

Comparing Class Actions and Pilot Judgments: How the Procedures of the U.S. Class Action can Help Safeguard the Right of Individual Access in the Pilot Judgment Procedures at the European Court of Human Rights (working title)

Tatiana Sainati

INTRODUCTION

In 1959, with the monstrous shadows of World War II still shrouding the continent, the European Court of Human Rights (ECtHR) opened its doors to stand as a bulwark of democracy, to ward against tyranny, and to prevent the recurrence of the massive human rights violations of the war.¹ In the intervening decades, the Court served as a bright beacon of hope: its jurisprudence has transformed the legal and political landscape of Europe;² its case law is widely lauded as the “most developed and extensive” of the human rights institutions;³ and it has secured its position as the most successful and effective international human rights tribunal in the world.⁴ Yet, the Court’s very success now threatens to drown out the Court’s light. In recent years, the Court has been inundated by applications, in a rising tide that shows no sign of waning, and now threatens to overwhelm the institution completely.⁵

¹ Antoine Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, 2009 *Nomiko Vima* (Greek L. J.) 1, 1.

² Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 *Eur. J. Int’l L.* 125, 126 (2008).

³ Antoine Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, 2009 *Nomiko Vima* (Greek L. J.) 1, 1.

⁴ Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 *Eur. J. Int’l L.* 125, 126 (2008).

⁵ Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 *Eur. J. Int’l L.* 125, 126 (2008).

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In an effort to keep afloat amid this growing flood of cases, the Court developed an innovative new mechanism, the pilot-judgment procedure.⁶ This procedure targets a specific category of claims, termed “repetitive applications,” which have proven especially relevant in considering how to stem the overflow of cases before the Court.⁷ Repetitive applications “allege violations of the Convention . . . deriv[ing] from the same structural human rights problem in a Contracting State.” These applications require the Court to rearticulate again and again the same finding of a violation in a significant number of well-founded cases arising from the same structural problem in a Contracting state, without raising any new substantive questions of law. Thus, these cases merely require that the Court repeatedly apply well-established case law.⁸ These repetitive applications place a tremendous strain upon the Court and threaten to overwhelm the institution completely. Approximately two-thirds of admissible applications are repetitive cases stemming from systemic human rights violations in the domestic legal regime.⁹

The pilot-judgment procedure is designed to cope effectively with the systemic human rights problems that lead to large numbers of repetitive applications.¹⁰ Through the pilot judgment, the Court attempts to identify defects arising from a “widespread or systemic problem on the national level.” Remedying such systemic defects halts the tide of similar violations, and

⁶ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 6 (2013).

⁷ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 5 (2013).

⁸ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 5 (2013).

⁹ Markus Fyrnys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1232 (2011)

¹⁰ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 6, 7 (2013).

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corresponding surge of applications before the Court.¹¹ The Court also aims, through the procedure, to “ensure the effective processing of follow-up cases,” and thereby dispense with numerous cases already pending before the Court at the time of the delivery of the pilot judgment.¹² Toward this end, the Court may suspend consideration of cases arising from the same systemic problem, asking the affected applicants to resubmit their grievances with national authorities once an effective domestic remedy has been implemented.¹³ Thus, through the pilot judgment, the court addresses a general problem by adjudicating an individual case.¹⁴

The pilot judgment procedure has been heralded as a bold and innovative response to the flood of repetitive cases,¹⁵ and, particularly given the Court’s exemplary position in the field of human rights, may serve as a harbinger of how aggregate human rights litigation could work in a more systematized human rights regime. Despite its promise, the procedure as implemented and applied is beset by problems: the legal basis for the pilot judgment procedure remains contested;¹⁶ the rules and procedures governing the pilot judgment mechanism lack clarity and

¹¹ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 8 (2013).

¹² Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 8 (2013).

¹³ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 8 (2013).

¹⁴ Antoine Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, 2009 *Nomiko Vima* (Greek Law Journal) 1, 1.

¹⁵ See, e.g., Markus Fynys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1232 (2011); Philip Leach, Helen Hardman & 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*, 10 *Hum. Rts. L. Rev.* 246, 358 (2010); Steven Greer and Luzius Wildhaber, *Revisiting the Debate about ‘Constitutionalising’ the European Court of Human Rights*, 12 *Hum. Rts. L. Rev.* 655, 671 (2012).

¹⁶ Antoine Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, 2009 *Nomiko Vima* (Greek Law Journal) 1, 11.

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predictability;¹⁷ and, significantly, the pilot judgment mechanism omits procedural safeguards necessary to ensure the very individual rights of both pending and potential future applicants that the European human rights system was designed to protect.¹⁸ The adjournment of similar, pending cases undermines the individual right of access to the Court guaranteed by Article 34 of the European Convention of Human Rights.¹⁹ Moreover, there are no guarantees that the case selected for application of the pilot judgment procedure fully reflects the various facts and legal issues related to numerous violations.²⁰ There is also scant assurance that the individual applicant in the pilot judgment will adequately represent the interests of similarly situated individuals.²¹ Concerns for the rights of absent individual applicants have led some to call for procedural safeguards to ensure that “class-wide relief applies to all similarly situated applicants and is appropriate to the systemic human rights issues it has adjudicated.”²²

¹⁷ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 36 (2013).

¹⁸ Mark Fynys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1257 (2011).

¹⁹ Mark Fynys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1257 (2011).

²⁰ Mark Fynys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1258 (2011); Antoine Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, 2009 *Nomiko Vima (Greek Law Journal)* 1, 13.

²¹ Mark Fynys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1258 (2011); Lawrence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Court of Human Rights Regime*, 19 *Eur. J. Int’l L.* 125, 154 (2008).

²² Lawrence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Court of Human Rights Regime*, 19 *Eur. J. Int’l L.* 125, 154 (2008); see also Mark Fynys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1258 (2011) (“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.”).

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Despite the gravity of these misgivings, no one has yet articulated a proposal for preserving the rights of absent applicants in the pilot judgment procedure.²³ This article seeks to fill this gap in the literature by demonstrating how American class-action procedural rules can be adapted to protect the interests of individual applicants before the ECtHR. American judges tasked with applying the rules enshrined in Federal Rule of Civil Procedure 23 (Rule 23), which governs class actions, have long grappled with the “uncertain line between the efficiency mandates of aggregate dispute resolution and the fairness concerns of absent class members.”²⁴ The attempts of American judges to ease the tension between the “advantages and disadvantages of adjudicating the rights of absent parties is a pervasive theme in class action law,”²⁵ and can provide direction, guidance and insight as to how the judges of the ECtHR can balance the need to stem the rising tide of applications before it with the individual rights of absent applicants impacted by the pilot judgment procedure. Such balance is necessary if the ECtHR is to continue vindicating the rights of individual victims of injustices and stave off systemic human rights violations.²⁶

This Article proceeds in three Parts. Part I first discusses the role of the right of individual petition in the Strasbourg system and the inherent tension between this individual

²³ Cite to every article/book I’ve read and discuss why it fails to provide a template for preserving the rights of absent applicants.

²⁴ Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 *Sup. Ct. Rev.* 337, 337.

²⁵ Theodore Eisenberg, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 *Vand. L. Rev.* 1529, 1530 (2004).

²⁶ See Christian Tomuschat, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, in *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* 1, 15 (Rudiger Wolfrum & Ulrike Deutsch, eds., 2009) ([I]f the Court is really meant to help the victims of injustices, it must necessarily address the factual substance of individual cases. Its general guidelines alone do not have the necessary impact).

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right and the collective nature of the pilot judgment. Next, it describes Rule 61, which governs the pilot judgment procedure, in greater detail before turning to a consideration of the ECtHR’s pilot judgment jurisprudence. Finally, Part I concludes by laying out some of the criticisms that have been levied at the pilot judgment procedure. Part II provides a brief overview of Rule 23, before turning to an analysis of how American judges have used the twin concepts of “identity of interest” and “adequacy of representation” to flesh out the contours of Rule 23 and safeguard the rights of absent class members in practice. Part III adopts a comparative law analysis to demonstrate how similar tensions and concerns animate both Rule 23 and the pilot judgment procedure, before discussing how the ECtHR could begin to use the principles enshrined in Rule 23 to afford greater protection to the rights of absent applicants when issuing pilot judgments.

I. THE PILOT JUDGMENT PROCEDURE

Accounts of the pilot judgment procedure and what elements it includes vary – but absent from all is any discussion of the suitability of the application selected as the pilot case for a test case, or the individual applicant as a representative for the entire class of applicants and potential applicants concerned. The procedural protections afforded to individual applicants and future applicants must be fixed with greater certainty – particularly in light of the importance of the right of individual petition in the European human rights regime.

A. The right of individual petition and the pilot judgment procedure

In 1950, still reeling from the atrocities of the Nazi regime, the nascent Council of Europe finalized the text of the European Convention on Human Rights (ECHR) in an effort to prevent the recurrence of the massive human rights violations of World War II.²⁷ The European

²⁷ Christian Tomuschat, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, in *THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED*

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Court of Human Rights (ECtHR) was created to adjudicate disputes between the States Parties to the ECHR, as well as cases originating in petitions brought by individual applicants claiming to be the victims of a breach of the Convention by a State Party.²⁸ The importance of this right of individual petition, enshrined in Article 34 of the ECHR,²⁹ cannot be overstated. The ECHR was the first international instrument to include a procedural entitlement to commence international proceedings against a State for violations of fundamental human rights.³⁰ Over the years, the right of individual petition has been significantly expanded.³¹ The Court itself has played a significant role in this expansion, taking a “*pro victima*” judicial approach to the interpretation of the Convention provisions,” and evincing a determination to preserve “the practical effectiveness of the victims’ access to international justice” by emphasizing the duty of the States “not to hinder the effective exercise of the right of individual petition.”³² Indeed, the Court has recognized that the right of individual petition is “of the highest importance and is now a key

BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS 1, 2 (Ruediger Wolfrum & Ulrike Deutsch, eds. 2007).

²⁸ J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (2d. ed. 1993)

²⁹ Article 34 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.

³⁰ Pietro Sardaro, *The Right of Individual Petition to the European Court*, in *PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS*, 45, 47 (Paul Lemmens and Wouter Vandenhole, eds. 2005).

³¹ Pietro Sardaro, *The Right of Individual Petition to the European Court*, in *PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS*, 45, 47 (Paul Lemmens and Wouter Vandenhole, eds. 2005).

³² Pietro Sardaro, *The Right of Individual Petition to the European Court*, in *PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS*, 45, 49 (Paul Lemmens and Wouter Vandenhole, eds. 2005).

