, there was no longer a need for the same provisions to be included into the remedy Law. As of this time the Government had been concentrating on the introduction of the special procedure of enforcement of the judgments for which the State is responsible. It took, however, another half a year for the remedy law to be adopted: it was during the 1144th HR meeting (June 2012) that the Ukrainian Government informed the Committee of Ministers of the adoption of the remedy law.[193] This law, *On guarantees of the*

[188] See, the resolution of the Cabinet of Ministers of Ukraine of 23 November 2011 no. 1210 "On the improvement of social protection of citizens affected by the Chernobyl disaster".

[189] According to the resolution of the Cabinet of Ministers of Ukraine of 30 May 1997 no. 523, the state pension to the Chernobyl victims should have been no less than 6, 8 or 10 minimum salaries depending on the category of disability. This was supposed to be a **minimum** amount with additional payments possible (e.g., to compensate for the damage to health inflicted as a result of the radiation), thus making the amount even more substantial.

[190] For the inflation rates see: http://index.minfin.com.ua/index/infl/.

[191] For the minimum living wage rates see: http://www.zkg.ua/prozhytkovyj-minimum-u-2012-2013-2014-2015-rokah/.

[192] See, the letter of the Government Agent of Ukraine before the ECtHR of 3 March 2012 no 12.3-23/1491 to the Committee of Ministers. Available online at: https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD(2012)263& Language =lanEnglish&Site=CM.

[193] See, the Committee's decision welcoming the adoption of the remedy Law at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2011)1144/25&Language=lanFrench&Ver=original&Site= &BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679 and the letter of the

State concerning the execution of court decisions, was signed by the President of Ukraine on 22 June 2012 and became operational as of 1 January 2013.

The Law provided for a completely new procedure of enforcement at the expense of the State Budget of Ukraine of the domestic judgments for which the State is responsible differentiating between the judgments delivered against the State authorities and against the State enterprises and organizations as well as the companies under the moratorium on the sale of property.[194] As to the first category of judgments, it was envisaged that the respective awards shall be payable within 3 months starting from the date of lodging of the relevant documents by a creditor to the State Treasury Service of Ukraine. The Law was designed so that to require a minimum of documents: in order to obtain the debt owed to him a creditor had to submit only the bank account details.[195] The judgments delivered against State enterprises and organizations as well as the companies under the moratorium on the sale of property shall be enforced at the expense of the State Budget of Ukraine if within 6 months starting from the date of lodging the relevant application by a creditor to the State Bailiffs' Service they are not enforced by the debtor. In this case, the State Treasury Service of Ukraine was obliged to conduct the payment of the outstanding amounts within 3 months. Thus, the overall length of enforcement of this category of judgments was not to exceed 9 months.[196] Also, a compensation of 3% per annum on the unpaid amount until final settlement was envisaged for the delays that might occur during the enforcement proceedings.[197]

As it can be seen, after the 2011-2012 decisions of the Constitutional Court of Ukraine, "settling" the question of social payments, these measures provided for by the

Government Agent of Ukraine before the ECtHR of 30 July 2012 no 12.3-23/5242 to the Committee of Ministers enclosing the text of the Law translated in English at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2191492&SecMode=1&DocId=1919344&Usage=2.

[194] Article 2 of the Law.

[195] Article 3 of the Law.

[196] Article 4 of the Law.

[197] Article 5 of the Law.

remedy Law were aimed solely at resolving the situation of non-payment of the judgment debts. Although generally welcomed by the Committee of Ministers, a number of problematic issues was identified in relation to the remedy Law, the two most important being the due financing of the new procedure and the situation with the decisions which were adopted before the entry into force of the Law.[198] In the latter context, as the Law was to be applied as of 1 January 2013, only the judgments adopted after that date were covered by the new procedure; those adopted before this date were not covered by the Law thus being a potential source for the new applications to the ECtHR.

This was of a special importance as on 26 July 2012 the Court, having "de-frozen" the consideration of the individual non-enforcement applications, delivered its first judgment in the case of *Kharuk and others v Ukraine*[199]. In this judgment the Court noted both that the new procedure "do[es] not provide for compensation for the delays in the enforcement of domestic decisions which have already taken place"[200] and that "it is unclear whether the implementation of the new regulations will be supported by sufficient budgetary allocations."[201]

As regards the judgments delivered before 1 January 2013 it was obvious that further legislative measures were required.[202] According to the Explanatory Note to the respective draft law, prepared by the Ukrainian Government to address this issue, in 2013 only two categories of already adopted judgments, for which the State is responsible (i.e., those caused by the moratoriums), would have required more than **16 billion** UAH. Having regard to the

[198] See, Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights of 19 September 2012, CM/Inf/DH(2012)29. Available online at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH(2012)29&Language=lanFrench&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679

[199] See, *Kharuk and others v Ukraine*, application no. 703/05 and 115 other applications, judgment of 26 July 2012.

[200] Ibid, § 18.

[201] Ibid.

[202] A requirement was expressly stated in the Committee's decision adopted at the 1150th HR meeting on 26 September 2012. Available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2011)1150/26&Language=lanFrench&Ver=original&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679.

excessiveness of the amounts due, the Government opted for a gradual restructuring of the debts. The draft Law provided for the inventory of all the outstanding debts by establishing a procedure to submit all the unpaid judgments to the State Bailiffs' Service of Ukraine within a certain time-period. The latter would than establish the total amount of the indebtedness and decide on its restructuring based on the financial possibilities of the State. Afterwards, the debts would be paid according to a particular order of priority with the social and salary related payments to be covered first. This draft law was adopted on 19 September and became final on 16 October 2013.[203]

The adoption of the Law was welcomed by the Committee of Ministers[204], although the financial concerns remained. In the view of the amounts of indebtedness indicated by the Government in the Explanatory Note to the draft Law, these concerns were not baseless and remain pertinent. According to the latest information by the State Treasury Service of Ukraine[205] as of January 2016 it had received more than 109,000 unenforced court judgments requiring more than 1.8 billion UAH to be paid to the creditors. At the same time, the budgetary allocations envisaged for the four years in the period 2013-2016 amounted only to around 154, 77, 150 and 145 million UAH respectively[206], that is only around 29% of the amount required. With this, in 2016 the State Treasury Service of Ukraine plans to conduct payments under the judgments submitted in April-July 2013.

