

Beyond Dispute: International Judicial Institutions as Lawmakers

Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights

By Markus Fyrnys*

A. Introduction

The institutional design of the Strasbourg system that has evolved over the last decades is an expression of contemporary debates surrounding the system's very nature and purpose. The current debate primarily bears on the range of choices that the Council of Europe faces in adapting to the changes in Europe, which largely have been caused by its expansion to cover nearly all post-Communist States of Central and Eastern Europe since the 1990s. This expansion, and with it the extension of the scope of the European Convention on Human Rights (the Convention) to now more than 800 million people in forty seven countries, has confronted the European Court of Human Rights (the Court) with a far broader range of human rights problems than had previously existed.¹ By 2010, the number of pending cases had risen to 139,650 but the Court's adjudicative capacity remains limited.²

Against the background of an overwhelming number of applications,³ the current debate regarding its core functions raises the question of whether the Court should engage in

* Research fellow at the Chair of Public Law and Philosophy of Law at the University of Mannheim. The author wishes to thank Armin von Bogdandy, Hans-Joachim Cremer, Isabel Feichtner, Ingo Venzke and the *Dienstagsrunde* at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg for their helpful comments and discussion. Comments are welcome at markus.fyrnys@web.de

¹ Robert Harmsen, *The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform*, in: JUDGES, TRANSITION, AND HUMAN RIGHTS, 33 (John Morison, Kieran McEvoy & Gordon Anthony eds, 2007).

² On the latest data, see Eur. Court H.R., *Analysis of Statistics 2010*, 7. On the Court's adjudicative capacity, see Steering Committee for Human Rights (CDDH), *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system of the Convention*, Document CM(2004)65 Addendum, 7 April 2004, para. 7, also published in 26 HUMAN RIGHTS LAW JOURNAL 90, 91 (2005).

³ See THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS, (Rüdiger Wolfrum & Ulrike Deutsch eds, 2009).

“constitutional,” in contrast to “individual,” adjudication. The “constitutional”⁴ concept highlights the Court’s function in a pan-European standard setting. In this respect, individual cases are the material from which legal arguments about what the concrete provisions of the Convention mean are extrapolated⁵ and the general content of the legal order provided by the Convention is developed.⁶ According to this conception, it is the lawmaking role—the generation and stabilization of normative expectations beyond an individual case by providing legal arguments for later disputes⁷—that should be seen as the Court’s main *raison d’être*.⁸ In contrast, the “individual” concept emphasizes the Court’s core function of individual human rights adjudication that is geared towards ensuring, on a case-by-case basis, that every genuine victim of a violation receives a judgment from the Court.⁹

It is worth noting that approximately two-thirds of the admissible complaints¹⁰ are repetitive cases that concern systemic human rights violations within the domestic legal order. Against this backdrop, the Court’s judicial elaboration of the so-called “pilot judgment procedure” is an innovative response to the problem of repetitive cases and rests on the idea of the Court’s constitutional function. Besides finding an individual violation of Convention rights, a “full” pilot judgment¹¹ consists of the following steps: first, identifying a systematic malfunctioning of domestic legislation or administrative practice; second, concluding that this systematic problem may give rise to numerous subsequent well-founded applications; third, recognizing that general measures are called for and suggesting the form such general measures may take in order to remedy the systematic defect; and fourth, adjourning all other pending individual applications deriving

⁴ STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 7 (2006), stating that the Court “is already ‘the Constitutional Court for Europe’, in the sense that it is the final authoritative judicial tribunal in the only pan-European system.” See also Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 *HUMAN RIGHTS LAW JOURNAL* 161, 162 (2002). On the constitutional role of the Inter-American Court of Human Rights, see Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 *GERMAN LAW JOURNAL* 1203 (2011).

⁵ Harmsen (note 1), 36.

⁶ Wildhaber (note 4), 162.

⁷ On the lawmaking role of judicial decisions, see Armin von Bogdandy & Ingo Venzke, *Beyond Dispute? International Judicial Institutions as Lawmakers*, 12 *GERMAN LAW JOURNAL* 979, 986 (2011).

⁸ Harmsen (note 1), 36.

⁹ Christian Tomuschat, *Individueller Rechtsschutz: das Herzstück des „ordre public européen“ nach der Europäischen Menschenrechtskonvention*, 30 *EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT* 95, 96 (2003).

¹⁰ Around 90 % of all individual applications are inadmissible.

¹¹ On a systematic analysis of different types of pilot judgments, see PHILIP LEACH, HELEN HARDMAN, SVETLANA STEPHENSON & BRAD K. BLITZ, *RESPONDING TO SYSTEMATIC HUMAN RIGHTS VIOLATIONS* 13 (2010).

from the same systematic defect. Finally, the Court uses the operative part of the judgment to reinforce the obligation to take general measures.¹²

The very fact that pilot judgments are focused on the identification of systematic malfunctioning of the domestic legal order and on the indication of appropriate general remedial measures normatively extends the binding effect of the Court's judgments and changes their legal nature, accentuating the Court's constitutional function. The pilot judgments' legal nature reveals features combining individual and general effect in the domestic legal order by extending an individual complaint procedure through elements of judicial review of legislation. The paper argues that a pilot judgment is an innovative strategy of imposing the Court's judicature on the domestic legislative process. The Court generalizes the legal arguments of its judgment beyond the individual case by issuing a programmed lawmaking obligation to the domestic legislature. The Court uses the generality of domestic legislative acts to solve its docket problem of repetitive cases. This judicial lawmaking by requesting domestic legislation is a remarkable judicial strategy of compliance or internalization, which is able to substitute the lack, in doctrinal terms, of direct effect of the Convention and the lack of *erga omnes* effect of the Court's judgments in the domestic legal system.

The judicial elaboration of the pilot judgment procedure with its extension of the effect of the Court's judgments has an impact on the distribution of competences in the multi-leveled Convention system, particularly between the Court and the state parties in a vertical dimension, but also between the Court and the Committee of Ministers in a horizontal dimension. This judicialization of politics on different levels of the Convention system is a particularly interesting example in the broader perspective of this project on "International Judicial Institutions as Lawmakers." In order to elucidate and explore repercussions in the distribution of competences, this paper first highlights the judicial elaboration of the pilot judgment procedure in *Broniowski v. Poland* (B.). Second, the paper explores the judicial elaboration of the pilot judgment as procedural and substantial lawmaking by the Court and analyses the vertical and horizontal impact on the Convention's system of competences (C.). Third, the paper addresses the issue whether such lawmaking by an international adjudicative authority can be justified particularly in terms of procedural and democratic legitimacy and in respect of the consequences for the individual in the Convention system (D.), followed by a concluding outlook (E.).

¹² Luzius Wildhaber, *Pilot Judgments in Cases of Structural or Systematic Problems on the National Level*, in: THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS, 69, 71 (Rüdiger Wolfrum & Ulrike Deutsch eds, 2009).

B. Judicial Elaboration of the Pilot Judgment Procedure

The Court's judicial elaboration of the pilot judgment procedure extends, *inter alia*, the binding effect of its judgment beyond the decisive case, with a vertical and horizontal impact on the multileveled Convention system's distribution of competences. It is therefore of critical importance to first outline the prevalent understanding of the effect of the Court's judgments, to show how they are executed by state parties and to discuss the supervisory authority of the Committee of Ministers (B.I.). After recapitulating the unsuccessful initiative of installing the pilot judgment with Protocol No. 14 (B.II.), the section highlights the judicial elaboration of the pilot judgment procedure in *Broniowski v. Poland* (B.III.).

1. Effect, Execution, and Supervision of the Court's Judgments

From the perspective of the Convention, the substantive binding effect of the operative part of the Court's judgment is limited *ratione personae*, *ratione temporis*, and *ratione materiae*.

According to effects *ratione personae*, the judgment of the Court has a binding effect *inter partes*—on the individual applicant and on the state party against which an individual application is directed. Article 46 of the Convention clarifies this by providing: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." Basically, no other state party is legally bound by the judgment in the sense of the doctrine *res judicata*.¹³ At the same time, in accordance with Article 1 of the Convention,¹⁴ the state parties are, however, obliged to respect the rights and freedoms defined in Section I of the Convention,¹⁵ and the Court's judicature substantially concretizes the rights and freedoms' substance.¹⁶ Thus, even if the Court's case law may only be considered to have the normative effect of orienting¹⁷ and guiding others, as opposed to creating legal obligations in the sense conveyed by the doctrine of *res judicata*,

¹³ Eckart Klein, *Should the Binding Effect of the Judgments of the European Court of Human Rights be Extended?*, in: PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE – STUDIES IN MEMORY OF ROLV RYSSDAL, 705, 706 (Paul Mahony, Franz Matscher, Herbert Petzold & Luzius Wildhaber eds, 2000).