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component of the machinery for protecting the rights and freedoms set out in the Convention.”³³

Thus, the history of the right of individual petition “has been a steady, long march toward the effective realisation of full justiciability for all human rights at a supranational level,” meaning that all victims of human rights violations are ensured an effective international judicial remedy to vindicate their rights.³⁴ As a result, the right of individual petition has become entrenched as “the cornerstone of the European human rights system.”³⁵

Paradoxically, this very concept of individualized justice that has become foundational to the European human rights regime threatens to undermine the ECtHR. The individual concept embodied in the right of individual petition envisions the ECtHR’s core adjudicative function as “ensuring, on a case-by-case basis that every genuine victim of a violation receives a judgment from the [ECtHR].”³⁶ But the sheer number of individual cases pending before the Court renders such individualized attention impracticable. In September 2012, 139,500 applications were pending before the Court. In 2011, the Court decided “only” 52,188 applications. The

³³ Mamatkulov and Askarov v. Turkey, App. Nos. 46827/99 and 46951/99 at ¶122 E.Ct.H.R. (Feb. 4, 2005).

³⁴ Pietro Sardaro, *The Right of Individual Petition to the European Court*, in PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS, 45, 48 (Paul Lemmens and Wouter Vandenhole, eds. 2005).

³⁵ Pietro Sardaro, *The Right of Individual Petition to the European Court*, in PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS, 45, 49 (Paul Lemmens and Wouter Vandenhole, eds. 2005); *see also* Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference (July 3, 2009), *available at* <http://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/pilotjudgmentprocedure.pdf> (noting that the right of individual petition “is the cornerstone of a mechanism of collective guarantee whose reach extends to 800 million persons within the jurisdiction of the Contracting States”).

³⁶ Markus Fynys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 German L. J. 1231, 1232 (2011).

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discrepancy between pending applications and concluded cases dramatically illustrates that “a deadlock of the Strasbourg system is imminent.”³⁷

The exponential rise in applications can be traced to the expansion of the ECtHR’s jurisdiction after the fall of the Iron Curtain, when the Council of Europe invited the formerly Socialist states of Central and Eastern Europe to accede to the ECHR. The accession of these states drastically increased the number of potential applicants before the Court from 450 to 800 million persons.³⁸ The deficiencies in the democratic structures, rule of law and human rights protections in the former Soviet bloc states caused increasing numbers of their citizens to resort to the Strasbourg Court to secure their “new” rights as guaranteed by the Convention.³⁹ As a result, an “almost frightening” number of new applications have been brought by applicants in the formerly socialist States.⁴⁰

In stark mathematical terms, there has been an increase of approximately 20 per cent from year to year in the number of judgments handed down.⁴¹ Roughly two-thirds of the complaints lodged are repetitive applications.⁴² These repetitive applications allege conventional

³⁷ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 3 (2013).

³⁸ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 3-4 (2013).

³⁹ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 3-4 (2013).

⁴⁰ Christian Tomuschat, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, in *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* 1, 10-11 (Rudiger Wolfrum & Ulrike Deutsch, eds., 2009).

⁴¹ Christian Tomuschat, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*, in *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* 1, 11 (Rudiger Wolfrum & Ulrike Deutsch, eds., 2009).

⁴² Markus Fynys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1232 (2011)

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violations arising in the same structural human rights problem in a Contracting State, and thus require the Court to repeat the same finding of a violation again and again, without raising any new substantive questions as far as the interpretation of the Convention.⁴³ In recognition of the problems created by repetitive applications, the Committee of Ministers, the political arm of the European Council, invited the ECtHR “as far as possible, to identify, in its judgments a finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications.”⁴⁴ The Court responded by issuing its first pilot judgment in 2004.⁴⁵

B. The Pilot Judgment Procedure as Enshrined in Rule 61

The pilot judgment procedure developed as a means of coping effectively with the widespread human rights problems and systemic deficiencies leading to an influx of repetitive applications.⁴⁶ Through the procedure, the Court attempts to alleviate widespread human rights problems by (1) identifying defects arising from a systemic problem on the domestic level, and (2) securing the effective processing of follow-up cases in order to dispose of those cases already lodged with the Court when the pilot judgment is issued, as well as potential future cases lodged

⁴³ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 5 (2013).

⁴⁴ Committee of Ministers, Council of Europe, Resolution Res(2004)3 on Judgments Revealing an Underlying Systemic Problem, adopted May 12, 2004, *available at* <https://wcd.coe.int/ViewDoc.jsp?id=743257>

⁴⁵ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 6 (2013).

⁴⁶ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 7 (2013).

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before the domestic reforms have been enacted.⁴⁷ The pilot judgment procedure thus aims to ease the tension between the individual right of access to the Court, and the urgent need for efficiency if the ECtHR is to staunch the tide of individual applications that threaten to drown it. As currently conceived, however, the pilot judgment procedure tilts the balance between these competing concerns in favor of efficiency over individual rights.

1. The Uncertain Elements of the Pilot Judgment Procedure

The elements of the procedure itself remain uncertain.⁴⁸ Since the Court issued its first pilot judgment in 2004, it has continued to “feel[] its way,” crafting several “variants” of the procedure in recognition of the flexibility necessary to accommodate the broad range of situations confronting the Court.⁴⁹ The resulting procedural inconsistencies are reflected in the diverse procedural elements identified by scholars of the Court. Markus Fynys enumerates five elements of the procedure: (1) a finding of a “systemic malfunctioning” in a domestic legislative or administrative practice; (2) a determination that the systemic problem could provoke numerous, well-founded applications; (3) an acknowledgment of the need for general remedial measures and recommendation of the form such measures should take; (4) an adjournment of pending individual applications arising from the same systemic defect; and (5) the use of the

⁴⁷ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 8 (2013).

⁴⁸ See, Kjartan Oppedal, *Institutional Development Through Crisis? An Analysis of European Court of Human Rights’ Pilot Judgment Procedure Addressing Systemic Human Rights Issues* 62 (Sept. 2011)(unpublished Master Thesis) (There exists no consensus as to exactly what constitutes a Pilot Judgment and the procedure has been flexibly put to use).

⁴⁹ Luzius Wildhaber, *Pilot Judgments in Cases of Structural or Systemic Problems on the National Level*, in *THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS* 69, 71, 74-75 (Rudiger Wofrum & Ulrike Deutsch, eds., 2009).

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operative part of the judgment to reinforce the obligation to take general remedial measures.”⁵⁰

Dominik Hader articulates four elements of a pilot judgment procedure: (1) the identification of a systemic problem or practice incompatible with the ECHR; (2) an indication of specific measures required to resolve the underlying problem; (3) the possible adjournment of similar pending applications while the Court waits for the respondent state to adopt the prescribed general measures; and (4) a striking of similar applications from the Court’s roster once an effective domestic remedy has been implemented.⁵¹

The Court’s former president, Luzius Wildhaber, has identified up to eight different elements of a pilot judgment: (1) the finding of a violation by the Grand Chamber revealing a problem in the concerned State affecting an entire class of individuals; (2) a “connected conclusion” that the problem has led or could lead to multiple applications before the Court; (3) the provision of guidance to the State on the general measures required to solve the problem; (4) an indication that such domestic measures must work retroactively to address existing similar cases; (5) the adjournment of all pending cases raising the same issue; (6) the use of the operative part of the Court’s judgment to reiterate the obligation to take legal and administrative remedial measures; (7) the deferral of any decision on the issue of just satisfaction until the state takes action; and (8) notification to the Council of Europe regarding the progress of the pilot case.⁵² Françoise Tulkens, a Judge at the European Court of Human Rights and President of the Court’s Second Section distills the pilot judgment into two “core” elements: (1) the

⁵⁰ Markus Fynys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1232-33 (2011).

⁵¹ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 36 (2013).

⁵² Antoine Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges* 2009 *Nomiko Vima* (Greek Law Journal) 1, 2.

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identification of a general problem and its cause, and (2) the guidance given by the Court to the state concerned.⁵³

2. *The Ambiguous Rule 61*

In 2011, the Court codified the pilot judgment procedure in Rule 61 of the Rules of the Court.⁵⁴ However, Rule 61 is riddled with ambiguities, and fails to articulate “clear and predictable standards” for and the necessary elements of a pilot judgment procedure.⁵⁵ The Rule provides that the Court may initiate pilot judgment proceedings “where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.”⁵⁶ However, the Rule nowhere clarifies standards for determining which cases are “similar.”⁵⁷

The Rule also requires the Court to “first seek the views of the parties on whether the application under examination results from the existence of such a problem or dysfunction in the Contracting Party concerned and on the suitability of processing the application in accordance with that procedure,”⁵⁸ and allows the Court to initiate the pilot judgment procedure *proprio motu*, or at the behest of either or both of the parties before it.⁵⁹ Yet, the rule does not enunciate any factors to determine whether an application is suitable for the pilot judgment process, nor

⁵³ Francoise Tulkens, Seminar: Responding to Systemic Human Rights Violations: Pilot Judgments of the European Court of Human Rights and Their Impact at the National Level: Perspectives from the Court: A Typology of the Pilot-Judgment Procedure, June 14, 2010 at 2.

⁵⁴ Rules of Court, Rule 61, Jan. 1 2014.

⁵⁵ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 36 (2013).

⁵⁶ Rule 61(1).

⁵⁷ Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* 36 (2013).

⁵⁸ Rule 61(2)(a).

⁵⁹ Rule 61(1); (2)(b).

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does it prescribe benchmarks for deciding whether a particular application sufficiently reflects all of the relevant “facts and legal issues related to numerous violations.”⁶⁰

The Rule states that the Court must articulate “both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.”⁶¹ It further provides that the Court may, at its discretion, “reserve the question of just satisfaction either in whole or in part pending the adoption by the respondent Contracting Party of the individual and general measures specified in the pilot judgment,” but articulates no standards for determining when it is appropriate to do so.⁶² Similarly, the Rule affords the Court great leeway in determining whether to “adjourn the examination of all similar applications pending the adoption of the remedial measures required by virtue of the operative provisions of the judgment,” and coevally, whether to recommence the examination of an adjourned application “where the interests of the proper administration of justice so require.”⁶³ Here, too, the Rule nowhere clarifies the criteria for determining when similar applications will be adjourned. And, although the Rule does require that concerned applicants “be informed in a suitable manner of the decision to adjourn” as well as “all relevant developments affecting their cases,” there is no mechanism for such applicants to participate in the decision to adjourn, nor are there any standards for deciding which applications are similar

⁶⁰ Markus Fynys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1257 (2011).

⁶¹ Rule 61(3)

⁶² Rule 61(5).

⁶³ Rule 61(6)(a),(c)

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enough to be adjourned pending the implementation of remedial measures articulated in a pilot judgment.⁶⁴

The Rule’s provision for friendly settlements states that where a friendly-settlement agreement is reached “such agreement shall comprise a declaration by the respondent Party on the implementation of the general measures identified in the pilot judgment Contracting as well as the redress to be afforded to other actual or potential applicants.”⁶⁵ This provision likewise fails to provide clear and predictable guidelines for determining whether a settlement is fair to absent applicants, or any mechanism for the absent applicants to either contest or consent to the settlement’s provisions.⁶⁶ Thus, the overriding focus of Rule 61 is efficiency concerns – getting numerous cases settled quickly, in order to clear the Court’s docket – rather than on procedural safeguards designed to secure the rights of individual applicants.