In order to provide a solution to this problem, which has additionally been aggravated by the military conflict in Eastern Ukraine and economic crisis, in 2015 the Government

[203] The text of the Law *On Amendments to the Law of Ukraine On guarantees of the State concerning the execution of court decisions* is available in Ukrainian online at: http://zakon0.rada.gov.ua/laws/show/583-18/§n17#n17 and its provisions are fully incorporated into the text of the current Law *On guarantees of the State concerning the execution of court decisions.*

[204] See, the Committee's decision adopted at the 1186th HR meeting, on 5 December 2013. Available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH(2013)1186/21&Language=lanEnglish&Ver=original&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679.

[205] See, http://treasury.gov.ua/main/uk/publish/article/235403.

[206] See, the Laws of Ukraine *On the State Budget* for the years 2013, 2014 and 2015. Available in Ukrainian at: http://zakon2.rada.gov.ua/laws/show/5515-17, http://zakon4.rada.gov.ua/laws/show/719-18, http://zakon3.rada.gov.ua/laws/show/80-19 and at http://zakon0.rada.gov.ua/laws/show/928-19 respectively.

envisaged a possibility to restructure the outstanding indebtedness by means of issuance of the financial treasury bonds covering 90% of the sum with the maturity up to seven years and the deferred payment of two years and with 3% interest rate. The remaining 10% of the debt amount will be paid in cash.[207] This procedure was massively criticized by the public[208] and the Committee alike. The latter, in its decision adopted at the 1230th meeting in June 2015 expressed its concern about the proposed scheme and noted that "if not carefully designed, [it] could run contrary to the authorities' efforts to introduce an effective remedy for cases of the present group".[209]

Most importantly, however, the Committee, noting that the problem of non-enforcement of domestic judicial decisions has been persisting in Ukraine for more than a decade, expressly stated that neither of the measures adopted by the Government resolved the non-enforcement problem.[210] And so it is: with more than 7 years since the adoption of the pilot judgment and nearly 12 years after the first non-enforcement case Ukraine remains (almost) where it was. The most notable difference however is in the way the social payments beneficiaries were affected in the course of the country trying to resolve the non-enforcement problem and execute the ECtHR's pilot judgment. And, while all these measures where aimed at preventing future non-enforcement applications reaching the Court, the above analysis evidences that this aim was not achieved.

[207] See, Section 23 of the Law of Ukraine *On the 2015 State Budget*, cited above.
[208] See, for example, the communication from the Ukrainian Helsinki Human Rights Union of 26 May 2015, available in English online at: https://wcd.coe.int/ViewDoc.jsp?id=2330971&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.
[209] See, the Committee's decision adopted at the 1230th HR meeting on 11 June 2015. Available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2015)1230/26&Language=lanFrench&Ver=original&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679.
[210] Ibid.

5. In place of conclusion: differences and similarities of the non-enforcement pilot-judgments and the measures to implement them

In 2009 flooded by the non-enforcement cases the Court applied the pilot judgment procedure, designed specifically to tackle systemic problems, to the three major "perpetrators": Moldova, Russia and Ukraine. Apart from being adopted in the same year, the three pilot judgments share many other similar features, as well as distinctions though.

To start with, the reasons behind the violation of the right to enforcement in these countries related in one way or another to the realization of the social rights. In all the three cases the respondent Governments failed to secure the payments due to the applicants under the domestic legislation entitling them to certain social benefits. It was different however in that, in the Moldovan case, the problem was more straightforward: it lay in the legislation granting the right to social housing to a very wide category of persons at the expense of the local governments only without any help from the central budget. In that, in the Courts view, this was an "easy" problem of deficient legislation. In Russia and Ukraine the situation was different in that the deficiencies were both legislative (outdated and ineffective legislation) and administrative (e.g., lack of funds, irregularities in relations between the federal and local governments, deficient practices in enforcement proceedings). Thus, the Court characterized it as complex and involving multiple factors. This distinction will be the reason for the different approaches that the Court took when ordering remedial measures.

Further, the question of keeping with time-limits and, related to that, the diligence on the part of the respondent Governments, also features as a point of comparison between these cases. In particular, although providing for no concrete guidance on what measures shall be implemented to resolve the problems identified, all three Court's judgments contain specific time-limits for such implementation. While for Moldova and Russia the deadline was 6 months, in the Ukrainian case it was 1 year. This can be explained by the fact that in Ukraine, despite the fact that all the three countries shared a long history of non-enforcement

complaints, there were no previous measures envisaged and/or implemented with regard to the non-enforcement unlike in Moldova and Russia. In particular, in Moldova by the time of consideration of the *Olaru and others* case the authorities had already drafted a Law aimed at the complete abolition of the legislative provisions granting the rights to social housing.[211] Such initiative was generally welcomed by the Court, who noted that "such a measure, if followed through, is capable of solving the problem for the future" [212], but the Court pointed out that it would not resolve the problem of the already adopted judgments awarding social housing. Also, the Russian authorities since the first *Burdov* judgment (and other non-enforcement judgments) were more aware and willing to address the underlying problems as compared to their Ukrainian colleagues. Unfortunately, the deadlines set by the Court, however long, proved to be an ineffective requirement as all the three respondent Governments violated them. Probably, the only exception is Moldova, where the violation of the deadline was minimal and occurred for an objective reason rather than because of the authorities' reluctance to act timely and diligently. The worst scenario occurred in Ukraine where, despite the longest deadline, more than 2 years had passed before the adoption of the remedy law.