¹⁴ Art. 1 of the Convention reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

¹⁵ Peter Leuprecht, *The Execution of Judgments and Decisions*, in: THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, 801, 812 (Ronald St. J. Macdonald, Franz Matscher & Herbert Petzold eds, 1993).

¹⁶ Klein (note 13), 706.

¹⁷ Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEXAS INTERNATIONAL LAW JOURNAL 359, 374 (2005).

many domestic authorities (legislative, executive, and judicial) recognize the Court's case law and act accordingly.¹⁸

With regard to *ratione temporis*, the binding effect of judgments of the Court is retrospectively limited to the matter in dispute. There is no direct prospective effect apart from the normative effect of orientation mentioned above.

Finally, under *ratione materiae*, the binding effect is generally limited to the facts of the individual case. Taking into account the fact that the state parties have accepted the jurisdiction of the Court in certain cases as final, the term of Article 46 (1) of the Convention "to abide by the judgment" primarily means that the responsible state party has to accept that, with regard to a certain case, a violation of the Convention has, or has not, occurred.¹⁹

Despite the limitations of the effect of its judgments, the Court has never hesitated in identifying the legislative origin of an individual violation.²⁰ As the Court has observed in several judgments, "in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it."²¹ Right from the beginning of its case law, the Court has stipulated that a judgment might create the obligation for a state party to amend its legislation if a violation of the individual applicant's right caused by legislation would otherwise continue.²² Even if the violation is caused by an individual judgment by a domestic judicial authority, or by an administrative act of a domestic authority, the responsible state party is obligated to investigate whether an abstract provision of law predetermines the individual violation of the applicant's right. If this is the case, it must amend its legislation in order to avoid repeating the violation of the same individual, as established by the Court's judgment,²³ or foreseeable violations in parallel cases.²⁴

¹⁸ *Id.*, 706. Parliamentarians across Europe sometimes consult the Courts case law when drafting and revising statutes and administrative regulations, see Tom Barkhuysen & Michel L. van Emmerik, *A Comparative View on the Execution of Judgements of the European Court of Human Rights*, in: EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS, 1, 15 (Theodora A. Christou & Juan Pablo Raymond eds, 2005). On the differences of the effect of the judgments of the Inter-American Court of Human Rights, see Binder (note 4), 1218.

¹⁹ JÖRG POLAKIEWICZ, DIE VERPFLICHTUNGEN DER STAATEN AUS DEN URTEILEN DES EUROPÄISCHEN GERICHTSHOFS FÜR MENSCHENRECHTE 251 (1993).

²⁰ Eur. Court H.R., *Marckx v. Belgium*, Judgment of 13 June 1979, Series A, No. 31, paras 25-68.

²¹ Eur. Court H.R., *Maestri v. Italy*, Judgment of 17 February 2004, Reports of Judgments and Decisions 2004-I, para. 47.

²² Jochen Abr. Frowein, *The Binding Force of ECHR Judgments and its Limits*, in: HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW – LIBER AMICORUM LUZIUS WILDHABER, 261, 262 (Stephan Breitenmoser, Bernhard Ehrenzeller, Marco Sassòli, Walter Stoffel & Beatrice Wagner Pfeifer eds, 2007).

²³ In order to adapt its legislation to the requirements of the Convention for cases, which are merely parallel as they are normatively not pre-determined by law at the national level, the State Party is obligated to do legal

Even where violations stem from discretionary acts of national courts or authorities, that is the legislation has not strictly programmed the violation, or where other cases are only similar without being connected to the same legal provision, it is quite plausible to consider the responsible state party to be bound to avoid similar infringements in parallel cases.²⁵ This obligation, however, does not extend the binding effect of the Court's judgment in the sense of the doctrine *res judicata*, but rather derives from the normative effect of the concrete Convention provision concerned²⁶ and/or from the general obligation of the state parties to respect the Convention in accordance with Article 1 of the Convention.

Consequently, the legislative origin of an individual violation has not affected the mode in which the operative part of the judgment used to be drafted.²⁷ The malfunctioning of domestic legislation was only sometimes discussed in the reasoning followed by suggestions for prospective amendments.²⁸

The *travaux préparatoires* suggest that the Court was for a moment intended to be empowered to nullify internal administrative and judicial decisions or legislation, but the state parties eventually rejected this constitutional or supranational approach.²⁹ Although it is not written anywhere in the Convention, it follows from its structure, its preparatory

"comparisons" because cases have to be tested whether they are truly in parallel to the case decided by the Court or whether they can for some reason be distinguished, HANS-JOACHIM CREMER, HUMAN RIGHTS AND THE PROTECTION OF PRIVACY IN TORT LAW 12 (2010).

²⁴ JOCHEN ABR. FROWEIN & WOLFGANG PEUKERT, EUROPÄISCHE MENSCHENRECHTSKONVENTION KOMMENTAR 604 (2009). The non-application of the legal provision violating the Convention is insufficient. The existence of the legal provision presents a steady and imminent danger to the Convention guarantees. In democracies governed by the rule of law the law-applying national authorities will have difficulties avoiding the application of a norm that has not been nullified. Therefore legislative action is necessary, see Klein (note 13), 707.

²⁵ CREMER (note 23), 11.

²⁶ *Id.*, 12.

²⁷ Lech Garlicki, *Broniowski and After*, in: LIBER AMICORUM LUZIUS WILDHABER – HUMAN RIGHTS – STRASBOURG VIEWS, 177, 183 (Lucius Cafilisch, Johan Callewaert, Roderick Lidell, Paul Mahoney & Mark Villiger eds, 2007).

²⁸ Eur. Court H.R., *Scozzari and Giunta v. Italy*, Judgment of 13 July 2000, Reports of Judgments and Decisions 2000-VIII, para. 249; Eur. Court H.R., *Kudla v. Poland*, Judgment of 26 October 2000, Reports of Judgments and Decisions 2000-XI, para. 150-160; Eur. Court H.R., *Assanidze v. Georgia*, Judgment of 8 April 2006, Reports of Judgments and Decisions 2004-II, para. 198.

²⁹ COUNCIL OF EUROPE, COLLECTED EDITION OF THE „TRAVAUX PRÉPARATOIRE“ OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 45 (1975). On nullifying effects of the judgments of the Inter-American Court of Human Rights, see Binder (note 4), 1212.

work and the wording of Article 41 of the Convention,³⁰ that there is no positive legal basis empowering the Court as an appellate or cassation body.³¹

Created to provide subsidiary human rights protection in relation to the state parties,³² the Court is limited to issuing declaratory judgments.³³ By virtue of Article 1 of the Convention, the primary competence for securing compliance with the Convention's provisions is placed on the authorities of the state parties.³⁴ The state party, which is found to violate the Convention, has the discretion to decide on the "means to be utilized in its domestic legal system for performance of its obligation."³⁵ The state party enjoys certain discretion that can be conceptualized as a concretization of the principle of subsidiarity.³⁶ Only "if the internal law of the High Contracting Party concerned allows only partial reparation to be made,"³⁷ does the Court have the authority to demand a just satisfaction (*restitutio in integrum*) in accordance with Article 41 of the Convention. In all other respects, the Convention entrusts the choice regarding the execution of a judgment to the domestic authorities under the supervision of the Committee of Ministers.

In accordance to Article 46 (2) of the Convention, the judgments "shall be transmitted to the Committee of Ministers, which shall supervise its execution." The Committee of Ministers consists of one representative from each state party of the Council of Europe and is considered to be the Council of Europe's policy-making and executive organ.³⁸ In

³⁰ Art. 41 of the Convention reads: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

³¹ Frowein (note 22), 261; FROWEIN & PEUKERT (note 24), 603.

³² Eur. Court H.R., *Handyside v. United Kingdom*, Judgment of 18 January 1978, Series A, No. 24, para. 48; Eur. Court H.R., *Sadik v. Greece*, Judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, para. 30.

³³ FROWEIN & PEUKERT (note 24), 602; POLAKIEWCZ (note 19), 217; Helmut Steinberger, *Reference to the Case Law of the Organs of the European Convention on Human Rights before National Courts*, 6 HUMAN RIGHTS LAW JOURNAL 402, 407 (1985).

³⁴ Paul Mahony, *Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUMAN RIGHTS LAW JOURNAL 57, 78 (1990).