C. The Courts Pilot Judgment Jurisprudence

In issuing its first pilot judgment, the Court noted that

[T]he pilot judgment procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving [systemic] problems at the national level, thereby securing to the persons concerned the Convention rights and freedoms as required by Article 1 of the Convention, offering to them more rapid redress and, at the same time, easing the burden on

⁶⁴ Rule 61(6).

⁶⁵ Rule 61(7).

⁶⁶ Rule 61(7).

the Court which would otherwise have to take to judgment large numbers of applications similar in substance.⁶⁷

Since this first articulation of the “primary purpose” of the pilot judgment procedure, the Court has repeatedly emphasized that the goal of the pilot judgment is “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.”⁶⁸ In determining whether the pilot judgment procedure is appropriate, the Court considers “the growing threat to the Convention system resulting from large numbers of repetitive cases that derive from, among other things, the same structural or systemic problem”⁶⁹ Significantly, the very “primary purpose” of the pilot judgment procedure

⁶⁷ *Broniowski v. Poland*, Application No. 31443/96, Judgment (Friendly Settlement), ¶35 (Sept. 28 2005).

⁶⁸ *Hutten-Czapska v. Poland*, Application No. 35014/97, Judgment (June 19, 2006); *see also* *Manushaqe Puto and Others v. Albania*, Application Nos. 604/07, 43528/07 & 34770/09, Judgment, ¶103-04 (July 31, 2012) (noting that the goal of the pilot judgment procedure is to “facilitate the speediest and most effective resolution of a dysfunction affecting the protection of the Convention right in question in the national legal order,” with the aim of “induc[ing] the respondent State to resolve large numbers of individual cases arising from the same structural problem at the domestic level.”; *Alisic and Others v. Bosnia and Herzegovina*, Application No. 60642/08, Judgment, ¶ 97 (Nov. 6, 2012) (“In order to facilitate effective implementation of its judgments, the Court may adopt a pilot-judgment procedure allowing it to clearly identify structural problems underlying the breaches and to indicate measures to be applied by the respondent States to remedy them. The aim of that procedure is to facilitate the speediest and most effective resolution of a dysfunction affecting the protection of the Convention rights in question in the national legal order.”); *Burdov v. Russia*, Application No. 33509/04, Judgment, ¶127 (Jan. 15, 2009) (“The object of the pilot judgment procedure is to facilitate the speediest and most effective resolution of a dysfunction affecting the protection of Convention rights in question in the national legal order,” and “[a]nother important aim of the pilot-judgment procedure is to induce the respondent State to resolve large numbers of individual cases arising from the same structural problem at the domestic level, thus implementing the principle of subsidiarity which underpins the Convention system.”).

⁶⁹ *Hutten-Czapska v. Poland*, Application No. 35014/97, Judgment (June 19, 2006); *see also* *Manushaqe Puto and Others v. Albania*, Application Nos. 604/07, 43528/07 & 34770/09, Judgment, ¶103-04 (July 31, 2012) (noting that the goal of the pilot judgment procedure is to

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tacitly concedes the tension between individual rights and efficiency concerns that the mechanism produces. On the one hand, the Court expresses the need to ensure the “speedy and effective resolution” for “the persons concerned,” that is – the need to quickly and efficiently secure the individual rights at risk. On the other hand, the Court acknowledges the importance of addressing the “threat to the Convention system” created by structural dysfunctions in national legal orders. Yet, in practice, the Court has subordinated the rights of individuals in an effort to tread water amid a veritable flood of applications.

1. General Remedial Measures and the Right of the Individual

This same tension between individual rights and efficiency concerns is latent in the Court’s discussions of general remedial measures – and here, too, the rights of individuals are subordinated to the Court’s need to stem the deluge of applications inundating its docket. For example, in the case of *Maria Atanasiu and others v. Romania*, the Court noted that “findings of a violation of the Convention ha[ve] been constantly on the increase, and several hundred more similar applications are pending before the Court, which are liable to give rise to further

“facilitate the speediest and most effective resolution of a dysfunction affecting the protection of the Convention right in question in the national legal order,” with the aim of “induc[ing] the respondent State to resolve large numbers of individual cases arising from the same structural problem at the domestic level.”; *Alisic and Others v. Bosnia and Herzegovina*, Application No. 60642/08, Judgment, ¶ 97 (Nov. 6, 2012) (“In order to facilitate effective implementation of its judgments, the Court may adopt a pilot-judgment procedure allowing it to clearly identify structural problems underlying the breaches and to indicate measures to be applied by the respondent States to remedy them. The aim of that procedure is to facilitate the speediest and most effective resolution of a dysfunction affecting the protection of the Convention rights in question in the national legal order.”); *Burdov v. Russia*, Application No. 33509/04, Judgment, ¶ 127 (Jan. 15, 2009) (“The object of the pilot judgment procedure is to facilitate the speediest and most effective resolution of a dysfunction affecting the protection of Convention rights in question in the national legal order,” and “[a]nother important aim of the pilot-judgment procedure is to induce the respondent State to resolve large numbers of individual cases arising from the same structural problem at the domestic level, thus implementing the principle of subsidiarity which underpins the Convention system.”).

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judgments finding a breach of the Convention.” The Court described the situation as an “aggravating factor as regards the State’s responsibility” as well as a “threat to the future effectiveness of the Convention machinery.”⁷⁰ Accordingly, the Court determined that the case was suitable for the pilot judgment procedure, and emphasized that it was “imperative that the State take general measures as a matter of urgency capable of guaranteeing in an effective manner the right to restitution or compensation while striking a fair balance between the different interests at stake.”⁷¹

In *Broniowski*, the Court noted that the respondent State, Poland, must take appropriate “legal measures and administrative practices” in order to guarantee “the implementation of the property right in question in respect of the remaining . . . claimants,”⁷² and accounting for the rights of “the many people affected” by the underlying violation.⁷³ The Court emphasized that such general measures must be designed to “remedy the systemic defect underlying the Court’s finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause,” in order to ensure that the “Court does not have to repeat its finding in a lengthy series of comparable cases.”⁷⁴ Likewise, in *Rumpf v. Germany*, the Court noted “that the instant case concerns a recurring problem underlying the most frequent violations of the Convention found by the Court in respect of Germany,”⁷⁵ and accordingly

⁷⁰ *Maria Atansiu and others v. Romania*, Application No. 30767/05 and 33800/06, Judgment, ¶¶217, 218 (Oct. 12, 2010).

⁷¹ *Maria Atansiu and others v. Romania*, Application No. 30767/05 and 33800/06, Judgment, ¶¶228 (Oct. 12, 2010).

⁷² *Broniowski v. Poland*, Application No. 31443/96, Judgment, ¶172 (June 22, 2004).

⁷³ *Broniowski v. Poland*, Application No. 31443/96, Judgment, ¶173 (June 22, 2004).

⁷⁴ *Broniowski v. Poland*, Application No. 31443/96, Judgment, ¶193 (June 22, 2004).

⁷⁵ *Case of Rumpf v. Germany*, Application No. 46344/06, Judgment, ¶43 (Sept. 2, 2010).

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found that general “measures must also be taken in respect of other persons in the applicant’s position, notably by solving the problems that have led to the Court’s findings.”⁷⁶

In each of these cases, the Court looked beyond the rights of the individual applicant before it, emphasizing the need to enact remedial measures capable of providing redress to others similarly situated to the applicant. At the same time, the Court also stressed the role of general remedial measures in stemming the tide of applications “deriving from the same cause.” Indeed, the Court’s authority to declare the need for general measures is explicitly linked to the potential increase in the number of well-founded applications filed before the Court, and a corresponding “critical threat to the future effectiveness of the Convention machinery.”⁷⁷ In balancing the individual rights at stake against the need to preserve the efficacy of the Convention system, however, the rights of the individual are subordinated.

This is particularly clear, for example, in the case of *Yuriy Nikolayevic Ivanov v. Ukraine*. Here, the Court once again required general measures “in respect of other persons in the applicant’s position, notably by solving the problems that have led to the Court’s findings.”⁷⁸ At the same time, the Court conceded that “there are some vulnerable groups of the Ukrainian population who are affected by those problems more than others” and thus that “it is not necessarily the case that persons in the same situation as the applicant belong to an ‘identifiable class of citizens.’”⁷⁹ The Court also acknowledged that the underlying violation – here, unreasonable delays in the enforcement of domestic proceedings – were caused by a variety of

⁷⁶ Case of *Rumpf v. Germany*, Application No. 46344/06, Judgment, ¶59 (Sept. 2, 2010).

⁷⁷ Case of *Manushaque Puto and Others v. Albania*, Applications Nos. 604/07, 43528/07, 46684/07 and 34770/09, Judgment, ¶108 (July 31, 2012).

⁷⁸ Case of *Yuriy Nikolayevich Ivanov v. Ukraine*, Application No. 40450/04, Judgment, ¶78 (Oct. 15, 2009).

⁷⁹ Case of *Yuriy Nikolayevich Ivanov v. Ukraine*, Application No. 40450/04, Judgment, ¶83 (Oct. 15, 2009).

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factors, noting that a number of factors that contributed to the delay in enforcement in the applicant’s case, and that other factors had caused delays in other cases raising similar issues.⁸⁰ In other words, the Court tacitly acknowledged that the individual applicant in the case may not have been a fair representative of all those alleging the same Conventional violation and that the application may not have raised all of the questions of law and fact implicated in the systemic problem identified. Nevertheless, the Court imposed general measures.

2. Adjourning of Similar Proceedings and the Right of the Individual

The Court’s practice of adjourning pending similar applications is yet another example of the ascendancy of the court’s growing need to ensure an efficiently functioning convention system over individual rights. The ECtHR has explicitly linked the adjournment of similar applications to the goal of providing “the speediest possible redress to be granted at domestic level to all the individuals suffering from the structural problem identified.”⁸¹ In *Ivanov*, the Court “adjourn[ed] the examination of similar cases pending the implementation of [such] measures by the respondent State,”⁸² despite the fact that the Court had already conceded the dissimilarities between the applicant and those very applications it suspended and without articulating any standards for determining which applications were sufficiently similar to warrant adjournment.⁸³

⁸⁰ Case of Yuriy Nikolayevich Ivanov v. Ukraine, Application No. 40450/04, Judgment, ¶84 (Oct. 15, 2009).

⁸¹ Maria Atanasiu and others v. Romania, Application Nos. 30767/05 and 33800/06, Judgment, (Oct. 12, 2010).

⁸² Case of Yuriy Nikolayevich Ivanov v. Ukraine, Application No. 40450/04, Judgment, ¶98-99 (Oct. 15, 2009).

⁸³ Case of Yuriy Nikolayevich Ivanov v. Ukraine, Application No. 40450/04, Judgment, ¶84 (Oct. 15, 2009).