Another interesting point of comparison is the Court's rulings on the issue of remedies which would provide effective redress for the Convention violations on account of the failure to enforce domestic court decisions (Article 13 violation). It was only in the Ukrainian pilot judgment that the Article 13 issue was from the outset clearly invoked by the applicant. In the Russian case the Court's approach to Article 13 as regards the implementation of the effective remedy was unusual: while the applicant did not refer to this Article in his application, the Court took this issue up on its own motion. The analysis of the remedies available in the domestic legislation at the material time led the Court to conclude that they

[211] See, *Olaru and others v Moldova*, § 31.
[212] Ibid., § 57.

do not constitute – either separately or in conjunction – an effective domestic remedy as required by the Convention. The Court grouped the remedies available in to two categories: those of preventive nature and those of compensatory nature. As for preventive measures the Court recalled that, based on its previous case law, there were virtually no such measures in the domestic legal order in respect of the judgments delivered against the State, as, in particular, the bailiff had no powers to force the State to pay a court award.[213] Other measures advanced by the Government, e.g., the criminal responsibility of State officials for non-enforcement and the procedure of declaring the State officials' actions in respect of enforcement unlawful were also found ineffective as they did not bring a creditor any closer to the actual enforcement of the judgment.[214] As regards compensatory measures, in particular the possibility to obtain pecuniary and non-pecuniary damage compensation, being conditional upon the acknowledgment of the debtor's fault (which is virtually impracticable where the State is a debtor) and applied rarely and inconsistently by the national courts, they were likewise rejected.[215] Based on the totality of the above factors the Court saw them as indicative of a "persistent systemic dysfunction"[216] and a practice incompatible with the ECHR. Similarly, in the *Olaru and others* case the applicant's alleged only the violations of Article 6 (1) and Article 1 of Protocol 1. The violation of Article 13 of the Convention in this case was based on the Court's conclusions in the previous cases and the lack of any information on the introduction of remedies thereafter.

The measures implemented by the Governments following the pilot judgments also share points of comparison. The Moldovan and Ukrainian authorities opted both for root-cause elimination as well as for the establishment of a compensatory remedy. In particular, the domestic legislation in these countries was amended so that to abolish the legal

[213] See, *Burdov no. 2*, § 101.
[214] Ibid., §§ 102-104.
[215] Ibid., §§ 106, 109-116.
[216] Ibid., § 134.

entitlements giving raise to the occurrence of the indebtedness (e.g., the entitlements to social housing or social benefits) as well as to provide for the procedure via which a creditor could obtain a compensation in the case of prolonged enforcement of a judgment delivered in his favour. It should be noted however, that the two compensatory remedies were different in nature: in Moldova it was the judicial procedure while in Ukraine it was the administrative procedure. In this context, the Russian and the Moldovan compensatory mechanisms are most similar, although the former did not abolish any social rights.

The assessment of the effectiveness of the measures adopted is not an easy task to do as it involves many factors, most notably the financial considerations. However, based on the relevant decisions of the Committee of Ministers and the Court it could be asserted that out of three countries under consideration only Moldova can be said to be successful in executing the pilot judgment: the Committee no longer supervises it under the enhanced procedure and the Court rejects the non-enforcement complaints as inadmissible in the view of the domestic remedy. The situation with the Russian pilot judgment execution is somewhat more complicated, especially in view of the recent Court's judgement in the *Gerasimov* case. And Ukraine is in the most regrettable situation with all its efforts to comply with the pilot judgment rendered ineffective in the face of economic crisis, financial incapability and lack of political will.

With the latter considerations in mind, the next and the final Chapter of the present thesis will look into the lessons that one can learn from the comparative study just done.

CHAPTER III TACKLING NON-ENFORCEMENT AS A SYSTEMIC PROBLEM: LESSONS TO BE LEARNED

A. Introduction

Based on the findings on the previous Chapter dedicated to the comparative study of the non-enforcement pilot judgments and their execution this final Chapter will try to identify the issues, that arise from the analysis done and, most importantly, the lessons that can be learned from the application of the pilot judgment procedure. It will seek to show that while this procedure, designed specifically to tackle systemic problems in the Member States, can be effective in some cases, in other cases it has limited impact which is highly dependent on the nature of the systemic problem at stake. One question that will be dealt with is whether systemic violations are, – and can be – effectively addressed based on an individual complaint. It will also be shown that the Court's time-limit orders in the pilot judgment procedure have been rendered ineffective by the respondent governments. Possible solutions to this problem will be advanced. In the context of execution of the pilot judgments the question of general measures, in particular the relationship between compensatory measures and root-cause elimination, will be addressed.

1. Tackling systemic problems via individual applications: concerns for the pilot judgment procedure

As noted above, although at the moment there is (almost) unanimous understanding that the pilot judgment procedure is a success, a number of concerns have been raised as to its legal nature, basis in the Convention and, especially, as to the Court's competences. One of the problems pertinent to the present research is the use of the individual complaints procedure to address systemic problems.