³⁵ Eur. Court H.R., *Marckx v. Belgium* (note 20), para. 58.

³⁶ Mark E. Villiger, *The Principle of Subsidiarity in the European Convention on Human Rights*, in: PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW – LIBER AMICORUM LUCIUS CAFLISCH, 623, 632 (Marcelo G. Kohen ed., 2007).

³⁷ *Id.*, para. 58.

³⁸ See Leo Zwaak, *The Supervisory Task of the Committee of Ministers*, in: THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 291, 291 (Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak eds, 2006).

accordance with Rule 16 of the Rules of the Committee of Ministers,³⁹ “the Committee of Ministers may adopt interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make the suggestion with respect to the execution.”⁴⁰ Aside from these political and diplomatic injunctions, expulsion of a responsible state party is the *ultima ratio* sanction in accordance with Article 8 of the Statute of the Council of Europe.⁴¹ Expulsion, however, would be counterproductive since the violating state party would no longer be under the control of the Strasbourg system.⁴² Therefore, the Committee of Ministers regularly refrains from applying this sanction; instead, it usually provides a monitoring system of compliance and functions as a political forum for constructive dialogue assisting state parties in amending domestic legislation. Briefly, the Convention system attributes the power to supervise the execution of judgments to the Council of Europe’s political body.

Despite the lack of a mechanism of direct coercion with respect to the implementation of judgments, the Court generally enjoys a high rate of compliance with its judgments.⁴³ Nonetheless, there have been several instances of slow and reluctant reactions by domestic governments and legislators and, in effect, repetitive cases kept accumulating before the Court,⁴⁴ derived from the same structural cause as an earlier application that had led to a judgment finding a breach of the Convention.⁴⁵ The situation of repetitive cases appeared dangerous for both the authority of the Court as well as the effectiveness of the Strasbourg system as a whole.⁴⁶

³⁹ Adopted by the Committee on Ministers on the basis of Art. 46(2) of the Convention.

⁴⁰ Interim resolutions take various forms, see ELIZABETH LAMBERT-ABDELGAWAD, *THE EXECUTION OF JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS* 40 (2002).

⁴¹ *Id.*, 40.

⁴² See Steering Committee for Human Rights, Explanatory Report to Protocol No. 14 (note 2), 100; Helen Eaton & Jeroen Schokkenbroek, *Reforming the Human Rights Protection System Established by the European Convention on Human Rights: A New Protocol No. 14 to the Convention and Other Measures to Guarantee the Long Term Effectiveness of the Convention System*, 26 *HUMAN RIGHTS LAW JOURNAL* 1 (2005).

⁴³ Laurence Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 *YALE LAW JOURNAL* 273, 296 (1997); DAVIS HARRIS, MICHAEL O’BOYLE & COLLIN WARBRICK, *LAW OF THE EUROPEAN CONVENTION* 878 (2009).

⁴⁴ Garlicki (note 27), 183.

⁴⁵ Steering Committee for Human Rights, Explanatory Report to Protocol No. 14 (note 2), 91.

⁴⁶ Garlicki (note 27), 183.

II. Protocol No. 14 as a Failure

The judicial elaboration of the pilot judgment procedure as a legal framework to deal with repetitive cases is no *deus ex machina*.⁴⁷ The innovation has to be seen in the context of the broader reform discussion regarding Protocol No. 14. The Court itself initially demanded an explicit jurisdiction to issue pilot judgments in its September 2003 Position Paper, submitted as part of the drafting process for Protocol No. 14.⁴⁸ According to this proposal, a pilot judgment would be delivered where the Court deemed that a systematic malfunctioning of domestic legislation or practice of the respondent state party causes a violation in an individual case. Such finding of systematic malfunctioning would be communicated to both the Committee of Ministers and the state party concerned, triggering an accelerated execution process. The respondent state party would be obliged by a pilot judgment to introduce a general remedy, by regularly amending domestic legislation. Furthermore the pilot judgment would have the effect of suspending applications of other individuals against the state party before the Court concerning the same matter. Once the Court has assured that the domestic legal order had been amended appropriately, the remaining applications issued on the same matter could be struck off the docket and referred back to the appropriate domestic authorities.⁴⁹ The intention of the Court was to provide for a procedure dealing more effectively with systematic human rights violations causing repetitive cases by obliging the responsible state party to adopt general remedial measures rather than dealing with each repetitive complaint individually case-by-case.⁵⁰

The Steering Committee for Human Rights⁵¹ was sympathetic to the Court's proposal and recognized the usefulness of such a solution,⁵² but it was against amending the Convention due to political resistance that had been expressed within Council of Europe governmental circles against the introduction of a Convention-based pilot judgment procedure that

⁴⁷ Elizabeth Lambert-Abdelgawad, *La Cour européenne au secours du Comité des Ministres pour une meilleure exécution des arrêts "pilot,"* 61 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 203, 213 (2005); Stefanie Schmahl, *Piloturteile des EGMR als Mittel der Verfahrensbeschleunigung*, 35 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 369, 371 (2008).

⁴⁸ See EUR. COURT H.R., DOCUMENT CDDH-GDR (2003) 024, POSITION PAPER OF THE EUROPEAN COURT OF HUMAN RIGHTS, 12 September 2003, paras 12-13; Harmsen (note 1), 45.

⁴⁹ Harmsen (note 1), 45, 46.

⁵⁰ *Id.*, 46.

⁵¹ The Steering Committee for Human Rights (usually known by its French acronym, CDDH) is the expert, intergovernmental body within the Council of Europe charged with overseeing the functioning and development of the organization's human rights activities. As such, it plays a proactive role in the process of amending the Convention.

⁵² Steering Committee for Human Rights, Explanatory Report to Protocol No. 14 (note 2), 92.

would create formal obligations for the respondent state parties to adopt general measures.⁵³

Therefore, the Court's proposal has not found its way into the new wording of Article 46 of the Convention as amended by Protocol No. 14.⁵⁴ However, the Committee of Ministers adopted a resolution in which it invited the Court:

to identify . . . what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.⁵⁵

The Committee of Ministers concurrently recommended⁵⁶ the improvement of domestic remedies, emphasizing that, in addition to the obligation under Article 13 of the Convention to provide an individual who has an arguable claim with an effective domestic remedy, state parties have a general obligation to solve the problems underlying the violations found.⁵⁷ Mindful that the improvement of remedies at the domestic level, particularly in relation to repetitive cases, should also contribute to reducing the workload of the Court, the Committee of Ministers advised the state parties, executing the judgments that point out domestic structural deficiencies, to review and "[to] set up

⁵³ Harmsen (note 1), 46.

⁵⁴ Art. 46 of the Convention reads: "(1) The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. (2) The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. (3) If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee. (4) If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1. (5) If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

⁵⁵ Committee of Ministers of the Council of Europe, Resolution Res(2004)3 on Judgments Revealing an Underlying Systemic Problem, 12 May 2004, 26 HUMAN RIGHTS LAW JOURNAL 119 (2005).

⁵⁶ Committee of Ministers of the Council of Europe, Recommendation Rec(2004)6 on the Improvement of Domestic Remedies, 12 May 2004, 26 HUMAN RIGHTS LAW JOURNAL 116 (2005).

⁵⁷ Garlicki (note 27), 184. Art. 13 of the Convention reads: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

effective remedies, in order to avoid repetitive cases being brought before the Court.”⁵⁸ In spite of the state parties’ resistance to the Court’s initiative in the reform process of Protocol No. 14, in its executive documents the Committee expressed the political will⁵⁹ to handle the problem of repetitive cases and invited the Court to do so.

III. *Broniowski v. Poland*

The Court immediately acted on those political suggestions when it delivered its precedent pilot judgment in the case of *Broniowski v. Poland*⁶⁰ in June 2004.⁶¹ The case concerned a compensation claim for the loss of property that is located in an area known as the “territories beyond the Bug River,” which comprises pre-World War II eastern provinces of Poland. As a consequence of the changes of Poland’s borders, more than one million people had to leave this territory that became incorporated into the Soviet Union. While many of the repatriates received some land in the new Western territories of Poland, a group of nearly 80,000 people remained uncompensated, although Polish legislation has recognized since 1946 that the repatriates were entitled to receive the value of their surrendered property. Over the next fifty years, several legislative acts of compensation appeared ineffective. These ineffective entitlements were dubbed as “right to credit,” by Polish legislation (the Land Administration Act 1985) and by the Polish Constitutional Court, which held that the “right to credit” has a special nature as an independent constitutionally guaranteed property right, allowing repatriates to bid for state assets. Due to the unwillingness of the Polish authorities to take effective and necessary action, in practice, however, only few “Bug River claims” could be satisfied by the system of “right to credit.”