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The Court has also used adjournment as a type of bargaining tool to encourage the State concerned to implement the general remedial measures required to cure the systemic violation identified. For example, in the case of *Olaru and Others v. Moldova*, the Court noted that it retained discretion to adjourn examination of similar cases in order to provide the respondent State with the opportunity to settle pending cases in various, unspecified ways.⁸⁴ However, the Court cautioned that if the respondent State “fail[ed] to adopt such measures following a pilot judgment and continues to violate the Convention, the Court will have no choice but to resume examination of all similar applications.”⁸⁵ Wielding its discretion in a slightly different manner toward the same end, the Court in *Rumpf* declined to suspend the examination of similar pending cases, finding that “continuing to process all length of proceedings cases in the usual manner will remind the respondent State on a regular basis of its obligation under the Convention and in particular resulting from the judgment.”⁸⁶

In other cases, the Court has declined to adjourn pending similar applications because it found that processing such cases would “not interfere with the respondent State’s duty to comply with its obligations under the Convention and in particular those resulting from the judgment.”⁸⁷ At other times, the Court has distinguished between cases already pending and those that could be filed after the delivery of the pilot judgment, in order to provide the respondent State with “an opportunity to settle the former category of cases in various ways.” This was the approach taken,

⁸⁴ Case of *Olaru and Others v. Moldova*, Application Nos. 476/07, 22539/05, 17911/08 and 1316/07, Judgment ¶¶51, 52 (July 28, 2009).

⁸⁵ Case of *Olaru and Others v. Moldova*, Application Nos. 476/07, 22539/05, 17911/08 and 1316/07, Judgment ¶¶51, 52 (July 28, 2009).

⁸⁶ *Rumpf v. Germany*, App. No. 46344/06, Judgment, ¶75 (Sept. 2, 2010).

⁸⁷ Case of *Dimitrov and Ahamaov v. Bulgaria*, App. Nos. 48059/06 and 2708/09, Judgment, ¶133 (May 10, 2011); *see also* *Finger v. Bulgaria*, App. No. 37346/05, Judgment ¶125 (May 10, 2011).

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for example, in *Ivanov*, where the Court adjourned for one year cases lodged after the delivery of the judgment, and instructed the Respondent State to “grant adequate and sufficient redress, within one year . . . to all applicants” in such cases.⁸⁸

In *Burdov v. Russia*, a case concerning the unreasonable length of domestic proceedings, the Court likewise differentiated between pending similar applications and those cases that could be brought in the future. As to the former, the Court determined that it would be “unfair if the applicants . . . who have allegedly been suffering for years of continuing violations of their right to a court . . . were compelled yet again to resubmit their grievances with the domestic authorities, be it on the grounds of a new remedy or otherwise.”⁸⁹ Accordingly, the Court required Russia to grant “adequate and sufficient redress, within one year, to all victims of non-payment or unreasonably delayed payment by State authorities of a domestic judgment.”⁹⁰ Contrastingly, in the case of *Greens and M.T. v. The United Kingdom*, where the applicants alleged a violation of their right to vote, the Court determined that “the continued examination of every application asserting a violation of [the right to vote] as a result of the current blanket ban on voting applicable to serving prisoners is no longer justified,” and that “the prevailing situation has given rise and continues to give rise to a violation of Article 3 of Protocol No. 1 in respect of every prisoner who is unable to vote in an election to the legislature and whose ineligibility arises solely by virtue of his status of prisoner.”⁹¹ The Court juxtaposed *Greens* with its earlier pilot judgment decisions, which concerned property complaints, or complaints regarding the

⁸⁸ Case of Yuriy Nikolayevich Ivanov v. Ukraine, Application No. 40450/04, Judgment (Oct. 15, 2009).

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⁹⁰ Case of Burdov v. Russia, Application No. 33509/04, Judgment, ¶¶144-45 (Jan. 15, 2009).

⁹¹ Case of Greens and M.T. v. The United Kingdom, Applications Nos. 60041/08 and 60054/08, Judgment, ¶120 (Nov. 23, 2010).

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non-enforcement of domestic judgments. In such cases, “the benefits of requiring the domestic authorities to introduce a remedy or to offer specific redress in all pending cases were clear.” In contrast, the Court noted that *Greens* concerned a violation “of an entirely different nature. No individual examination of specific cases [wa]s required in order to assess the appropriate redress,” and “no financial compensation is payable The only relevant remedy is a change in the law.”⁹² Finding nothing unfair about requiring such applicants to resubmit their grievances to the domestic authorities, the Court emphasized that repetitive judgments “would not contribute usefully or in any meaningful way to the strengthening of human rights protection under the Convention.”⁹³ Accordingly the Court suspended examination of pending and future similar applications,⁹⁴ even though it had already acknowledged that the number of applications filed “continues to grow, and with each relevant election which passes in the absence of amended legislation, there is the potential for numerous new cases to be lodged.”⁹⁵

The various approaches the Court has taken in deciding whether to adjourn similar pending and future applications reflects the lack of clear and consistent standards governing the use of the pilot judgment procedure. The adjournment of similar, pending cases is a central element of a pilot judgment and is critical to addressing the Court’s docket problem, but coevally,

⁹² Case of *Greens and M.T. v. The United Kingdom*, Applications Nos. 60041/08 and 60054/08, Judgment, ¶122 (Nov. 23, 2010).

⁹³ Case of *Greens and M.T. v. The United Kingdom*, Applications Nos. 60041/08 and 60054/08, Judgment, ¶122 (Nov. 23, 2010).

⁹⁴ Case of *Greens and M.T. v. The United Kingdom*, Applications Nos. 60041/08 and 60054/08, Judgment, ¶122 (Nov. 23, 2010).

⁹⁵ Case of *Greens and M.T. v. The United Kingdom*, Applications Nos. 60041/08 and 60054/08, Judgment, ¶122 (Nov. 23, 2010).

such adjournment erodes the individual’s right of access to the Court, guaranteed by Article 34 of the ECHR.⁹⁶

This erosion of the right of individual petition is particularly troubling, since the Court does not expressly address the ability of the individual applicant before the Court to represent absent applicants. Instead, the Court itself takes on the role of identifying and addressing the rights of absent applicants, noting that “it is inherent in the pilot-judgment procedure that the Court’s assessment of the situation complained of in a ‘pilot’ case necessarily extends beyond the sole interests of the individual applicant.”⁹⁷ Moreover, even where the Court explicitly notes that an application raises unique factual and legal issues, which may be unrepresentative of pending “similar” applications, it may nonetheless issue a pilot judgment⁹⁸ – and in so doing, prioritizes efficiency concerns over individual rights.

D. Criticisms of the Pilot Judgment

⁹⁶ Markus Fynys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1257 (2011).

⁹⁷ *Case of Maria Atanasiu and Others v. Romania*, ¶214; *see also Hutten-Czapska v. Poland*, Application No. 35014/97, ¶155 (June 19, 2006) (noting that the Court must “assess Poland’s compliance with Article 1 of Protocol No. 1 not only from the perspective of the impact of the combination of impugned restrictions on the applicant’s right of property . . . but also in a wider context, going beyond the applicant’s individual Convention claim and taking into account the consequences . . . for the Convention of the whole class of persons potentially affected).

⁹⁸ *See, e.g., Burdov v. Russia*, Application No. 33509/04, Judgment, ¶129 (Jan. 15, 2009) (“Persons in the same position as the applicant do not necessarily belong to an ‘identifiable class of citizen.’”); *id.* at ¶133 (noting that the underlying structural problems “do not affect only Chernobyl victims, as in the present case, but also other large groups of the Russian population, including some vulnerable groups); *Hutten-Czapska v. Poland*, Application No. 35014/97, ¶230 (June 19, 2006) (noting that the applicant’s situation was atypical); *Case of Kuric and Others v. Slovenia*, Partly Dissenting Opinion of Judge Costa, p. 95 (asserting that two of the applicants “were in very difficult circumstances for reasons relating to ill health and geographical distance, and the complexity of the various legal changes affecting their situation,” and arguing that the Court’s decision – even as to the applicants before it – failed to adequately consider the unique circumstances of the applicants).

Criticisms of the pilot judgment procedure emphasize this imbalance between individual rights and efficiency concerns, and elucidate the need for greater procedural safeguards to more effectively ensure that individual rights are not subordinated in the Court’s attempts to stem the rising tide of applications that threaten to submerge the Strasbourg system.⁹⁹ The lack of such safeguards means that there is “no guarantee that the application of the pilot judgment exactly reflects all the facts and legal issues related to numerous violations,”¹⁰⁰ or that a particular case will allow the Court to fully grasp the extent and ramifications of the underlying systemic problem.¹⁰¹ Instead, the Court “uses the first application that comes before it.”¹⁰² The individual applicant whose case is selected for the pilot judgment is “privileged in relation to the other [applicants]. Whilst reviewing the application of the pilot judgment, the others remain in stasis.”¹⁰³ Moreover, there remains the unchecked possibility “that the applicant of the pilot judgment will negotiate a friendly settlement that favors an individual damages award over systemic non-monetary remedies.”¹⁰⁴

II. THE CLASS ACTION

⁹⁹ See, e.g. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 *Eur. J. Int’l L.* 125, 154 (2008) (“The Court must develop safeguards to ensure that class-wide relief applies to all similarly situated applicants and is appropriate to the systemic human rights issues it has adjudicated.”).

¹⁰⁰ Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 *Eur. J. Int’l L.* 125, 154 (2008).

¹⁰¹ Antoine Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, 2009 *Nomiko Vima (Greek Law Journal)* 1, 13.

¹⁰² Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 *Eur. J. Int’l L.* 125, 154 (2008).

¹⁰³ Markus Fyrnys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1257-58 (2011).

¹⁰⁴ Markus Fyrnys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 *German L. J.* 1231, 1257-58 (2011).

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The American class action is a form of representative lawsuit, wherein a named plaintiff brings suit on behalf of all unnamed members of the class.¹⁰⁵ The use of the class action device to aggregate and litigate multitudinous claims, however, sits in tension with the vaunted American legal principle that “every person has an individual right to a day in court.”¹⁰⁶

In seeking to ease this tension, the U.S. Courts have developed two foundational concepts: (1) identity of interest, and (2) adequacy of representation.¹⁰⁷ These concepts have been enshrined in Federal Rule of Civil Procedure 23 (Rule 23), which currently governs the use of class actions in the federal system.¹⁰⁸ Pursuant to Rule 23, where members of the class have a sufficiently strong identity of interest, and where the class’ interests are competently and vigorously represented, courts tread on safe ground in binding absent class members to the final judgment.¹⁰⁹ In practice, the requirements of Rule 23 have been flexibly applied depending on the type of claim asserted, as can be illustrated by looking to two common forms of class action: the mass tort class action and civil rights class actions.

A. The Evolution of Rule 23

¹⁰⁵ Owen. M. Fiss, *The Political Theory of the Class Action*, 53 Wash. & Lee L. Rev. 21, 25 (1996).