In a pilot judgment, by identifying a systemic problem – based on the facts of a particular case – and ordering the State to take measures to resolve it, the Court attempts to

grapple with the repetitive applications overburdening it. While designed primarily to process individual instances of human rights violations, the pilot judgment procedure has been also used to "uphold a general standard of human rights protection, thus, to effectuate comprehensive compliance with the Convention"[217]. This is how the Convention's individual complaints procedure was used to enable the Court to address not only a violation in respect of a particular individual, but also a widespread problem potentially affecting a large number of people and thus constituting a threat to the effectiveness of the whole Convention system. This prompted scholars to examine more closely the appropriateness of such an extended reach of the Court's competences. For instance, considering the implications of the use of the individual complaints procedure to address systemic problems Haider notes, that at times the Court's conclusions as to the existence of such problems in a particular state were reached "*on occasion*" of an application rather than derived directly and solely from the facts of this application.[218] Buyse also doubts the sufficiency of addressing systemic problems via a particular case noting that each case has it particularities and raises only one aspect out of the overall complexity of a systemic problem.[219]

In the context of the above concerns the Russian and Moldovan pilot judgments can be offered as an example, as in both judgments the Court addressed the systemic aspects of the non-enforcement problem in separate parts of the judgment, thus making them *additional* and almost *separate* from the findings in the applicants' cases themselves. This "separateness" can be further illustrated by the fact that in these judgments the Court examined the question of existence of the domestic remedies of its own motion, while the applicants did not assert this violation.[220] This emphasizes a broader, more generalized view of the Court on the non-enforcement problem, encompassing not only the facts of a particular

[217] See, Haider, cited above, p. 124.
[218] Ibid., page 104.
[219] See, Buyse, cited above, p. 88.
[220] See above, Chapter II, pp. 28 and 37.

case, but also its findings in previous judgments, which raises reasonable doubts as to the appropriateness of such examination.

The Court has itself on several occasions noted that "in proceedings originating in an individual application, it has to confine its attention, as far as possible, to the issues raised by the concrete case before it"[221]. Along this line legal commentators also argue that the individual complaints procedure was not meant to be used to address systemic violations and its use shall be confined solely to the facts of a given case.[222] Haider, by analysing the respective Convention provisions and the development of the Court's case law successfully shows that this approach is not viable. In his view, the strongest argument in favour of the use of individual complaints procedure to address systemic violations is that this procedure was meant by the drafters to uphold the general human rights standards throughout Europe, as otherwise the effectiveness and, indeed, the very nature and the need in the human rights court, would be diminished considerably.[223] To add to that, Wildhaber, the former President of the Court, notes that using an individual case to adopt a pilot judgment and thus compel the State to comply with its obligation to take general measures "recognises that some situations cannot be dealt with effectively purely by the judicial processing of individual cases".[224] With this, the conclusion seems to be that the Court's competence to look beyond the limits of the particular case and establish systemic nature of a particular violation can be unequivocally upheld.

[221] See, among many other sources, *Guzzardi v Italy*, application no. 7367/76, judgment of 6 November 1980, para 88; *Adolf v Austria*, application no. 8269/78, judgment of 26 March 1982, para 36.
[222] For the list of legal scholars asserting the inappropriateness of the use of individual complaints to deal with widespread human rights violations see Haider, cited above, pp. 108-109. For more on the relations between individual rights and the Convention system effectiveness see Sainati, cited above; and Vajić, Nina and Dikov Grigory, "Pilot Judgments and Class Actions : What Solution for Systematic Violations of Human Rights?" in *Russia and the European Court of Human Rights : A Decade of Change : Essays in Honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, ed. Olga Chernishova and Mikhail Lobov (Oisterwijk : Wolf Legal Publishers (WLP), 2013), 105–20. The issue is also further developed in the concepts of individual and constitutional justice in Greer and Williams, "Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?, cited above.
[223] See, Haider, cited above, pp. 107-125.
[224] See, Wildhaber, cited above, p. 5.

There is however, another aspect of the use of individual complaints procedure to deal with systemic problems which relates to the possibility – and effectiveness – of addressing extremely complex problems through a particular case. As it has been described above, only the Moldovan pilot judgment was (relatively) straightforward and in the words of the Court itself, the problem was not particularly complex being limited to legislative shortcomings by which all responsibility for providing social housing rested solely on the local authorities. In both Russia and Ukraine the non-enforcement problem had a number of reasons underlying it, ranging from the varied legal nature of debtors (state and municipal authorities, state companies or those effectively controlled by it, companies under special bans on forced sale of property, individuals, etc.), variety of payments due (salary arrears, pensions, social benefits and compensations, etc.), deficiencies in the enforcement procedure itself and up to the banal lack of funds.[225] Upon this background, the application of the pilot judgment procedure in the cases raising one specific issue only (e.g., the non-payment of compensations to those who suffered from the Chernobyl disaster as in *Burdov* or *Ivanov* cases), although understandable from the Court's practical viewpoint, is, at best, misleading for an outside observer as it might create an impression that only this particular aspect of the non-enforcement problem led to the recognition of its systemic nature and reinforces the abovementioned argument of finding a systemic violation "on occasion" of an application.

With this, understanding the systemic nature of the non-enforcement problem and, most importantly, measures to resolve it, would require additional research and systematization. Regrettably, this has not been done by the Court in its judgments, but by the Committee in a number of its working documents and, sometimes, decisions adopted. In practical terms, it de-focuses the attention of all the parties to the process and it is easy to imagine that a particular aspect of the problem might be left outside. Although there is indeed

[225] The reasons of non-enforcement in the two countries were analyzed in detail in the respective sub-chapters of Chapter II.

a certain division of powers between the Court and the Committee, this particular aspect seems to fall under the Court's competence. Thus, more clarity and a more detailed approach when delivering pilot judgments addressing complex problems are needed. Clear pronouncement of all aspects of the problem based, for instance, on a summary of the previous findings[226], would be beneficial for the respondent Government, the Committee of Ministers and the Court itself (e.g., when addressing further cases raising similar issues). On the other hand, as suggested by some authors[227], a more thorough selection of an application to become a basis of a pilot judgment so that it addresses all the aspects of the systemic problem can be offered as a solution to the situation at stake. While this approach might be operational in some cases, where the problem is systemic but limited in scope, in the complex non-enforcement cases like those in Russia and Ukraine, this is hardly manageable.

With this, the individual complaints procedure for the purposes of pilot judgments shall be used with caution. Clearer reasons for the Court in reaching the conclusion on the systemic nature of a violation shall be given so that to make the life of the respondent State and the Committee easier and thus to boost effectiveness of the judgment's implementation.