In 1996, the first applications of the “Bug River claims” were brought to the Court. In 2002, it declared the application by *Broniowski* admissible.⁶² The applicant claimed that the

⁵⁸ Committee of Ministers of the Council of Europe, Recommendation Rec(2004)6 (note 56), 117; Garlicki (note 27), 184.

⁵⁹ Art.15.b of the Statute of the Committee of Ministers, provides for the Committee of Ministers to make recommendations to member states on matters for which the Committee has agreed “a common policy.”

⁶⁰ Eur. Court H.R., *Broniowski v. Poland (GC)*, Judgment of 22 June 2004, Reports of Judgments and Decisions 2004-V. Since *Broniowski v. Poland* in 2004 the Court had issued several judgments that are expressly identified as pilot judgments by the Court itself: Eur. Court H.R., *Hutten-Czapska v. Poland*, Judgment of 19 June 2006, Reports of Judgments and Decisions 2006-VIII; Eur. Court H.R., *Burdov v. Russia (No. 2)*, Judgment of 15 January 2009; Eur. Court H.R., *Olaru and others v. Moldova*, Judgment of 28 July 2009; Eur. Court H.R., *Yuri Nikolayevich Ivanov v. Ukraine*, Judgment of 15 October 2009; Eur. Court H.R., *Suljagic v. Bosnia and Herzegovina*, Judgment of 3 November 2009; Eur. Court H.R., *Rumpf v. Germany*, Judgment of 2 September 2010; see LEACH, HARDMAN, STEPHENSON & BLITZ (note 11), 13.

⁶¹ Garlicki (note 27), 184; Harmsen (note 1), 52.

⁶² Eur. Court H.R., *Broniowski v. Poland (GC)*, Decision on Admissibility of 19 December 2002, Reports of Judgments and Decisions 2002-X, see Garlicki (note 27), 178.

compensation, which he had received for the loss of his mother's property in the former Polish territory, was inadequate under the terms of Article 1 of Protocol No. 1 to the Convention.⁶³ In particular, the application contended that the system of "right to credit" had proven to be of little or no value as the relevant assets had largely been withdrawn from the bidding process.

In 2004, the Court issued the judgment⁶⁴ that a claimant's entitlement to compensation, which represented only 2% of the original value of the lost property, was in violation of Article 1 of Protocol No. 1 to the Convention⁶⁵ and reserved the question of the application of Article 41 of the Convention for a future decision.

In the operative part of the 2004 judgment, the Court found that the violation of *Broniowski's* right provided by Article 1 of Protocol No. 1 to the Convention "has originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the 'right to credit' of Bug River claimants."⁶⁶ Therefore, the Court stated:

[t]he respondent State must secure, through appropriate legal measures and administrative practices, the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1.⁶⁷

⁶³ Art. 1 of Protocol No. 1 to the Convention reads: "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." See Garlicki (note 27), 178.

⁶⁴ Eur. Court H.R., *Broniowski v. Poland* (GC) (note 60).

⁶⁵ The relocation that took place at the end of the 1940s remains – *rationae temporis* – outside the jurisdiction of the Convention and the Court. The situation is different when a State Party enacts new legislation or maintains old legislation providing compensation for loss property confiscated under a previous regime. Once such an entitlement has been provided for by legislation post-dating the ratification of the Convention and of its Protocol No. 1, the compensation claim for the loss of property enjoy full protection under the Convention, Garlicki (note 27), 179, 181. See Eur. Court H.R., *Broniowski v. Poland* (GC) (note 60), para. 125.

⁶⁶ *Id.*, operative part, para. 3.

⁶⁷ *Id.*, operative part, para. 4.

In the reasoning of the judgment, the Court firstly cited the Committee of Minister's resolution,⁶⁸ which invited the Court to identify in its judgments an underlying systemic problem and to assist state parties in finding the appropriate solution. The Court secondly cited the Committee of Minister's recommendation⁶⁹ reminding the state parties of their obligation to set up effective remedies, in order to avoid repetitive cases being brought before the Court.⁷⁰ According to the Court's estimation, 167 further applications were already on its docket concerning the same subject matter, while the settlement of the Bug River claims more generally concerns nearly 80,000 people.⁷¹ The Court thus recognized the "threat to the future effectiveness of the Convention machinery."⁷²

The Court argued that:

a judgment in which the Court finds a breach imposes on the respondent State a legal obligation . . . also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.

The Court also noted that:

[a]lthough it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected.⁷³

Once Poland adopted new legislation providing for adequate compensation, the Court

⁶⁸ Committee of Ministers of the Council of Europe, Resolution Res(2004)3 (note 55), 119.

⁶⁹ Committee of Ministers of the Council of Europe, Recommendation Rec(2004)6 (note 56), 116.

⁷⁰ Eur. Court H.R., *Broniowski v. Poland (GC)* (note 60), para. 190.

⁷¹ *Id.*, para. 193.

⁷² *Id.*, para. 193.

⁷³ *Id.*, paras 192, 193. See Garlicki (note 27), 185.

confirmed a friendly settlement concluded by the parties in 2005.⁷⁴

C. Judicial Lawmaking and Its Impact on the Distribution of Competencies Within the Convention System

This part first briefly analyses the judicial elaboration of the pilot judgment procedure in the case of *Broniowski v. Poland* as procedural but also as substantive lawmaking by the Court (C.I.). It then examines the impact of such judicial lawmaking on the institutional design of the Strasbourg system particularly in regard with the state parties' competence to amend the Convention (C.II.), the state parties' competence to implement the Convention (C.III.), and the Committee of Ministers' competence to supervise the implementation by state parties (C.IV.).

I. Pilot Judgment as Judicial Lawmaking

In its precedent pilot judgment the Court evolved a new procedural regime by extending the operative part of the final judgment far beyond the individual case identifying a structural problem, and requested the respondent state party to adopt specific general and/or individual measures.

Next to this procedural lawmaking the request may be understood as a substantively programmed lawmaking obligation, which demands the domestic authorities of the respondent state party to amend specific legislation to remedy the systemic defect of its domestic legal order. In post-*Broniowski* pilot judgments the Court further stated, "measures must also be taken in respect of other persons in the applicant's position."⁷⁵ By issuing such a programmed lawmaking obligation, which demands national authorities to amend legislation in respect of other individuals, the Court uses the generality of domestic legislative acts to generalize the legal argument of its judgment beyond the concrete individual complaint to solve its docket problem of repetitive cases. By generating domestic legislation the Court stabilizes normative expectations, which are enshrined in the Convention and are concretized by the Court, in the domestic legal order for numerous cases. This judicially decreed cooperation of an international court with domestic legislation is an innovative judicial strategy of imposing the Court's legal arguments on domestic legal and political systems.

⁷⁴ Eur. Court H.R., *Broniowski v. Poland* (GC), Judgment of 28 September 2005 (friendly settlement and just satisfaction), Reports of Judgments and Decisions 2005-IX.

⁷⁵ Eur. Court H.R., *Olaru and Others v. Moldavia* (GC), Judgment of 28 July 2009, para. 49; citing Eur. Court H.R., *Scozzari and Giunta v. Italy* (GC), Judgment of 13 July 2000, Reports of Judgments and Decisions 2000-VIII, para. 249; Eur. Court H.R., *Christine Goodwin v. the United Kingdom* (GC), Judgment of 11 July 2002, Reports of Judgments and Decisions 2002-VI, para. 120; Eur. Court H.R., *Lukenda v. Slovenia*, Judgment of 6 October 2005, Reports of Judgments and Decisions 2005-X, para. 94; Eur. Court H.R., *S. and Marper v. the United Kingdom* (GC), Judgment of 4 December 2008, para. 134.

As mentioned above, the Court has no appellate jurisdiction, nor is there an *erga omnes* effect of the Court's judgments or any mechanism of preliminary reference to the Court for domestic judges. Thus, internalization by cooperation between the Court and domestic courts or executive authorities seems to be ineffective in contrast to the judicial system within the European Union. The judicial lawmaking in cooperation with domestic legislation can be ascribed as a Court's strategy to secure compliance against the backdrop of the lack of doctrines of direct effect and supremacy of the Convention and the lack of *erga omnes* effect of the Court's judgments in the domestic legal order.