¹⁰⁶ Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Soble, An Historical Analysis of the Binding Effect of Class Suits, 146 U. Pa. L. Rev. 1849, 1946 (1998); see also Roger C. Cranton, Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction, 80 Cornell L. Rev. 811, 815 (1995)(noting that class actions threaten to displace the traditional individual rights and party autonomy model of U.S. litigation under pressures exerted by the “volume, complexity, cost and interrelatedness of . . . mass exposure torts”).

¹⁰⁷ Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Soble, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1855 (1998).

¹⁰⁸ F.R.C.P. 23 (1966).

¹⁰⁹ Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Soble, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1855 (1998).

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The class action is a procedural device through which a class representative may assert both her own claims, and similar claims of other individuals who share common interests.¹¹⁰ Class actions in their current incarnation evolved as an exception to the “formal rigidity of the necessary parties rule in equity.”¹¹¹ That rule required that all persons “materially interested, either as plaintiffs or defendants in the subject of the bill ought to be made parties to the suit, however numerous they may be.”¹¹² However, equity created certain exceptions to the formal rule to respond to situations where (1) the parties were too numerous for all to appear before the court, or (2) where the question was one of “general interest,” allowing a few to sue on behalf of the many, or (3) where the parties elected to form a voluntary association.¹¹³ From these beginnings, modern class actions emerged, and became embodied in Rule 23, which was crafted to “catalogue in ‘functional’ terms the repeating patterns where mass litigation through representative parties had proven appropriate.”¹¹⁴

Although the Rule was largely intended to “foster judicial economy by avoiding a multiplicity of suits,” the goal of efficiency by no means obviated the primary objective – the “vindication of substantive rights.”¹¹⁵ Fairness concerns thus permeate the text of Rule 23.¹¹⁶ The Rule imposes four prerequisites for class actions: (1) numerosity, that is, the class must be

¹¹⁰ Roger C. Cranton, Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction, 80 Cornell L. Rev. 811, 819 (1995).

¹¹¹ *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999); see also Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 376 (1967) (“[T]he class action probably reaches back to bills of peace with multiple parties.”).

¹¹² *West v. Randall*, 29 F. Cas. 718, 721 (No. 17,424) (CCRI) (Story, J.).

¹¹³ *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 832-33 (1999).

¹¹⁴ *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 832-33 (1999).

¹¹⁵ Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2184 (1989).

¹¹⁶ Indeed, the word “fair” or “fairly” appears no less than seven times in the text. F.R.C.P. 23.

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“so numerous that joinder of all members is impracticable”; (2) commonality, which requires “questions of law or fact common to the class”; (3) typicality, which demands that the representative’s claims or defenses be typical of the claims or defenses of the class; and (4) adequacy of representation, that is, the class representatives must “fairly and adequately protect the interests of the class.”¹¹⁷ In effect, these requirements “limit the class claims to those fairly encompassed by the named plaintiff’s claims.”¹¹⁸ The requirements of typicality and commonality go to establishing an “identity of interest” among class members. These two requirements “tend to merge,” both serving as “guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”¹¹⁹ To have a binding effect on absent parties, a class action must be devised in such a way that those present “are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issues.”¹²⁰

Beyond these four prerequisites, Rule 23 only allows class actions if one of three circumstances is met: (b)(1) classes, where the prosecution of separate actions by or against individual class members would raise the risk of either “inconsistent or varying adjudications” thereby creating “incompatible standards of conduct for the party opposing the class;” or where individual adjudications would either effectively be dispositive of the interests of members not party to the individual proceedings or would prevent such non-party members from protecting their

¹¹⁷ F.R.C.P. 23(a).

¹¹⁸ *Gen. Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982).

¹¹⁹ *Gen. Telephone CO. of the Southwest v. Falcon*, 457 U.S. 147, 157 & n.3 (1982).

¹²⁰ *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996).

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interests; (b)(2) classes, where the party opposing the class “has acted or refused to act on grounds that apply generally to the class,” such that either injunctive or declaratory relief is appropriate for the whole class; or (b)(3) classes, where the court determines that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”¹²¹

Additional provisions provide further protections for class members. The court must certify a class action, and in doing so, “define the class and the class claims, issues, or defenses, and must appoint class counsel.”¹²² The court must also provide notice to the class, and, in the case of (b)(3) classes, the court must further provide “the best notice” practicable, including a clear, comprehensible statement of the nature of the action, the definition of the certified class, the claims, issues or defenses, an opt-out provision, that any class member may “enter an appearance through an attorney” if they so chose, and the binding effect of the class judgment.¹²³ The court is vested with discretion to divide the class into subclasses as appropriate.¹²⁴ In order “to protect class members and fairly conduct the action,” the court may require notice of, *inter alia*, the class members’ right to state whether they believe the representation to be “fair and adequate,” and to intervene in the action.¹²⁵ The court may “impose conditions on the representative parties or on interveners.”¹²⁶ Settlement or dismissal requires notice to all members of the class, a hearing and finding that the settlement will be “fair, reasonable, and

¹²¹ F.R.C.P. 23(b).

¹²² F.R.C.P. 23(c)(1).

¹²³ F.R.C.P. 23(c)(2).

¹²⁴ F.R.C.P.(c)(3)(5).

¹²⁵ F.R.C.P. 23(d)(1)(B)(iii).

¹²⁶ F.R.C.P. 23(d)(1)(C).

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adequate,” and any member may object to the proposal.¹²⁷ The Court must also appoint a class council, bearing in mind the work the counsel has done to identify or investigate potential claims, the counsel’s experience and knowledge of applicable law, the resources the counsel is able to commit to her representation of the class, as well as “any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class.”¹²⁸

It bears noting that Rule 23 vests considerable responsibility with judges who play a “special monitoring role,” in ensuring fair, reasonable and adequate proceedings.¹²⁹

Correspondingly, the rule also entails a substantial amount of judicial discretion in its application.¹³⁰ Accordingly, the ways in which U.S. judges have interpreted the mandates of Rule 23 provide critical insight into how its provisions can be adapted to ensure fair and equitable outcomes in practice.

B. Mass Tort Class Actions

Modern mass tort litigation in the United States is an outgrowth of public tort litigation, typically challenging corporate, rather than government wrongdoing.¹³¹ As their name suggests, mass torts are massive in scale, resulting in a crush of claims that creates “troublesome problems of judicial delay, repetitive trials, high transaction costs, and an inevitable interrelationship among claimants.”¹³² Beyond these evils, the onslaught of cases resulting from mass torts also

¹²⁷ F.R.C.P. 23(d)(5).

¹²⁸ F.R.C.P. 23(g)(1).

¹²⁹ Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 Harv. L. Rev. 78, 143-44 (2011).

¹³⁰ Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 Vanderbilt L. Rev. 1, 15 (2009).

¹³¹ Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court’s Mass Tort Jurisprudence*, 44 Ariz. St. L. J. 1109, 1119 (2012).

¹³² Roger C. Cranton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 Cornell L. Rev. 811, 817 (1995).

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threatens the displacement of the traditional individual rights model of U.S. litigation.¹³³ Mass torts thus generate friction between the collective question of liability and the deeply personal issue of damages.¹³⁴ Relieving this friction requires finding a balance between forging a feasible class action, and ensuring the “precarious interests of nonparticipating litigants.”¹³⁵ To strike the necessary equilibrium, the Court has required “guarantees of loyalty of the agents for the absent class members . . . to those whose rights must ultimately be adjudicated in absentia.”¹³⁶ The Court’s emphasis on loyalty can particularly be seen in looking at the high standards it has imposed to find sufficient identity of interest – that is commonality and typicality of the claims involved – and the ability of the proposed class representatives and class counsel to adequately represent the interests of absent class members.

1. Ensuring Identity of Interest – The Need for Commonality in Mass Torts

One of the fundamental challenges presented by mass tort class actions inheres in the need to determine “what shared experiences suffice to generate a group that courts ought to treat as a set.”¹³⁷ Mass tort class actions are typically brought under Rule 23(b), which, as the Supreme Court has emphasized, necessitates something more than the ordinary commonality requirements.¹³⁸ In 23(b) class actions, common questions of law or fact must *predominate*. Accordingly, the test for certifying a class in a mass tort must be whether “proposed classes are

¹³³ Roger C. Cranton, Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction, 80 Cornell L. Rev. 811, 815 (1995).

¹³⁴ Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 343 (1999).

¹³⁵ Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 340 (1999).

¹³⁶ Samuel Issacharoff, *Governance and Legitimacy in the Law of*

¹³⁷ Judith Resnik, Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, 125 Harvard L. Rev. 78 (2011).

¹³⁸ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 622 (1997).

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sufficiently cohesive to warrant adjudication by representation.”¹³⁹ This test has been applied in *Amchem Products, Inc. v. Windsor*, a mass tort action concerning asbestos-related claims where the proposed class constituted myriad individuals linked by one commonality: “Each was or some day may be, adversely affected by past exposure to asbestos products.”¹⁴⁰

In *Amchem*, the Supreme Court acknowledged the “most objectionable aspects” of asbestos litigation, including ever-growing dockets in both federal and state courts, long delays and lengthy trials, repeated relitigation of the same issues, transaction costs vastly in excess of victims’ recovery and “exhaustion of assets” that “threatens and distorts the process,” making it likely that future claimants could “lose altogether.”¹⁴¹ Yet even in the face of this elephantine mass of litigation, the Court declined to certify the class, finding that the predominance requirement of Rule 23 was not met, because the interests of as-yet asymptomatic class members were not sufficiently aligned with those of currently symptomatic members.¹⁴² Instead, the Court emphasized that Rule 23(b) “calls for caution when individual stakes are high and disparities among class members great.”¹⁴³

2. Adequacy of Representation

¹³⁹ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 622 (1997).

¹⁴⁰ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Asbestos-related claims in the U.S. courts had led to a massive docket crisis somewhat similar to that faced by the European Court of Human Rights after the fall of the Iron Curtain. *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 820, n.1 (1999) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997)). The problem with resorting to aggregate resolution of asbestos claims inhered in the tension between the quintessentially individual nature of the legal claims and compensable harms incurred by particular litigants and the sheer volume and interrelatedness of claims. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 343 (1999). Thus, the propriety of resolving individual asbestos related claims in the aggregate likewise reflects the tension between effectively settling individual applications through a pilot judgment at the European Court.

¹⁴¹ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997).

¹⁴² *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997).