2. Problematic issues of setting time-limits for the implementation of general measures

Another problematic issue related to the Court's competences in the framework of the pilot judgment procedure is the use and the observance by the States of the time-limits to implement the measures ordered by the Court. The deadlines are used by the Court for two interrelated purposes: to provide an impetus for the respondent government to act promptly and thus to ensure that the Court would be able to free itself from the backlog of repetitive applications as quickly as possible. The choice of the particular deadline depends largely on

[226] A recent example of such approach can be found in the Chamber judgment in the case of *Muršić v. Croatia* (application no. 7334/13, judgment of 12 March 2015) related to the detention conditions, where the Court provided an extensive summary of its case law on the issue.
[227] See, Buyse, cited above, p. 88.

the facts of the case and on the circumstances of the particular State's situation as well as the remedial measures required. The judgments analyzed above show that in Moldovan and Russian cases where some previous measures had been adopted the Court opted for a shorter deadline for the general measures to be implemented (6 months), while in Ukraine, due to the complex nature of the underlying problems and the absence of (almost) any previous efforts to resolve them, the deadline was longer (1 year). Interestingly enough, in the early pilot judgments the Court set no specific deadline but merely ordered the measures to be implemented within a reasonable time.[228]

Several questions arise in the context of prescribing lime-limits. The first question relates to the Court's powers to set such limits in the light of the States' discretion in executing the judgments. There is no question that the States have to abide by the Court's judgments, but at the same time there is nothing in the Convention about setting the time-limits.[229] While there is a legal basis for the payment of just satisfaction within particular a time-period (i.e., for the implementation of individual measures) at least in the Rules of Court[230], there are no provisions governing the application of deadlines to general measures. Haider considers that in the light of the general obligation of the States to execute the Court's final judgments one can only conclude that the measures required shall be taken as promptly as possible, and generally the time-limits are not in conflict with the States' discretion in executing the ECtHR judgments.[231] In the light of the nature of the pilot judgment procedure this conclusion gains even more weight, but still leaves open another question: the State's lack of influence in relation to the decision on the *duration* of time-limits. From the texts of the judgments analyzed above it doesn't transpire that any discussion as to the duration of

[228] See, for example, *Broniowski v Poland*, para 198 and *Hutten-Czapska v Poland*, para 247, both cited above.
[229] Article 46 of the Convention merely requires the States to abide by the final judgments of the Court in the cases to which they are parties.
[230] See, section 3 of Rule 75 of the Rules of Court, cited above.
[231] See, Haider, cited above, p. 223.

time-limits had taken place beforehand. The estimation of the duration is thus entirely in the hands of the Court.

In this context Haider notes that where the systemic problems are well-known and have existed for years, shorter deadlines are appropriate. It is true, indeed, that the State should –by the time of delivery of a pilot judgment, at the latest, – be aware of the existence of a particular systemic deficiency in its legal order and the deadline might be just an additional impetus to its resolution. It is however not that easy with long-standing, deep-rooted, complex and, importantly, financially dependent problems, precisely as in the case of non-enforcement. It has been shown above that while under an obligation to execute pilot judgments within set deadlines all the three respondent governments failed to take the measures prescribed by the Court in due time. While Moldova violated the deadline for objectively justified reasons, Russia and Ukraine, lagging behind in designing and implementing the Court's orders faced the need to request the prolongation of deadlines, and ultimately exceeded them by at least 6 months and up to 18 months respectively.[232] These examples are not to say that the Court should not engage in setting deadlines at all, but to show that setting deadlines requires realistic assessment of the situation at stake in the first place (which is impossible without consulting the respondent State and hardly imaginable in the framework of the adoption of a judgment but rather in the framework of supervision of its execution by the Committee) and its more rigid monitoring after having set it. In the latter context, the Court's only possibility is the resumption of consideration of adjourned individual applications (as was the case, for example, with the Ukrainian judgment). While the latter is an effective tool indeed, most of the leverage is, due to the division of powers between the Court and the Committee, concentrated in the hands of the latter. However, as the Committee's work is highly politicized its influence can be described as less "tangible".

[232] The 18-months delay in the execution of the Ukrainian pilot judgment is counted up to the adoption of the first remedy law. The duration of the delay grows as we consider the remedy law becoming operational (24 months) and the adoption of the amendments to it making thus an overall of a 33-months delay.

With the above arguments in mind, it could be suggested, that to boost effectiveness the powers of setting time-limits might be "re-arranged" between the Court and the Committee: the Court would set a "within reasonable time" deadline while the Committee, having received the judgment for supervision will establish, together with the respondent State and having regard to the particularities of the situation at stake, a viable deadline, accompanied by a detailed plan of actions with intermediary deadlines. Of course, such "re-arrangement" does not preclude situations of non-abidance or *force majeure* situations like the one in Moldova (i.e., political crisis and dissolution of the Parliament) but will bring the Committee into the execution process at an earlier stage (for, before the expiration of the deadline set by the Court the influence of the Committee is hardly visible) thus ensuring closer cooperation and constant supervision. It will also ensure that the deadlines are agreed upon with the involvement of the respondent State thus ensuring their viability, as compared to those set out by the Court alone, as it might be not in a position to realistically evaluate the time needed to resolve the problem it identifies in a pilot judgment. On the other hand, this will also help resolving the competence-related issue related to the absence of express Convention provisions on setting deadlines. On the overall, the practice suggested could help evade the possibility of "backfire" of setting deadlines, meaning that when the Court prescribes certain deadlines and the respondent States fail to act within these deadlines, the authority of the Court is severely undermined.