In the follow-up friendly settlement the Court reviewed Poland's domestic legislation in regard of the individual applicant but also in a general perspective in regard of all other repetitive cases. The very fact that pilot judgments are focused on the identification of a systematic problem and on the indication of appropriate general remedial measures has an impact on their binding effect and their legal nature, accentuating the Court's lawmaking function in terms of the constitutional concept. The pilot judgments' legal nature reveals features combining individual and general effect in the domestic sphere by extending an individual complaint procedure by elements of judicial review of legislation⁷⁶ in regard of the concrete application but also in general.

The idea of judicial discretion and agency in lawmaking that exceed the lines between discourses of norm application and discourses of norm generation⁷⁷ challenges the principle of democracy as well as the understanding of the rule of law. In any domestic democratic legal order with a constitutional guarantee of fundamental rights and the rule of law, it is necessary to develop a theory of law and a theory of democracy combined in a theory of judicial review, that is a theory of separation of powers, to define the proper role of the judiciary in relation to the legislative.⁷⁸ This need of theoretical reflection nonetheless exists in regard to the multileveled Convention system.

The primary function of the Court is the settlement of legal disputes. In the exercise of this function, however, the Court quite inevitably concretizes and develops the provisions of the Convention, thus portraying an important lawmaking dimension. It was the Court that answered the question as to its function by interpreting the Convention not as an asset of

⁷⁶ Garlicki (note 27), 186.

⁷⁷ JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 192-193 (1997); Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 14 (2010); von Bogdandy & Venzke (note 7), 988, 989.

⁷⁸ HABERMAS (note 77), 238 *et seq.*; Mahony (note 34), 58; CHRISTOPH MÖLLERS, GEWALTENGLIEDERUNG – LEGITIMATION UND DOGMATIK IM NATIONALEN UND INTERNATIONALEN RECHTSVERGLEICH (2005).

reciprocal rights and duties among the state parties, but, far more momentously,⁷⁹ as a “constitutional instrument of European public order.”⁸⁰ The term “constitutional” is ambiguous and has appeared in several judicial forms. The Court maintains the “European public order” by balancing its lawmaking function and the legislative power of the state parties.

The Court is prone to an evolutionary interpretation of the Convention, with results that could hardly be foreseen at the Convention’s ratification. By virtue of the Convention, the Court is empowered by the state parties to exercise public authority by issuing final judgments, which determine the legal or factual situation of domestic authorities, of the judgment supervisory machinery within the Strasbourg system and of individuals.⁸¹ Due to the combination of the wide-reaching substantive scope, the compulsory character—in law, in fact or both—and the lawmaking function the Court exercises functions may interfere with the domestic legislative, executive, and judicative in a vertical dimension but also in a horizontal one with the supervisory machinery within the Convention system.⁸²

This paper cannot provide the elaboration on a comprehensive theory of judicial review in the multileveled Convention system. With an interest in highlighting the political repercussions of the Court’s pilot judgment procedure, it may suffice to offer an analysis of the impacts on the distribution of competences between the Court, the state parties and the Committee of Ministers within the Convention system.

II. Judicial Lawmaking and the State Parties’ Competence to Amend the Convention

By elaborating the pilot judgment procedure the Court has extended the binding effect *ratione personae*, and *ratione materiae* beyond the wording and the prevalent understanding of Article 46 of the Convention. According to Article 35 of the Convention,⁸³ the Court’s competence is to interpret and to apply, not to amend, the

⁷⁹ Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EJIL 125, 138 (2008).

⁸⁰ Eur. Court H.R., *Loizidou v. Turkey*, Judgment of 23 March 1995, Series A, No. 310, para. 75.

⁸¹ For the concept of international public authority, see Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN LAW JOURNAL 1375, 1381 (2008). See for judicial decisions von Bogdandy & Venzke (note 7), 989.

⁸² Compare von Bogdandy & Venzke (note 7), 990. More generally on the international judiciary in a constitutionalist reading, Geir Ulfstein, *The International Judiciary*, in: THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW, 126, 127 (Jan Klabbers, Anne Peters & Geir Ulfstein eds, 2009).

⁸³ Art. 35 of the Convention reads: “(1) The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47. (2) In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.”

Convention. The competence of amendment as such rests with the state parties of the Council of Europe. Thus, the elaboration of the pilot judgment procedure causes the judicialization of politics⁸⁴ at the Convention's amending level.

III. Judicial Lawmaking and the State Parties' Competence to Implement the Convention

The distinction between the Court's competence of judicial review by interpretation, on the one hand, and the state parties' competence to amend the Convention, on the other, is not the only distribution of competences operated by the Convention.⁸⁵ By virtue of Article 1 of the Convention, the primary competence for securing compliance with the Convention provisions is placed on the domestic authorities (legislative, executive and judicial) under the supervisory authority of the Committee of Ministers in accordance with Article 46 (2) of the Convention.⁸⁶

As mentioned above, the Court interprets the Convention as a "constitutional instrument of European public order."⁸⁷ The Court maintains the "European public order" by calibrating the balance between judicial review and deference to domestic law-makers.⁸⁸ In accordance with Article 1 and Article 46 of the Convention the Court concretized the principle of subsidiarity in relation to the implementation of judgments of the Court⁸⁹ in terms of judicial self-restraint to recognize the horizontal and vertical distribution of competences between the Court and domestic authorities of the state parties with consequences for the supervisory function of the Committee of Ministers. Deriving from the principle of subsidiarity and linked with the principle of democracy,⁹⁰ the state parties enjoy a certain margin of appreciation that gives them the discretion to decide "the choice of means to be utilized in its domestic legal system for performance of its obligation"⁹¹ because "[t]he national authorities have direct democratic legitimation and are . . . in

⁸⁴ Torbjörn Vallinder, *When the Courts go Marching in*, in: THE GLOBAL EXPANSION OF JUDICIAL POWER, 13 (C. Neal Tate & Torbjörn Vallinder eds, 1995).

⁸⁵ Mahony (note 34), 78.

⁸⁶ Art. 1 of the Convention reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." See Mahony (note 34), 78.

⁸⁷ Eur. Court H.R., *Loizidou v. Turkey* (note 80), para. 75.

⁸⁸ Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EJIL 125, 131 (2008).

⁸⁹ Eur. Court H.R., *Norris v. Ireland*, Judgment 26 October 1988, Series A, No. 142, para. 50; Eur. Court H.R., *Clooth v. Belgium*, Judgment of 5 March 1998, Reports of Judgments and Decisions 1998-I, para. 14.

⁹⁰ Dinah Shelton, *Subsidiarity and Human Rights Law*, 27 HUMAN RIGHTS LAW JOURNAL 4, 9 (2006); Villiger (note 36), 632.

⁹¹ Eur. Court H.R., *Marckx v. Belgium* (note 20), para. 58.

principle better placed than an international court to evaluate local needs and conditions.”⁹² Furthermore, state parties have different written and unwritten constitutional systems and traditions and are exposed to different challenges when implementing international decisions.⁹³ For instance, the relations between national and international law differ or federal state parties encounter the particular problem of a separation of powers on different levels.⁹⁴ In such varying pluralistic democracies there is a spectrum of measures to the domestic authorities for fulfilling their obligation of implementation. Any choice within this spectrum is within their discretion and not contrary to the Convention.⁹⁵

The Convention system, like a domestic constitution protecting fundamental rights and freedoms, reflects the function to restrict democratic discretion to a certain extent.⁹⁶ Nonetheless, not all discretion is removed since the state parties have preserved the competence for implementing the execution of judgments. The Court’s judicial review forms part of a vertical system of checks and balances. A degree of judicial self-restraint can be required for an appropriate balance between judicial review and deference to domestic law-makers. On the one hand, the Court stresses the subsidiary nature of the Strasbourg system in relation to domestic human rights protection systems.⁹⁷ On the other hand, the Court, however, proactively reviews domestic legislation, administrative acts and judicial rulings using distinctive methods of interpretation and an evolving understanding of Convention rights and freedoms.⁹⁸ Over time, the Court has employed the judicial methodological instruments to generate a slow but constant change of the sphere of autonomy of the state parties.⁹⁹

This is the case in a pilot judgment. Although Poland was technically given a choice of how to comply, the *Broniowski* judgment did not exemplify the same discretion usually given to the respondent state party. Instead, Poland had only two choices left: Firstly, to amend domestic legislation to provide the realization of the property rights, or secondly, to

⁹² *Id.*, para. 48.

⁹³ Villiger (note 36), 632.

⁹⁴ *Id.*, 632.

⁹⁵ Mahony (note 34), 78.