¹⁴³ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

Adequacy of representation requires a determination of whether the class’s interests will be advanced “with reasonable competence and vigor.”¹⁴⁴ The concept of adequate representation is not entirely distinct from the question of identity of interest.¹⁴⁵ Indeed, the Supreme Court has noted that the requirements of commonality and typicality articulated by Rule 23 “focus court attention on whether a proposed class has sufficient unity so that absent class members can fairly be bound by decisions of class representatives.”¹⁴⁶ Thus, the exception to the general rule that every individual is entitled to a day in court requires that a non-party’s interests will be adequately represented by someone with the *same* interests who is a party.¹⁴⁷ Nevertheless, identity of interest can exist without adequacy of representation, as demonstrated by the problem of the “sellout” representative.¹⁴⁸

To prevent such sellouts, the adequacy inquiry required by Rule 23 aims to expose conflicts of interest between named representatives and those they wish to represent.¹⁴⁹ In *Amchem*, the Supreme Court assessed the adequacy of representation in the context of a proposed global settlement of all pending and future asbestos related claims.¹⁵⁰ Rejecting the settlement, the Court emphasized that “[i]n significant respects, the interests of those within the single class are not aligned” particularly because “for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in

¹⁴⁴ Restatement 2d of Judgments §42(d)(1982).

¹⁴⁵ Geoffrey C. Hazard Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1856 (1998).

¹⁴⁶ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 621 (1997)

¹⁴⁷ *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 846 (1999).

¹⁴⁸ Geoffrey C. Hazard Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1856 (1998).

¹⁴⁹ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

¹⁵⁰ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

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ensuring an ample, inflation-protected fund for the future.”¹⁵¹ Reflecting the immediate needs of the currently ill, the settlement included “no structural assurances of fair and adequate representation for the diverse groups and individuals affected,” and lacked even basic guarantees that the named plaintiffs properly grasped their representational responsibilities to absent class members.¹⁵²

The Court undertook a similar analysis in assessing the adequacy of class counsel’s representation in another asbestos-related case, *Ortiz v. Fireboard Corp.*¹⁵³ Like *Amchem*, *Ortiz* concerned a settlement class action. After decades spent litigating on two fronts – against plaintiffs seeking damages for exposure to asbestos and against Fireboard’s own insurers who did not want to pay out – Fireboard approached a group of leading asbestos plaintiffs’ lawyers and offered to discuss a “global settlement” of its asbestos liability.¹⁵⁴ In rejecting the proposed settlement, the Court emphasized that the class counsel was highly incentivized to achieve “any agreement” that they thought would survive the requisite Rule 23 fairness hearing in order to reap “gigantic fees”, instead of striving for “the best possible arrangement for the substantially unidentified global settlement class.”¹⁵⁵ The Court observed that the class must be “divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) . . . into homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.”¹⁵⁶

¹⁵¹ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 (1997).

¹⁵² *Amchem Products, Inc. v. Windsor*, 521 U.S. 627 (1997).

¹⁵³ 527 U.S. 815 (1999).

¹⁵⁴ *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 824.

¹⁵⁵ *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 856 (1999).

¹⁵⁶ *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 856 (1999).

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The Court’s rationale in *Amchem* and *Ortiz* is significant in four key respects: first, it underscores the nexus between identity of interest and adequacy of representation, elucidating that a litigant who lacks the same interests and goals as absent parties is ill-suited to represent those parties. Second, it demonstrates the fundamental importance of ensuring that the named representative or representatives understand and accept their obligations to absent class members. Third, it illuminates the necessity for adequate representation by *both* the named party representative *and* the class counsel. Finally, it clarifies the importance of a device vesting courts with the authority to create subclasses with distinct representation in order to remove the possibility of impermissible conflicts of interest.

C. Civil Rights Class Actions

Civil rights class actions occupy a special place in American jurisprudence.¹⁵⁷ And it is worth noting the “special dependence” of civil rights litigation on the class action mechanism. In many cases, “full relief would have been impossible were it not for the plaintiff’s ability to proceed as a class.”¹⁵⁸ Moreover, class actions enable judges “to get to the heart of an institutional problem” in ways that individualized suits do not.¹⁵⁹ Rule 23 was partially drafted to ensure the authority of judges tasked with overseeing long-term school desegregation orders, and ultimately paved the way for similar institutional reforms in jails, prisons, mental hospitals and

¹⁵⁷ Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 *Ariz. L. Rev.* 575 (1997) (“Indeed, those who revised the federal class actions rules in 1966 took particularly into account the concerns of civil rights litigants. Professor Albert Sacks, who was Associate Reporter of the revised rules, was intimately familiar with civil rights litigation and had in mind the role of class actions in civil rights litigation in formulating the rule.”).

¹⁵⁸ Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 *U. Pa. L. Rev.* 2179, 2185 (1989).

¹⁵⁹ Jack B. Weinstein, *Some Reflections on the “Abusiveness” of Class Actions*, 58 *F.R.D.* 299, 304 (1973).

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employment.¹⁶⁰ Civil rights claims typically proceed as Rule 23(b)(2) actions.¹⁶¹ Rule 23(b)(2) anticipates that where the party opposing the class acted on grounds that apparently apply to an entire group, a representative should be allowed to secure for the class the appropriate injunctive or declaratory relief.¹⁶²

1. Identity of Interest – Finding Commonality in Civil Rights Class Actions

The tests for identity of interest have been less stringent in civil rights class actions than in their mass tort analogs. In the civil rights context, the Court has noted that “suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs,” and that “common questions of law or fact are typically present.”¹⁶³ Issues of adequacy of representation or commonality of claims are consequently often left unaddressed in the Court’s civil rights class action cases.¹⁶⁴ Nevertheless, the Court has refused to blindly accept that the mere allegation of racial or ethnic discrimination provides a sufficient “basis for concluding that the adjudication of [the] claim of discrimination . . . would require the decision

¹⁶⁰ Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 Harv. L. Rev. 78, (2011).

¹⁶¹ Jack B. Weinstein, *Some Reflections on the “Abusiveness” of Class Actions*, 58 F.R.D. 299 (1973).

¹⁶² Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 389 (1967); *see also* Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2187 (1989) (In civil rights suits, parties generally request injunctive or declaratory relief in lieu of damages).

¹⁶³ *East Tx. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405-06 (1977); *see also* *Gen. Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 57 (1982)

¹⁶⁴ *See, e.g.* *Bd. of Ed. of Oklahoma Cty. Public Schools v. Dowell*, 498 U.S. 237 (1991) (no mention of adequacy of representation, need for notice, commonality of claims); *Freeman v. Pitts*, 503 U.S. 467 (1992)(same); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971) (same); *Wolff v. McDonnell*, 418 U.S. 539 (1974)(same); *Turner v. Safley*, 482 U.S. 78 (1987)(same); *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979)(same); *Bd. of Pardons v. Allen*, 482 U.S. 369 (1987)(same).

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of any common question.”¹⁶⁵ In the context of an employment class action alleging ethnically discriminatory hiring and promotion practices, the Court accordingly found that “it was error for the District court to *presume* that respondent’s claim was typical of other claims,”¹⁶⁶ noting that the evidentiary approach advanced by the representative and those used for the class claims “were entirely different.”¹⁶⁷ The Court has emphasized that even in the civil rights context, a class action must be devised in such a way that the named parties “are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issues.”¹⁶⁸ Thus, even in the context of civil rights claims that are inherently class suits raising class wide wrongs, the Court has insisted upon the importance of identifying common questions of law and fact in order to ensure that the representative’s claim is truly typical of and raises questions common to, the claims of absent class members.

2. *Adequacy of Representation in the Civil Rights Class Action*

Much like identity of interest, the question of adequacy of representation in the civil rights context has been less strictly scrutinized than in the area of mass torts.¹⁶⁹ Here, too, however, the Court has emphasized that “a class representative must be part of the class and possess the same interest and suffer the same injury as class members.”¹⁷⁰ It is accordingly not enough that the proposed representative be “a member of an identifiable class of persons of the

¹⁶⁵ Gen. Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 157 (1982).

¹⁶⁶ Gen. Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 158 (1982).

¹⁶⁷ Gen. Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 159 (1982).

¹⁶⁸ Richards v. Jefferson Cty., 517 U.S. 793, 801 (1996).

¹⁶⁹ See *supra*, n. 155 and accompanying text.

¹⁷⁰ Gen. Telephone of the Southwest v. Falcon, 457 U.S. 147, 153 (1982).

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same race or national origin,” and courts must “evaluate carefully the legitimacy of the named plaintiff’s plea that he is a proper class representative.”¹⁷¹

In the school desegregation context, courts have addressed the question of adequacy of representation by seeking the input and advice of community representatives, rather than relying solely on the named representative, to fashion appropriate relief.¹⁷² The resulting remedial plans have accordingly adopted elements of both integration hardliners, represented before the Court by NAACP lawyers, and those “of local blacks who favored plans oriented toward improving educational quality” in existing districts.¹⁷³ For example, in *Morgan v. Kerrigan*, a case involving the desegregation of Boston public schools, the plan adopted by the Court to implement desegregation and improve the overall quality of education for Boston students, was drafted following a “court-established method of citizen participation and monitoring,” inviting the feedback of various stakeholder groups.¹⁷⁴ To ensure ongoing community involvement, the court established a Citywide Coordinating Council of approximately 40 court-appointed members from diverse backgrounds.¹⁷⁵

Similarly, in *Keyes v. School District No. 1*, a Denver school desegregation class action, the district court rejected the class representative’s proposed integration plan, and proceeded with an independent study “for the purpose of developing a workable program.”¹⁷⁶ Significantly,

¹⁷¹ Gen. Telephone of the Southwest v. Falcon, 457 U.S. 147, 159, 160 (1982).

¹⁷² See, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L. J. 470, 482-83 (1975)(describing district court’s use of community representatives in Boston School litigation).

¹⁷³ Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L. J. 470, 485 (1975)

¹⁷⁴ *Morgan v. Kerrigan*, 401 F. Supp. 216, 248-53 (D. Mass. 1975), *aff’d* No. 75-1184 (1st Cir., 1976).

¹⁷⁵ *Morgan v. Kerrigan*, 401 F. Supp. 216, 65 (D. Mass. 1975), *aff’d* No. 75-1184 (1st Cir., 1976).

¹⁷⁶ *Keyes v. School Dist. No. 1*, Denver, Colorado, 380 F. Supp. 673, 684 (D.C.Colo. 1974).

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the court noted that representatives of the Mexican-American community had expressed a desire not to desegregate one school. Heeding the community’s call, the court determined that “desegregation is not in [the school’s] best interest.”¹⁷⁷ The court also considered objections made by the Congress of Hispanic Educators, and attempted to correct the problems identified by the group.¹⁷⁸ The plan finally adopted by the court included the creation of committees of parents, staff and community members to ensure ongoing community involvement in the integration project.¹⁷⁹

The district court in *Calhoun v. Cook*¹⁸⁰ likewise sought the input of stakeholders beyond the named class representatives in a class action brought to desegregate the Atlanta Public Schools.¹⁸¹ Prior to approving a proposed settlement plan, the court held “well-attended” hearings, where it solicited views from “numerous counsel, officials, parties and other interested persons.”¹⁸² The court also considered “both formal and informal written communications,” primarily from white parents not party to the case.¹⁸³ Although the court acknowledged that any plan would inevitably include features “objectionable to certain individuals or certain groups,” it satisfied itself that “the overwhelming majority of the plaintiff class” approved the proposal before deeming it “fair, adequate, and reasonable.”¹⁸⁴

¹⁷⁷ *Keyes v. School Dist. No. 1, Denver, Colorado*, 380 F. Supp. 673, 692 (D.C.Colo. 1974).