3. Effectiveness of the measures following a pilot judgment: root-cause elimination and compensatory remedies

As it has been on several occasions noted earlier, according to the Convention the States are under an obligation to abide by the final judgments of the Court, – that is to take individual and general measures based on the facts and findings of the Court in each particular case. The Court's placing on the States in the operative part of the judgment the

duty of taking general measures is, perhaps, the most outstanding feature of the pilot-judgment procedure even notwithstanding the fact that the Court remains constrained by the States' discretion in execution of judgments as well as by the Committee of Ministers' powers under this head. While indication of particular measures to be adopted is problematic in terms of the limitations of the Court's competences, the Court does indicate which parts of the domestic law and practice are not in line with the Convention to make it easier for the State to define a remedy. Otherwise, it would be "an endless and time-consuming process of trial and error, which serves neither the Strasbourg institutions nor the state concerned"[233].

Analyzing the Court's practice in respect of the remedial measures of general nature two types of measures can be discerned: those aiming at the root-cause elimination and those purely compensatory. For example, in the length of proceedings cases remedies aimed at expediting the proceedings and preventing them from becoming too lengthy would fall under the "root-cause elimination" type of measures[234] while the mechanisms allowing receiving a compensation in case of excessively lengthy proceedings fall under the second type of measures. From the Court's point of view, the "root-cause elimination" type of measures is certainly preferred, as it prevents the violation in the first place and does not merely remedy the situation *a posteriori*. This does not, however, preclude the State from choosing to adopt merely compensatory measures as the States enjoy a wide margin of appreciation in introducing measures following a pilot judgment.[235] The logic behind this approach is that as it is primarily for the State to address and remedy any human rights violation that might occur, thus compensatory mechanism, in place and functional, shall effectively prevent individuals from applying to the Court because they lose their victim status. However, even where such a remedy had been implemented, the Court still retains the power to examine the effectiveness of the compensatory remedy and may find it unsatisfactory. This is what

[233] See, Buyse, cited above, p. 85.
[234] See, for example, *Scordino v Italy*, cited above, para 183.
[235] See, *Nagovitsyn and Nalgiyev v Russia*, cited above, §§ 33-34.

happened in the Italian length of proceedings cases, where the compensatory mechanism for the violation of the reasonable time requirement introduced following the Court's findings was challenged due to the discrepancies between the amounts of the compensations awarded and the Court found that the applicants retained their victim status.[236] It was thus compelled to again adjudicate on the length of proceedings cases. This example shows that purely compensatory measures do not resolve the matter – which is a claimed outcome and the core of the pilot judgment procedure – but merely provide the Court with a possibility to reject applications for non-exhaustion of domestic remedies.

In the context of non-enforcement the choice and effectiveness of the remedial measures acquires a different shift. As it has been shown in the previous Chapter, most of the non-enforcement cases stem from the failure to pay monetary awards due to the lack of budgetary allocations. For instance, in Ukraine, the State Budget had been failing to provide for the (sufficient) funds to cover particular payments as well as those for the purpose of payment of court awards. Addressing the Government's arguments in that respect, the ECtHR has repeatedly emphasized that that lack of funds does not justify the non-compliance with domestic court judgments[237]. With this in mind the Committee of Ministers in its Memorandum called the Ukrainian authorities to ensure "an appropriate regulatory framework for budget planning to ensure in general that funds allocated correspond to the state's payment obligations".[238] However, seeing the cause of the problem in the inadequate "regulatory framework" for the distribution of budgetary funds, the Committee overlooked the root, the fundamental cause of the problem, that is the existence of a particular right (e.g.,

[236] Ibid; for more details on the issue of remedying the length of proceedings problem in Italy see Haider, cited above, pp. 18-19.
[237] Interestingly enough, in May 2015 the Supreme Court of Ukraine adopted a decision where it acknowledged that the lack of budgetary allocations for the payment of pension arrears is an acceptable justification for the non-enforcement of a court judgment and shall not entail the imposition of a fine by the State Bailiffs' service (see, the resolution of the Supreme Court of Ukraine of 19 May 2015 no. 667/4594/14-a. Available in Ukrainian online at http://www.reyestr.court.gov.ua).
[238] See the Memorandum on Ukraine, cited above, Part II, Section 2 (a).

to social benefits). Guaranteed by the State at the legislative level (as noted above, mostly in the populist laws adopted in the early years after the proclamation of independence), the right remains ineffective not because the "regulatory framework" is deficient, but for a simple reason of the lack of money, which has never been there, that is that the laws were knowingly adopted without being supported by proper funding. However sophisticated and thought-trough the budget regulations would be, it would not help until there is proper financing.

On the other hand, there is indeed an aspect of non-enforcement which is related to the proper regulations on budget planning. The lack of budgetary allocations to cover social payments causes an individual to claim his rights before the court. And this is how the outstanding "right-related" debt becomes a "judgment-related" debt – the two categories of payments which fall under different budgetary programs. Of course, the proper allocation of funds to finance the expenditures for the enforcement of court decisions could have helped, but this, again, would address the "symptom", not the "illness". Until there is a social right and it is not duly financed there will be more and more court judgments and more and more debts.

With this in mind, there is no wonder that ultimately what Ukrainian authorities have done, is effectively abolishing those social rights that gave rise to the occurrence of indebtedness. The sad thing is that even despite such cardinal measures, which hit most painfully on the most vulnerable groups of the society, the compensatory mechanism introduced in parallel, appeared to be ineffective. The total result of this is that the pilot judgement still remains unenforced and the Ukrainian people are in incomparably worse situation than before: they can neither receive their social benefits (in the previous amounts) nor obtain a compensation for the delays in enforcement of the domestic judgments.