⁹⁶ *Id.*, 81.

⁹⁷ Eur. Court H.R., *Handyside v. United Kingdom* (note 32), para. 48; Eur. Court H.R., *Sadik v. Greece* (note 32), para. 30, *see* Helfer (note 79), 138.

⁹⁸ *Id.*, 138.

⁹⁹ *Id.*, 138; Ress (note 17), 374.

compensate the claimants with equivalent redress. Another pilot judgment, the *Hutten-Czapska* judgment,¹⁰⁰ illustrates that this discretion can be further narrowed.

Similar to the *Broniowski*, the *Hutten-Czapska* case concerned the violation of Article 1 of Protocol No. 1. Here the applicant was one of around 100,000 landlords in Poland affected by a restrictive system of rent control. The Court held that the violation has originated in a systemic problem connected with the malfunctioning of domestic legislation imposing restrictions on landlords' rights, including defective provisions on the determination of rent and not providing for any procedure or mechanism enabling landlords to recover losses incurred in connection with property maintenance. The Court commanded that Poland had to, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism to maintain a fair balance between the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention.

This case illustrates that it:

is not simply a question of instituting a compensation procedure which . . . applies to a series of clearly defined individual cases. On the contrary, the solution to the problem in the present case involves a total overhaul of the legal system governing owners' rights vis-à-vis tenants, taking into account all the known difficulties, options and alternatives in such matters and the need to adopt a gradual approach in such a sensitive area—what is more, during the transition from a communist to a free-market regime.¹⁰¹

By issuing such a programmed lawmaking obligation in the operative part of the judgment, the judicial review in the follow-up procedure of a friendly settlement in accordance to Article 38 of the Convention innovatively moves "beyond the sole interests of the individual applicant and requires the Court to examine the case also from the point view of 'relevant general measures.'"¹⁰² The Court, in accepting the terms of the settlement in respect of both individual and general measures, attached particular weight to the general measures already taken and to be taken by the state party. These measures include legislation that had been passed between the initial judgment and the friendly settlement judgment, which was intended to remedy the structural problem.

¹⁰⁰ Eur. Court H.R., *Hutten-Czapska v. Poland*, Judgment of 19 June 2006, Reports of Judgments and Decisions 2006-VIII.

¹⁰¹ *Id.*, Partly Dissenting Opinion of Judge Zagrebelsky.

¹⁰² Eur. Court H.R., *Broniowski v. Poland (GC)* (note 74), paras 5-10.

The legal nature of friendly settlements after pilot judgments reveals different features, combining individual and general effects by extending an individual complaint procedure with elements of judicial review of legislation in regard to plaintiffs of parallel cases. It is questionable whether the Court is at all competent and has the necessary knowledge to express a view in abstract and in advance on the consequences of legislative reforms already introduced by a state party and to give a vague positive assessment of a legislative development whose practical application might subsequently be challenged by new applicants.¹⁰³

IV. Judicial Lawmaking and the Committee of Minister's Competence to Supervise the Implementation

The distinction between the Court's competence of judicial review and the state parties' primary competence for securing compliance with the Convention provisions is not the only distribution of competence operated by the Convention. According to Article 46 (2) of the Convention, once the Court's final judgment has been transmitted to the Committee of Ministers, the latter invites the respondent state party to inform it of individual and general measures taken to abide by the judgment and of steps taken to pay any amounts awarded by the Court in respect of just satisfaction.

The Court's competence to examine the judgments' execution in regard of the vertical relation to the state parties is related to the Court's competence in regard to the supervisory function of the Committee of Ministers in a horizontal relation.

An ordinary judgment of the Court does not expressly order the respondent state party to a specific measure to rectify the applicant's situation and prevent further violations. According to the principle of subsidiarity the state parties have discretion to choose the means by which they will implement individual or general measures under the supervision of the Committee of Ministers. This political body provides a forum of constructive dialogue and political review of individual and general measures. The supervision of execution is treated as a co-operative political task and not an inquisitorial one¹⁰⁴ with the lawful/unlawful concluding binary decision. By issuing a substantively programmed lawmaking obligation pilot judgments impose the legal arguments on the political process at the supervisory level. This form of judicialization of the political mechanism of supervision¹⁰⁵ restricts the Committee of Ministers' competence to supervise the

¹⁰³ Eur. Court H.R., *Hutten-Czapska v. Poland*, Judgment of 28 April 2008 (friendly settlement), Separate Opinion of Judge Zagrebelsky joined by Judge Jaeger.

¹⁰⁴ Committee of Ministers of the Council of Europe, CM/Inf(2008)8 final, Committee of Ministers on Human Rights Working Methods – Improved Effectiveness of the Committee of Minister's Supervision of Execution of Judgments, 7 April 2004, para 13.

implementation of judgments.

D. Justification of Judicialization of Politics within the Convention System

The pilot judgment causes the judicialization of politics¹⁰⁶ at the Convention's amending level, at the domestic legislative level as well as at the Convention's supervisory level. This section addresses the issue of how such lawmaking by the Court can be justified particularly in terms of procedural and democratic legitimacy.

I. Justification of Judicial Lawmaking at the Convention's Amending Level

The Court has extended the binding effect *ratione personae*, and *ratione materiae* beyond the wording and the prevalent understanding of Article 46 of the Convention. Thus the question arises, whether the judicial elaboration of the pilot judgments procedure is an *ultra vires* act. The extensive interpretation of Article 46 of the Convention as an act of judicial lawmaking in relation to the amendment competence of the state parties affects the tension between international judicialization and democratic control. This tension should influence the Court in exercising its power in terms of an appropriate balance between activism and restraint. The application of an expansive or more restrictive approach is primarily determined on the basis of the mandate of the Court.¹⁰⁷

According to Article 35 of the Convention the Court's mandate is to interpret and to apply Article 46 of the Convention, not to amend. The Court has opted for an approach of developing the meaning of indeterminate concepts by employing the method of evolutionary interpretation.¹⁰⁸ In its case law, the Court affirmed, "the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions."¹⁰⁹ The Convention's Preamble explicitly states that the purpose of the Convention is both the "maintenance" and the "further realization of human rights and fundamental freedoms." Therefore, the Court concluded that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard, and develop the rules instituted by the Convention."¹¹⁰ The interpretation of human-rights treaties falls

¹⁰⁵ Helfer (note 79), 149.

¹⁰⁶ Vallinder (note 84).

¹⁰⁷ Ulfstein (note 82), 150.

¹⁰⁸ Rudolf Bernhardt, *Evolutionary Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GERMAN YEARBOOK FOR INTERNATIONAL LAW 11, 17 (1999); Mahony (note 34), 61.

¹⁰⁹ Eur. Court H.R., *Tyrer v. United Kingdom*, Judgment of 25 April 1978, Series A, No. 26, para. 31, see Mahony (note 34), 61.

¹¹⁰ Eur. Court H.R., *Ireland v. United Kingdom*, Judgment of 18 January 1978, Series A, No. 25, para. 154.

into a special category, since the quite distinct object and purpose of a human-rights treaty take on a special importance.¹¹¹ The distinctive nature of the Convention as a human-rights treaty compels a flexible and evolutionary teleological interpretation of its open-textured terms if the Convention is not to become progressively ineffective with time.¹¹²

The overwhelming number of applications often concerning repetitive cases threatens “the future effectiveness of the Convention machinery.”¹¹³ However, questions arise whether the approach of evolutionary interpretation only allows the development and concretization of material provisions of fundamental rights and freedoms that are already spelled out in the Convention. In this respect the Court’s practice in developing procedures of judicial review, which are not spelled out in the Convention, would no longer correspond to the essence of the evolutionary method.

Furthermore, the preparatory works of the Convention speak against the extension of *res judicata* of the Court’s judgments. As emerges from the *travaux préparatoires*, it was at some point proposed that the Court’s judgments should have *erga omnes* effect on national jurisdictions, but the state parties rejected this approach.¹¹⁴ In addition, Protocol No. 14 has not formally introduced the pilot judgment procedure.¹¹⁵

Next to formal mandating by the Convention, the Court’s mandate in terms of Article 46 of the Convention can also be extensively interpreted in the light of consensual subsequent practice of the state parties in accordance with Article 31 (3) lit. b of the Vienna Convention on the Law of Treaties. The application of the pilot judgment procedure is broadly considered to have been successful, because many post-*Bornowski* pilot judgments have led to legislative changes in the domestic legal orders.¹¹⁶ Thus, the state parties accepted the new procedure. Furthermore, the resolution of the Committee of Ministers¹¹⁷ inviting the Court to identify in its judgments finding an underlying systemic problem and to assist state parties in finding the appropriate solution allows for an assumption of consensual subsequent practice of the state parties. Thus, the judicial elaboration of the pilot judgment procedure is based on the political will of the state

¹¹¹ Rudolf Bernhardt, *Thoughts on the Interpretation of Human Rights Treaties*, in: PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION – STUDIES IN HONOUR OF GERARD WIARDA, 65 (Franz Matscher & Herbert Petzold eds, 1988).