¹⁷⁸ *Keyes v. School Dist. No. 1, Denver, Colorado*, 380 F. Supp. 673, 693 (D.C.Colo. 1974).

¹⁷⁹ *Keyes v. School Dist. No. 1, Denver, Colorado*, 380 F. Supp. 673, 704, App. B (D.C.Colo. 1974).

¹⁸⁰ 362 F. Supp. 1249 (1973).

¹⁸¹ The approved desegregation plan was developed by both parties, as well as a “Biracial Committee” that had been appointed previously by the Court. 362 F. Supp. 1249, 1249-50 (1973).

¹⁸² 362 F. Supp. 1249, 1250 (1973).

¹⁸³ 362 F. Supp. 1249, 1251 & n.5 (1973).

¹⁸⁴ 362 F. Supp. 1249, 1252 (1973).

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The Supreme Court took up the question of the adequacy of counsel’s representation in the school desegregation context in *NAACP v. Button*. In the case, the NAACP – longtime champion of integration – had to defend its methods of soliciting and representing communities in school desegregation class actions.¹⁸⁵ In such litigations, NAACP legal staff typically met with parents and children to clarify the necessary legal steps to achieve desegregation. At these meetings, the staff member would bring forms authorizing NAACP attorneys to represent the signers in legal proceedings seeking school integration.¹⁸⁶ The Commonwealth of Virginia had challenged these activities as improper solicitation.¹⁸⁷ The Court determined that there was “no showing of a serious danger” because “no monetary stakes are involved, and so there is no danger that the attorney will subvert the paramount interests of his client to enrich himself.”¹⁸⁸ Moreover, the goals of the NAACP had not been shown to be in conflict with those of its members and nonmember litigants.¹⁸⁹

Justice Harlan’s dissent in *Button* proves particularly instructive. Justice Harlan identified two problems with the NAACP’s practice of sending attorneys employed by the association to represent individuals: First, he asserted that the lawyer so employed became “subject to the control of a body that is not itself a litigant.” Second, Justice Harland warned that the lawyer necessarily finds himself with an allegiance divided between his employer and his client.¹⁹⁰ Justice Harlan’s reasoning recognizes that, even in the civil rights context, the goals,

¹⁸⁵ 371 U.S. 415, 415 (1963).

¹⁸⁶ 371 U.S. 415, 421.

¹⁸⁷ 371 U.S. 415, 415 (1963).

¹⁸⁸ 371 U.S. 415, 415 (1963).

¹⁸⁹ 371 U.S. 415, 415 (1963).

¹⁹⁰ 371 U.S. 415, 460 (1963).

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needs and wishes of class members can be quite different.¹⁹¹ Accordingly, the careful court must be attuned to the variety of interests inevitably entangled in an aggregate litigation – even where the representatives are superficially similar to the absent class members. As several of the district courts overseeing desegregation apparently recognized, one way to ensure that the broad range of interests in civil rights class actions are attended is by soliciting community feedback and involvement in crafting effective remedial measures.

III. Integrating Class Action Protections with the Pilot Judgment Procedure

Adapting and applying the U.S. class action requirements to pilot judgment procedures could correct the imbalance between individual rights and efficiency needs at the Strasbourg Court, while also addressing concerns regarding representation and identity of interest that have been raised by the pilot judgment procedure’s critics.¹⁹² Understanding how the class action procedural rules and rationales could work at the ECtHR system necessitates a comparative legal analysis to illuminate the meaningful similarities between the U.S. federal and Strasbourg supranational regimes.

A. The Comparative Approach to Class Actions

The comparative law notion of legal transplants metaphorically depicts “the ‘legal borrowing’ of a principle or concept.”¹⁹³ Initially, the meaning was confined to “the moving of a rule . . .

¹⁹¹ Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L. J. 470, 492 (“The position of the established civil rights groups obviates any need to determine whether a continued policy of maximum racial balance conforms with the wishes of even a minority of the class.”).

¹⁹² See *supra* notes xx-xx and accompanying text.

¹⁹³ Peter de Cruz, *Legal Transplants: Principles and Pragmatism in Comparative Family Law in Comparative Law in the 21st Century*, 101, 102.

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from one country to another, or from one people to another”¹⁹⁴ and referred primarily to statutory rules.¹⁹⁵ From these relatively modest beginnings, legal transplant theory has expanded to include a wide array of different metaphors – and methods – for analyzing and comparing reciprocal influences across legal cultures.¹⁹⁶ The widespread concern with finding the most appropriate articulation of this process, in turn, reflects “the need to pay more attention to the relationship or ‘fit’ between law and society, and to develop methods for seeing how this varies culturally.”¹⁹⁷ The transplant metaphor remains relevant, “signal[ing] the need to consider the relationship between the part and the whole”¹⁹⁸ and “capturing the sense that the recipient [legal culture] wants (or needs) something just because it is different from what he or she already has, but that this difference carries with it the risk of generating problems of ‘rejection’ afterwards.”¹⁹⁹ Thus, conceptualizing the class action as a legal transplant requires an understanding of how its procedural safeguards and legal principles will “fit” within the ECtHR’s legal culture.²⁰⁰ Critical to this undertaking is an understanding of functional

¹⁹⁴ Alan Watson, *Legal Transplants: An Approach to Comparative Law* 21 (Scottish Academic Press, 1974).

¹⁹⁵ Peter de Cruz, *Legal Transplants*, in *Comparative Law in the 21st Century*, 102.

¹⁹⁶ See, e.g., Graziadei, *Transplants and Receptions* at 443 (“Possibly due to its rapid growth, the terminology of the field [of legal transplants] is still surrounded by some uncertainty. . . . Alternative terminology . . . has gained acceptance. . . . And the list of terms used to identify legal change by legal transfer goes on.”); Örüçü, *Unde Venit, Quo Tendit* in *Comparative Law in the 21st Century* at 12-13 (describing the manifold metaphors coined to express the notion of legal transplant and their conceptual limitations).

¹⁹⁷ Nelken, *Legal Transplants and Beyond* at 27.

¹⁹⁸ Nelken, *Legal Transplants and Beyond* at 32.

¹⁹⁹ Nelken, *Legal Transplants and Beyond* at 32.

²⁰⁰ See Rodolfo Sacco, *Legal Formats: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 *Am. J. Comp. L.* 1 (1991) (noting that where a particular legal rule is adopted into a legal system it is “no doubt helpful to understand both the foreign rules and institutions one is borrowing as well as of one’s own legal system”); see also Otto Kahn-Freud, *On Uses and Misuses of Comparative Law*, 37 *Mod. L. Rev.* 1, 6 (1974) (“[T]here are degrees of transferability.

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equivalents, a notion recognizing that “the classification and names of legal rules and institutions is far from conclusive in determining equivalence.”²⁰¹ Indeed, seemingly different terms, institutions, or rules may in fact have the same meaning, purpose, or goal.²⁰²

In light of these principles, several functional equivalents between the ECtHR and the U.S. federal courts, and between the class action and the pilot judgment procedures must be highlighted. First, the right of individual access is foundational to both the ECtHR and the U.S. federal courts. At the ECtHR, this right is framed in Article 34 of the ECHR as a right of individual petition.²⁰³ In the United States, the right is cast as a due-process “guarantee of litigative autonomy,” recognized in the principle that every person is entitled to his or her “day in court.”²⁰⁴ Yet both the Strasbourg and U.S. systems recognize the high importance of individual access to the court to protecting and enforcing individual rights.²⁰⁵

Second, both institutions grapple with efficiency concerns. At the ECtHR, these efficiency concerns derive from a deluge of individual applications that has risen steadily since the admission of the former Soviet States to the Council of Europe.²⁰⁶ In the United States, the efficiency concerns arise, not from a steady flood of claims, but in the context of certain large-scale harms, as was the case, for example, with the asbestos suits that threatened to crush the

I most cases one must ask what chances there are that the new law will be adjusted to the home environment and what are the risks that it will be rejected.”).

²⁰¹ W.J. Kamba, *Comparative Law: A Theoretical Framework*, 23 Int’l & Comp. L.Q. 485,517 (1974).

²⁰² W.J. Kamba, *Comparative Law: A Theoretical Framework*, 23 Int’l & Comp. L.Q. 485,517 (1974).

²⁰³ See, *supra* note 28 and accompanying text.

²⁰⁴ William B. Rubenstein, Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns, 106 Yale L. J. 1623, 1644 (1997).

²⁰⁵ See Judith Resnik, Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, 125 Harv. L. Rev. 78,80-81 (2011).

²⁰⁶ See, *supra* notes 37-42 and accompanying text.

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courts with an “elephantine mass of litigation,”²⁰⁷ or certain civil rights claims that assert inherently classwide harms.²⁰⁸ Whatever the derivation of these concerns, the result for both the ECtHR and the U.S. federal courts has been the same: Both must balance the individual right of access to the courts, which is avowedly critical to the preservation of fundamental rights and freedoms, against the need for an efficiently functioning legal system. In seeking to strike this equilibrium, both have adopted procedural devices – the pilot judgment at the ECtHR, and the class action in the United States – that effectively resolve the rights of absent parties. Thus, pilot judgments and class actions may usefully be viewed as differing means to achieve similar ends. Moreover, both Rule 23 (governing class actions) and Rule 61 (governing pilot judgments) afford substantial discretion to judges, and as a consequence, both have been flexibly applied.²⁰⁹ The built-in elasticity of both rules makes it easier to transplant the class action mechanism in such a way that it “fits” in with the Strasbourg system as a whole.²¹⁰ Accordingly, the judicial approaches taken by U.S. judges in adapting the proscriptions of Rule 23 to specific cases may provide guidance to ECtHR judges tasked with harmonizing the conflicting needs of preserving the right of individual access to the court, and ensuring an efficiently operating legal regime.

B. Affording Class Action Protections to Individual Applicants at the ECtHR

In defending the binding effect of pilot judgments on absent parties in a partially dissenting opinion in *Hutten-Czapska v. Poland*, Judge Zupancic invoked the rationale of the U.S. class action. Judge Zupancic noted that in circumstances “where the class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class,

²⁰⁷ See, *supra* notes 139-40 and accompanying text.

²⁰⁸ See *supra* note 161 and accompanying text.

²⁰⁹ See *supra* notes xx-xx and xx-xx and accompanying text.

²¹⁰ See, *supra* notes 194-96 and accompanying text.