In the context of the Russian non-enforcement problem and remedy measures, the Court's findings in the *Nagovitsyn and Nalgiyev* inadmissibility decision shall be mentioned

as the applicants expressly argued that that the remedy introduced post-pilot judgment was only a compensatory one (for the delays in the enforcement of judgments) and did not ensure the ultimate payment of the indebtedness. The Court reitatred its position that that while the prevention of violation and acceleration of payment of judgment debts are most desirable, a merely compensatory remedy for the prolonged enforcmemnt would also be considered effective. Therefore the approach adopted by the Russian authorities could not be regarded inefficient; the question would however remain as to the proper functioning of the remedy Law, especially in the cases when the State persistently fails to honor the judgment debt. But as at that stage this was a mere speculation the Court did not go into analyzing it.[239]

This goes again to the core of the non-enforcement problem. While Moldovan and Ukrainian authorities opted for the abolition of the rights that give raise to indebtedness thus targeting the root-cause, the Russian authorities opted for keeping the respective legal entitlements. This means that under certain circumstances there will be still a possibility of more judgments delivered and more awards unpaid. This possibility was repeatedly underlined by the Committee in its Interim Resolutions in respect of Russia[240] as well in 2010 Annual Report, where it noted that "the Russian authorities remain under the obligation to implement the necessary reforms (…) so as to ensure timely enforcement of domestic judgments. The adoption of such measures is all the more pressing since it was observed by the ECtHR that the Compensation Act does not ensure the ultimate execution of a domestic judgment but only provides the possibility to obtain compensation for delays already occurred"[241].

[239] See, *Nagovitsyn and Nalgiyev v Russia*, cited above, § 35.

[240] See, for example, Interim Resolution CM/ResDH(2009)43, cited above, stating that "the provision of a merely compensatory or acceleratory remedy may not suffice to ensure rapid and full compliance with obligations under the Convention, and that further avenues must be explored, e.g., through the combined pressure of various domestic remedies, provided that their accessibility, sufficiency and effectiveness in practice are convincingly established".

[241] Supervision of the execution of judgments of the European Court of Human Rights, Annual report 2010**,** Committee of Ministers**,** Council of Europe (April 2011), pp. 156-157. Available online at: http://www.coe.int/ en/web/execution/ annual-reports.

It appears from the above considerations that in the context of non-enforcement cases examined the measures aimed at root-cause elimination are not simply *preferred* but basically *the only* that can contribute effectively to the resolution of the problem. On the other hand, however, the form that such root-cause elimination measures took in Moldova and Ukraine by taking away some social rights was essentially a "levelling down" of the problem onto the population. Regrettably, this approach was upheld by the Court as well as the Committee thus compelling one to doubt if justice had been done indeed.

B. Conclusion

To sum up, based on the analysis of the pilot judgments in the Moldovan, Russian and Ukrainian non-enforcement pilot-judgments two competence-related issues pertinent to the procedure were identified in this chapter: the question of addressing complex systemic problems through an individual application and the question of setting and observing the time-limits to implement the measures required by the Court. While both are in line with the Courts powers and are important tools indeed, their application and level of effectiveness in the pilot judgment procedure is problematic. Further, in the light of the examination of the measures adopted by the respondent Governments following the pilot judgments, a question of the relationship between the purely compensatory remedy and root-cause elimination was addressed. It was followed by the conclusion that in the light of the peculiarities of the reasons for the non-enforcement problem in the three countries under scrutiny, the final resolution of the non-enforcement problem is hardly viable without the abolition of the social rights that give rise to the occurrence of the indebtedness. On the other hand, having analyzed the approach adopted by two out of the three governments under scrutiny, it is contended that such resolution is in essence at the expense of the population, making it rather a victim of the pilot judgment procedure than its beneficiary.

CONCLUSION

Since its creation in 1959 as a part of the Council of Europe – a regional organization to protect peace and democracy in the post-World War II Europe – the European Court of Human Rights has grown into the most successful human rights institution with the most developed and extensive case law. Moreover, due to the binding nature of its judgments the Court is also exclusive, for no other human rights institution possesses this feature. The Court has, however, fallen a victim of its own success. Over the past decade the number of individual applications reaching the Court has been constantly increasing threatening to overwhelm it. Thus, according to the data available in 1998 the Court received a total of 18,200 applications with this number being almost tripled in 2006 – a total of 51,300 applications.[242] In 2006 the Court was able to process via some form of judgment or decision only 29,650 applications[243], what evidences a very unbalanced relation between the numbers of applications lodged and disposed of. With this a deadlock of the Convention system is extremely real.

Such a sharp rise in the numbers of applications has been (partly) a result of the accession to the Convention of the Central and Eastern European States in the 1990s. The extension of the Convention protection to the newly democratized States had dramatic effects not only in terms of numbers – from some 450 million the Convention now applied to some 800 million people – but also in terms of the nature of the issues the Court was called to deal with. In the words of Baytes "[t]he consequence of [enlargement] was that certain of the newer states joined the ECHR before putting their house in order, so to speak, and so brought with them 'systemic problems of Convention compliance' that were entirely foreseeable."[244] Of course, not only the newly admitted member States faced largescale and systemic

[242] See, Analysis of Statistics 2006, cited above.
[243] Ibid.
[244] See, Bates, Ed. *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*. n.p.: Oxford University Press, 2010, p. 486, cited in Provost, above, p. 327.

problems, in fact some of the "old democracies" also contributed considerably to the Court's backlog (consider Italy with its length of proceedings cases). The systemic nature of the human rights violations manifested itself in the repetitive applications, that is, the applications based on the same deficiency in the domestic legal order. Repetitive applications not only consume the Court's resources (most notably, time) but also prevent it from dealing promptly and effectively with other cases raising pressing human rights concerns and important issues of the Convention interpretation. As a reaction to the growing numbers of the repetitive applications and the States' reluctance to resolve them the Court developed a creative tool[245] to deal with such largescale violations – the pilot judgment procedure. Since the delivery of the first pilot judgment in 2004 in the seminal *Broniowski v Poland* case the pilot judgment procedure has become an established part of the Court's arsenal. As aptly put by Fribergh, the pilot judgment procedure "combines the familiar with the innovative"[246] that is, while finding a Convention violation in an individual complaint (the "familiar" component) the Court at the same time identifies the shortcoming in the domestic legal order that affects a class of persons and, rather than dealing with all the – either real or potential – complaints the Court orders the respondent Government to implement remedy measure to solve the problem (the "innovative" component).