¹¹² Mahony (note 34), 65.

¹¹³ Eur. Court H.R., *Bronowski v. Poland (GC)* (note 60), para. 193.

¹¹⁴ *Id.*, Partly Dissenting Opinion of Judge Zupančič.

¹¹⁵ Eur. Court H.R., *Hutten-Czapska v. Poland*, Judgment of 19 June 2006, Reports of Judgments and Decisions 2006-VIII, Partly Dissenting Opinion of Judge Zagrebelsky.

¹¹⁶ LEACH, HARDMAN, STEPHENSON & BLITZ (note 11), 178.

¹¹⁷ Committee of Ministers of the Council of Europe, Resolution Res(2004)3 (note 55), 119.

parties. Nonetheless, the judicial lawmaking relies on the consensual or majoritarian¹¹⁸ will of the executives of the state parties represented in the Committee of Ministers; it does not rest on the will of the legislator in the Strasbourg system, which is the consensual will of the state parties' legislatures, who regularly amend the Convention in a formal process of democratic delegation. Otherwise domestic parliaments tend to be deferential to the executive in treaty negotiations.¹¹⁹ Thus, the autonomy of governmental-administrative elites in amending the Convention is relatively great.¹²⁰

II. Justification of Judicial Lawmaking at the Domestic Legislative Level

In a concurring opinion to the *Hutten-Czapska* friendly settlement Judge Ziemele wrote: "As to the scope of the Court's competence, the fact that the Court has the jurisdiction to develop procedures, especially where States have invited it to do so, does not answer the question about the scope and the limits of the exercise of such a power."¹²¹ In relation to the domestic legislative the pilot judgment moves towards a constitutional court-type jurisdiction reviewing domestic legislation and issuing a programmed lawmaking obligation in its operative part. One could use the constitutional argument conferring legitimacy by a higher order of norms that guides and channels the parliamentary legislative process.¹²² The presence of such norms within the framework of an international organization could promote its legitimacy by virtue of the norm's status, which could impose a legal duty to comply even against the will of the parliamentary majority. This "constitutional" argument is often made in respect to international human rights treaties. The provisions of the Convention as mutually defined by the state parties, but beyond the reach of domestic legislation, may justify restrictions on the national legislator¹²³ to protect human rights within an international constitutional framework.¹²⁴

¹¹⁸ Under Art. 20 of the Statute the Committee of Ministers, adoption of a recommendation requires an unanimous vote of all representatives present or a majority of those entitled to vote. However, at their 519 bis meeting in November 1994 the Ministers' Deputies decided to make their voting procedure more flexible and made a "Gentleman's agreement" not to apply the unanimity rule to recommendations.

¹¹⁹ von Bogdandy & Venzke (note 7), 994.

¹²⁰ *Id.*

¹²¹ Eur. Court H.R., *Hutten-Czapska v. Poland* (note 103), Concurring opinion of Judge Ziemele; citing *Nuclear Tests Case* (Australia v. France), ICJ Reports 1974, para. 23, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jimenez de Arechaga and Sir Humphrey Waldock.

¹²² von Bogdandy & Venzke (note 77), 22-25; Joshua L. Jackson, *Broniowski v. Poland: A Recipe for Increased Legitimacy of The European Court of Human Rights as a Supranational Constitutional Court*, 39 CONNECTICUT LAW REVIEW 759, 799 (2006).

¹²³ Ulfstein (note 82), 151.

¹²⁴ GREER (note 4), 7; Wildhaber (note 4), 162.

The purpose of the Court is, according to its own understanding, “to elucidate, safeguard, and develop the rules instituted by the Convention”¹²⁵ as a “constitutional instrument of European public order.”¹²⁶ One could view the Court as “the Constitutional Court for Europe,”¹²⁷ in the sense that it is the final authoritative adjudicative body in the pan-European constitutional system,¹²⁸ performs its adjudicatory role within the limits of the Convention system.¹²⁹

Nonetheless, such interpretation in terms of the liberal paradigm of judicial constitutional review¹³⁰ camouflages the vertical relation between the Court and domestic legislator in regard of the pilot judgment procedure. Pilot judgments do not restrict the domestic legislator to regulating a matter concerning human rights provisions of the Convention. In contrast, by its programmed lawmaking obligation the Court mobilizes the democratic legislator to amend in a self-regulatory manner domestic legislation in a Convention provision-related matter. As mentioned above, the Court wants to use the generality of domestic legislative acts to internalize and generalize the legal argument of its judgment in the domestic legal order. Pilot judgments are a form of judicially decreed cooperation between the Court and national parliaments. Thus, pilot judgments have a catalyzing effect on the domestic democratic legislative process, especially in the ongoing democratic transition in the new state parties of the Central and Eastern Europe.

As mentioned above, the state parties’ discretion secures the vertical distribution of competences between the Court and the domestic legislator, that is the relation between the co-original individual autonomy protected by fundamental rights and freedoms and the autonomy of the domestic democratic sovereign. The Court has to respect this flexible principle in programming its lawmaking obligation. The scope of discretion should differ according to the type of Convention provisions of the alleged violation. In the context of the right to property, the state parties should enjoy wide discretion, particularly in redistributing private property, being a domain where differences of opinion may vary largely in pluralistic democracies.¹³¹ The Court should exercise judicial self-restraint in programming the lawmaking obligation in pilot judgments related to economic and social rights. In the context of procedural and participatory rights, providing procedural and

¹²⁵ Eur. Court H.R., *Ireland v. United Kingdom* (note 110), para. 154.

¹²⁶ Eur. Court H.R., *Loizidou v. Turkey* (note 80), para. 75.

¹²⁷ STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 7 (2006).

¹²⁸ *Id.*, 7.

¹²⁹ Jackson (note 122), 799.

¹³⁰ HABERMAS (note 77), 240-253.

¹³¹ Mahony (note 34), 79.

democratic participation and effective legal protection, the discretion should be reduced.¹³²

III. Justification of Judicial Lawmaking at the Supervisory Level

By issuing a substantively programmed lawmaking obligation, a pilot judgment imposes its legal arguments on the political process at the supervisory level. The question arises whether such judicial lawmaking at the supervisory level would be an *ultra vires* act. Indeed, the judicial lawmaking at the supervisory level can be justified by a resolution¹³³ and a recommendation¹³⁴ of the Committee of Ministers itself.¹³⁵ Nonetheless, the concern of the Court's competence in regard to the supervisory authority of the Committee of Ministers is not only formal. Reminiscent of the *Hutten-Czapska* case, the structural problem was a large-scale one and required the adoption and carrying out of complex measures of a legislative and administrative character with an economic and social content.

On the one hand, it has been argued that such cases would pose legal and practical difficulties that the Committee of Ministers would be much better equipped to monitor than the Court, especially as to the implementation of complex, long-term measures.¹³⁶ The Committee of Ministers could take prospective examination into consideration in its initial interim resolutions. By contrast, the Court would regularly be the inadequate institution for the prospective examination of domestic legislative amendment because it might have to exercise caution in relation to future applications or it might have to examine impartially in adversarial proceedings.

On the other hand, the judicial lawmaking at the supervisory level is in accordance with the political reform process of Protocol No. 14. The question of the Court's relationship to the Committee of Ministers can be linked with the reform process leading to Protocol No. 14. The amended Article 46 of the Convention extends the judicial role in the supervisory

¹³² Compare Shelton (note 90), 10, stating: „the Court has applied a reduced margin of appreciation ... where the government has interfered with democratic institutions, such as dissolving political parties or restricting freedom of information on issues of public interest.“ See Eur. Court H.R., *Refah Partisi (The Welfare Party) and Others v. Turkey (GC)*, Judgment of 13 February 2003, Reports of Judgments and Decisions 2003-II; Eur. Court H.R., *Scharsach and News Verlagsgesellschaft mbH v. Austria*, Judgment of 13 November 2003, Reports of Judgments and Decisions 2003-XI. Nonetheless, it should grant wide margin of appreciation for matters concerning elections, noting that there are numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe, see Shelton (note 90), 10.

¹³³ Committee of Ministers of the Council of Europe, Resolution Res(2004)3 (note 55), 119.

¹³⁴ Committee of Ministers of the Council of Europe, Recommendation Rec(2004)6 (note 56), 116.

¹³⁵ Schmahl (note 47), 379.

¹³⁶ Eur. Court H.R., *Hutten-Czapska v. Poland* (note 103), Concurring Opinion of Judge Ziemele.

mechanism by introducing two new mechanisms enabling the Committee of Ministers to bring supervision matters before the Court. First, the Protocol establishes a form of infringement proceedings, modeled on that existing in European Union Law.¹³⁷ This provision permits the Committee, by a two-thirds majority vote, to make a reference to the Court seeking to determine whether a state party has fulfilled its obligation regarding the execution of a previous judgment.¹³⁸ Second, the Protocol institutes a form of clarification ruling.¹³⁹ Under this provision, the Committee of Ministers, again by a two-thirds majority vote, may request a ruling on a question of interpretation where the Committee of Ministers has found that its supervision of execution of a judgment has been hindered by the existence of problems surrounding the interpretation of that judgment.¹⁴⁰

Both amendments clarify the nature of the Convention as an interlocking horizontal set of institutions in which both the judicial and the political organs have distinctive and necessary functions.¹⁴¹ Nonetheless, Protocol No. 14 particularly strengthens the judicial role in the supervisory mechanism. In combination with a pilot judgment requesting the respondent state party in the operative part to adopt general measures in terms of a substantively programmed lawmaking obligation, an infringement proceeding will generate a “judicial review of legislative action” in general as well as a friendly settlement past to a pilot judgment.

Furthermore, much criticism has been levied at the effectiveness of, the lack of access to, the transparency of, and the publicness of the supervisory mechanism of the Committee of Ministers.¹⁴² In practice, the Committee only meets twice a year.¹⁴³ In the meantime its tasks are discharged by the so-called “Committee of the Ministers Deputies,” consisting of high officials who are generally the permanent representatives of their governments to the Council of Europe.¹⁴⁴ The sessions of the Committee of Ministers are not public, unless the Committee decides otherwise.¹⁴⁵

¹³⁷ Harmsen (note 1), 52.

¹³⁸ *Id.*, 52.

¹³⁹ *Id.*, 52.

¹⁴⁰ *Id.*, 52.

¹⁴¹ *Id.*, 52.

¹⁴² Philip Leach, *On Reform of the European Court of Human Rights*, 14 EUROPEAN HUMAN RIGHTS LAW REVIEW 725, 732 (2009).

¹⁴³ See Art. 21(c) of the Statute of the Council of Europe.

¹⁴⁴ Zwaak (note 38), 45.

¹⁴⁵ See Art. 21(a) of the Statute of the Council of Europe.

In this respect, the Court's procedural legitimacy is much more developed. Under Article 40 of the Convention, all the Court's hearings are public absent exceptional circumstances, and all documents are open to the public unless the President of the Court decides otherwise. In accordance with Article 36 of the Convention,¹⁴⁶ third parties have the right to submit written comments and to take part in hearings. According to Article 45¹⁴⁷ of the Convention, all judgments have to be reasoned. With regard to democratic legitimacy, the Court's judges are elected by the Parliamentary Assembly in accordance with Article 22 of the Convention.¹⁴⁸ In order to improve independence and impartiality of the judges, Protocol 14 extends the terms of office period to nine years while abolishing the re-election of judges.

IV. The Individual?

From the perspective of the individual applicant, the whole complicity of the pilot judgment procedure becomes particularly apparent. The adjournment of similar, pending cases is the central element of a pilot judgment to solve the Court's docket problem.¹⁴⁹ Coevally, the adjournment weakens the individual's right of access to the Court in accordance with Article 34 of the Convention.¹⁵⁰ Once the respondent state party has introduced a remedy in compliance with the pilot judgment these adjourned cases can subsequently be referred back. If the state response is insufficient, the adjourned cases could be re-opened by the Court. There is no guarantee that the application of the pilot judgment exactly reflects all the facts and legal issues related to numerous violations.¹⁵¹

¹⁴⁶ Art. 36 of the Convention reads: "(1) In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings. (2) The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings."

¹⁴⁷ Art. 45 of the Convention reads: "(1) Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible. (2) If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion."

¹⁴⁸ Art. 22 of the Convention reads: "(1) The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party. (2) The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies."

¹⁴⁹ However, similar pending cases will not always be adjourned. This is a matter of discretion for the Court depending on all relevant circumstances, see LEACH, HARDMAN, STEPHENSON & BLITZ (note 11), 176.

¹⁵⁰ Art. 34 of the Convention reads: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

¹⁵¹ Helfer (note 79), 154.

Furthermore, the applicant of the pilot judgment is privileged in relation to the others. Whilst reviewing the application of the pilot judgment, the others remain in stasis.¹⁵² Justice delayed is justice denied. The possibility that the applicant of the pilot judgment will negotiate a friendly settlement that favors an individual damages award over systematic non-monetary remedies is even more worrying for subordinated applicants.¹⁵³ If the state party's response is insufficient, the adjourned cases could be re-opened by the Court, of course. However, the re-opening of similar, pending cases is a discretionary act by the Court¹⁵⁴ that could leave the remaining applicants in an uncertain position¹⁵⁵ and extend considerably the length of such proceedings.¹⁵⁶ The Court has to pay attention to the procedure's legitimacy if the pilot judgment is to serve as an effective tool for improving compliance with the Convention.¹⁵⁷ The elaboration of procedural safeguards to ensure the adjudication on class-wide relief applications appropriate to the systematic human rights issues could improve the procedural situation. In this respect the establishment of Rule 61 of the Rules of the Court in February 2011 is a substantial progress. However, the term of "class action" and "collective applications"¹⁵⁸ has not yet been defined and further research needs to be conducted into their potential efficacy at the international level.¹⁵⁹

E. Outlook

Referring to this paper's title and the question whether the pilot judgment is a form of judicial expansion of competences without politics, it has been shown that the procedural lawmaking by elaborating the pilot judgment procedure was carried by the political will of

¹⁵² *Id.*, 154; citing Registrar of the European Court of Human Rights, "Pinto" cases adjourned pending decision on test case, Press Release 014, 18 January 2005, stating that the Court had adjourned over 800 Italian length-of-proceedings cases, pending its decision in a test case concerning the application of Italy's "Pinto Law."

¹⁵³ Helfer (note 79), 154; citing Andreas von Staden, *Assessing the Impact of the Judgment of the European Court of Human Rights on Domestic Human Rights Policies*, paper prepared for delivery at the Annual Meeting of the American Political Science Association, noting that a "state may prefer to simply pay just satisfaction without taking substantive steps to remedy the situation and fully remove the consequences of the violation and suggesting that many governments enter into friendly settlements for that reason." Helfer points out that the Court "may not approve a friendly settlement unless it manifests a "respect for human rights as defined in the Convention and the Protocols thereto" in accordance to Art. 37 of the Convention."

¹⁵⁴ LEACH, HARDMAN, STEPHENSON & BLITZ (note 11), 176.

¹⁵⁵ *Id.*, 30.

¹⁵⁶ *Id.*, 31.

¹⁵⁷ Helfer (note 79), 154.

¹⁵⁸ Eur. Court H.R., Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference, 3 July 2009, 8.

¹⁵⁹ Leach (note 142), 731.

the state parties' executives convened in the Committee of Ministers. Even though the international legislator had not solved the docket problem by Protocol No. 14 the political body of the Convention system invited the Court to react to the crisis. In the absence of a functional legislator, lawmaking by an international adjudicative body tried to solve a functional crisis in an international legal regime by realigning the competences in the Convention system. The state parties in post-*Broniowski* pilot judgments have accepted this shift of competences.¹⁶⁰ Furthermore, pilot judgments are a form of judicially decreed cooperation between the Court and national parliaments and have a catalyzing effect on the domestic democratic legislative process. Thus, the pilot judgment is a form of judicial lawmaking including domestic legislatures at the expense of the individual. That might be the cause for the Court's reasoning not invoking the effectiveness of the concrete Convention provision applied by the individual but the "effectiveness of the Convention machinery"¹⁶¹ as a whole.

¹⁶⁰ LEACH, HARDMAN, STEPHENSON & BLITZ (note 11), 178.

¹⁶¹ Eur. Court H.R., *Broniowski v. Poland (GC)* (note 60), para. 193.