While the pilot-judgment procedure has been repeatedly recognized as both innovative and most effective response to tackling systemic problems, it was also on many occasions described as problematic, most notably as regards the execution of the judgments adopted. The present study assessed the application and the effectiveness of the pilot judgment procedure in the context the non-enforcement of domestic judgments cases. The right to enforcement of domestic judgment is not expressly found anywhere in the Convention, nevertheless the Court was able to read it into the scope of protection of Article

[245] See, Buyse, cited above, p. 78.
[246] See, Fribergh, cited above, p. 521.

6 under the concept of the access to court. While the importance of the enforcement stage of the court proceedings has already been acknowledged in cases that concerned the violations of the reasonable time requirement, it was only with the 1997 *Hornsby v Greece* judgment that the right to enforcement was acknowledged as a separate right. In that judgment the Court found that the right of access to court would be rendered illusory and ineffective if a final judicial decision would remain unenforced. This finding, extending the scope of the Convention protection, had major implications for the later Court's practice and workload as the violations of this right were common for many Central and Eastern European Member States that joined the Convention around the same time. The three major "perpetrators" examined in this thesis – Moldova, Russia and Ukraine – provided the Court with the biggest number of the non-enforcement complaints which ultimately led to the adoption in 2009 of the three pilot judgments in respect of these countries. Apart from the date of adoption, the judgments and their execution share many similarities, most notably in that they all stem from the social rights related debts. Thus in all the three countries the Government failed to honor the domestic courts awards in the cases where the applicants, entitled to certain social payments and/or benefits (e.g., social housing, work-related arrears, pensions etc.), were unable to receive them. While in Moldova the non-enforcement problem was (more or less) straightforward stemming from the deficient legislation unevenly distributing the powers between the central and local authorities as regards the granting of social housing, in Russia and Ukraine the situation was more complex involving the legislative deficiencies as well as administrative. While it is hard to make conclusive assessment as to whether a certain State among those under scrutiny was successful in implementing its pilot judgment, the Moldovan case seems to be more successful than the other two, and the situation in Ukraine seems to be worth than that of Russia.

The analysis of the follow-up measures taken by the Governments points to the several issues that have significance beyond the three cases considered and that are pertinent for the pilot judgment procedure as a whole. Addressing these issues helps to answer the core question of this research which is whether the Court can tackle systemic problems effectively. Firstly, one issue that arose from the comparative study of the non-enforcement pilot judgments is (the effectiveness of) addressing systemic violations through an individual complaint. While the individual complaint procedure is indeed the most prominent feature of the Convention system, its use for the purposes of tackling systemic violations is problematic. The complex nature of the non-enforcement cases is the best example in this context As noted above, in both Russia and Ukraine the non-enforcement problem had a number of reasons underlying it, ranging from the varied legal nature of debtors, variety of payments due, deficiencies in the enforcement procedure itself and the banal lack of funds. With this, the application of the pilot judgment procedure based on the case raising only one specific issue (e.g., the non-payment of compensations to Chernobyl disaster victims as in *Burdov* and *Ivanov* cases) might limit the scope of the problem creating an impression that this it is this particular issue that is the reason to recognize the systemic nature of the violation. Additionally, it reinforces the common argument of the Court finding systemic violations "on occasion" of an application.

Secondly, the cases analyzed have shown that while setting time-limits for the implementation of the general measures following a pilot judgment is a necessary tool, its observance is extremely problematic. In fact, in all the three cases the Court's deadline orders were violated with considerable delays; this violation has a negative impact on the Court's authority. Thus, it is suggested that a reform in the Court's practice of setting deadlines is needed with an earlier and more visible involvement of the Committee of Ministers and

based, possibly, on the negotiations with the respondent State. This approach, while more politicized, seems to be more effective allowing setting viable deadlines.

Thirdly, the analyzed non-enforcement pilot judgments raise a fundamental question of the relationship between compensatory measures and root-cause elimination. It is a common understanding that the Court, which is governed by the principle of subsidiarity, is not empowered to order particular measures to be adopted following a pilot judgment. Based on this, the Court accepts both the compensatory measures and the measures aimed at the elimination of the root-causes should a State opt for one or another. However, there were instances in the past, and the present research shows that it is also true for the non-enforcement cases, that evidence the insufficiency of the purely compensatory measures. Even if implemented and properly designed the compensatory measures are still an *a posteriori* remedy and while they may preclude the applicants from applying to the Court for the reasons of the loss of the victim status, they do not help to resolve the roots of the problem. On the other hand, the Moldovan and Ukrainian cases have shown that where the State opts for the root-cause elimination measures (i.e., the abolition of the social rights that cause the occurrence of indebtedness) this may create new problem problems for the population.

These above concerns are, of course, only a limited list of the problems related to the effectiveness of the pilot judgment procedure. It is true that it was designed specifically to tackle systemic problems in the Member States, and its application in more than 20 judgments so far proves its viability and flexibility. On the other hand, this procedure is not a panacea. Its effectiveness is highly dependent on the nature of the systemic problem at stake: it is better suited to tackle more straightforward violations (like in the *Olaru* case) rather than complex and multifaceted ones. Moreover, its application, while having a good intention of helping a State to cope with a human rights problem, can "backfire" on the populations.

And last, but not least, where respondent State fails to implement a pilot judgment, the authority of the Court and the effectiveness of the whole Convention system is severely undermined. Thus, while the pilot judgment procedure has a clear potential, there is a need in constant improvement and more experience in the coming years to ensure its effectiveness.

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