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the claims or defences of the representative parties are typical of the claims or defences of the class, and the representative parties will fairly and adequately protect the interests of the class,” the ECtHR would have before it “all the actual and potential plaintiffs and our decision concerning one of them would have binding effect – not *erga omnes* but in relation to this particular class of action.”²¹¹ The Judge concluded that this would be in keeping with both the letter and spirit of the ECHR, because the parties before the ECtHR would be “all actual and potential plaintiffs.”²¹² Extrapolating further, the Judge asserted that, “this class-action analogy works in most situations in which the Court would find it practical and reasonable to apply the pilot judgment procedure.”²¹³ The Court’s pilot judgment decisions were thus “practical and pragmatic . . . akin to class-action judgments – that avert an increase in the quantity of cases without subverting the intended quality of the binding effect of the judgments of [the ECtHR].”²¹⁴

Nevertheless, the foundational requirements of identity of interest and adequacy of representation embodied in Rule 23 are manifestly absent from both Rule 61 and the ECtHR’s pilot judgment jurisprudence. Thus, as applied, the pilot judgment procedure has binding effect *erga omnes* on all actual and potential plaintiffs, without any of the procedural safeguards enshrined in Rule 23 to preserve the rights and interests of absent parties. Yet, Judge Zupanciac’s analysis is correct that the ECtHR could, theoretically, take advantage of the procedural rigors of the class action to stem the rising tide of applications, without undermining the “intended quality of the binding effect of the judgments of [the ECtHR].”²¹⁵ Although ultimately the ECtHR may want to consider redrafting Rule 61 to codify certain safeguards for absent applicants. But as an initial matter, the ECtHR’s judges need only adapt the principles of

²¹¹ Hutten-Czapska v. Poland, Application No. 35014/97, judgment, June 19, 2006 partly dissenting opinion of Judge Zupancic.

²¹² Hutten-Czapska v. Poland, Application No. 35014/97, judgment, June 19, 2006 partly dissenting opinion of Judge Zupancic.

²¹³ Hutten-Czapska v. Poland, Application No. 35014/97, judgment, June 19, 2006 partly dissenting opinion of Judge Zupancic.

²¹⁴ Hutten-Czapska v. Poland, Application No. 35014/97, judgment, June 19, 2006 partly dissenting opinion of Judge Zupancic.

²¹⁵ Hutten-Czapska v. Poland, Application No. 35014/97, judgment, June 19, 2006 partly dissenting opinion of Judge Zupancic.

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“identity of interest” and “adequacy of representation” articulated in American class action jurisprudence when issuing pilot judgments.

1. Ensuring Identity of Interest in Pilot Judgments

At the outset, it is worth noting that the extent to which the ECtHR needs to consider “what shared experience suffice to generate a group that courts ought to treat as a set”²¹⁶ will vary depending on the nature of the systemic problem identified. As a human rights court, the ECtHR presides over applications alleging human rights violations,²¹⁷ and such human rights claims are most closely analogous to civil rights actions before the U.S. courts.²¹⁸ In the context of civil rights class actions in the United States, the courts have applied less stringent standards to ensure identity of interests between the claims asserted by class representatives and the claims of the class, noting that such suits “are often by their very nature class suits, involving classwide wrongs.”²¹⁹

Nevertheless, the Supreme Court has refused allow a presumption that the representative’s claims are typical of the class, and has insisted that the class action must be structured in a manner that ensures that the named parties are “of the same class as those absent” and that the litigation enables a “full and fair consideration of the common issues.”²²⁰ When necessary, the U.S. courts have also divided proposed classes into “homogenous subclasses”

²¹⁶ See Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 *Harvard L. Rev.* 78 (2011).

²¹⁷ See ECHR Art. 34: (“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.”)(emphasis added).

²¹⁸ See Jack B. Weinstein, *Some Reflections on the ‘Abusiveness’ of Class Actions*, 58 *F.R.D.* 299 (1973) (noting that civil rights class actions play a key role in ensuring “a forum for the adjudication of disputes involving . . . citizens . . . deprived of human rights”).

²¹⁹ *East Tx. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405-06 (1977); see also *Gen. Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 57 (1982).

²²⁰ *Richards v. Jefferson Cty.*, 517 U.S. 793, 801 (1996).

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each with “separate representation to eliminate conflicting interests.”²²¹ In contrast, as currently conceived and applied, the pilot judgment procedure provides no explicit assurances that the application chosen as a pilot case will present all of the questions of law or fact that may be implicated by an underlying systemic problem. Indeed, the ECtHR has on even on occasion acknowledging that the applicant in a pilot case was atypical,²²² or that those affected by the underlying systemic dysfunction at issue could not be grouped into “an identifiable class of citizens.”²²³

Clearly, additional safeguards are necessary to ensure the identity of interest required to guarantee a “full and fair consideration of common issues.” Most fundamentally, the ECtHR must select the cases chosen for the pilot judgment proceedings with greater care.²²⁴ Selecting an appropriate case will require the court to become sufficiently well acquainted with the nature of the underlying systemic violation and the various ways in which the systemic violation impacts multitudinous applicants to ensure that the issues and facts alleged by the pilot applicant are common to absent applicants.

In some instances, the Court may already have the requisite familiarity. For example, in *Burdov*, the Court noted that, “the present case comes to be considered after some 200 judgments

²²¹ *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 856 (1999).

²²² *See Hutten-Czapska v. Poland*, Application No. 35014/97, Judgment, ¶¶227-28, 236 June 19, 2006 (noting that the applicant’s situation was not that of a “typical landlord” affected by the rent-control scheme at issue, and that the applicant’s “situation had changed and she had obtained the relief sought”).

²²³ *Yuriy Nikolayevich Ivanov v. Ukraine*, Application No. 40450/04, Judgment, ¶83, Oct. 15, 2009; *see also Burdov v. Russia*, Application No. 33509/04, Judgment, ¶133 January 15, 2009 (noting that “the multiple aspects of the underlying structural problems, which do not affect only Chernobyl victims, as in the present case, but also other large groups of the Russian population, including particularly some vulnerable groups”).

²²⁴ Antoine Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, 2009 *Nomiko Vima* (Greek Law Journal) 1, 13.

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have amply highlighted the non-enforcement problem [at issue in the claim] in Russia.”²²⁵ In other cases, the Court could consider eliciting background information from national human rights or civil society organizations.²²⁶ Another alternative would be for the Court to ask the applicant to explain how her claim is typical of the claims of absent applicants when soliciting the views of the parties on the “suitability of processing the application in accordance with” the pilot judgment procedure” pursuant to Rule 61.²²⁷ Finally, where, as in *Burdov* and *Ivanov*, there is no one “identifiable class of citizens,” the Court should consider creating subclasses. In such instances, the Court could potentially hear the applications of several applicants as representatives of homogenous subclasses simultaneously in order to ensure that all relevant aspects of the underlying systemic problem are understood and addressed.

2. Adequacy of Representation in the Pilot Judgment Procedure

Determining whether representation is adequate requires the ECtHR to consider whether absent applicants will be “loyally served” by their agents at the Court.²²⁸ To ensure such loyal service, the United States courts have required class representatives to “be part of the class and possess the same interest and suffer the same injury as class members.”²²⁹ It is moreover not enough that the proposed representative be “a member of an identifiable class of persons.”²³⁰

²²⁵ *Burdov v. Russia*, Application No. 33509/04, Judgment, ¶129, January 15, 2009.

²²⁶ Article 36(2) of the European Convention enables the President of the ECtHR to invite any party or individual concerned to participate in the proceedings. Such intervention affords an individual or organization the opportunity to raise particular arguments or materials before the Court.

²²⁷ Rule 61(2)(a).

²²⁸ See, Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 347 (1999).

²²⁹ *Gen. Telephone of the Southwest v. Falcon*, 457 U.S. 147, 153 (1982).

²³⁰ *Gen. Telephone of the Southwest v. Falcon*, 457 U.S. 147, 159, 160 (1982).

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Rather, judges must to “evaluate carefully the legitimacy of the named plaintiff’s plea that he is a proper class representative.”²³¹

In a like vein, the Court has also indicated the importance of ensuring that named representatives “properly grasp[] their representational responsibilities to absent class members.”²³² In the context of civil rights class actions, the courts have sought input from community representatives in order to fashion appropriate relief. In so doing, the courts have acknowledged that – even among an identifiable and ostensibly homogenous class – views may differ on what remedial measures will most effectively safeguard the rights at stake. Beyond the representation requirements for named plaintiffs, Rule 23 also mandates that judges will appoint class council, taking into account the familiarity of proposed council with the claims, the counsel’s expertise in the relevant area of law, and any other pertinent factors.²³³ The United States courts have likewise required assurances that class counsel will serve their clients effectively and faithfully.²³⁴

At the ECtHR, this would require assurances that the individual applicant whose case is selected for the pilot judgment procedure is an appropriate representative for the class. For instance, the ECtHR could require a rationalization for why the applicant is an acceptable representative when the ECtHR seeks the applicant’s views on whether the application is amenable to the pilot judgment procedure pursuant to Rule 61.²³⁵ The Court must also explain to the named applicant that they will represent all of the absent applicants in the pilot judgment

²³¹ *Gen. Telephone of the Southwest v. Falcon*, 457 U.S. 147, 159, 160 (1982).

²³² *Amchem Products, Inc. v. Windsor*, 521 U.S. 627 (1997).

²³³ F.R.C.P. 23(g)(1).

²³⁴ *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 856 (1999).

²³⁵ Rule 61(2)(a)

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proceeding.²³⁶ This would clarify the scope of the proceedings for the applicant, and also impose on the applicant a duty to loyally serve those not party to the case.

Here, too, the Court could consider seeking involvement from national human rights or civil society organizations, where feasible, to ensure that the applicant in the pilot case possesses the same interest and has endured the same violation as the absent applicants.²³⁷ In several pilot judgments, the Court has in fact heard from third party national organizations that intervened in proceedings to give the Court a fuller picture of the systemic violation at issue.²³⁸

Additionally, the Court could solicit input from the applicants whose rights will be impacted by the remedial measures ordered as to the form such measures should take – for example, by asking for community comments to proposed remedial plans.²³⁹ The Court should also provide a mechanism whereby absent applicants could contest the adequacy of the representation.²⁴⁰ The Court may also want to allow the applicants themselves to appoint a representative. Similar mechanisms for soliciting feedback from a broader section of concerned

²³⁶ See *supra* note 52 and accompanying text.

²³⁷ Article 36(2) of the European Convention allows the President of the Court to invite any concerned party or individual to participate in proceedings, in order to bring relevant arguments or materials to the Court’s attention.

²³⁸ See, e.g. *Suljagic v. Bosnia*, Application No. 27912/02, Judgment, ¶47, Nov. 3, 2009 (noting that third parties had filed written submissions with the Court to show the impact of domestic regulations at issue); *Mariat Atanasiu and Others v. Romania*, Application Nos. 30767/05 and 33800/06, Judgment, ¶¶207-09, Oct. 12, 2010 (third parties intervened to present information demonstrating that the domestic repatriation scheme at issue in the claim was “beset by myriad judicial, administrative and budgetary failings”); *Kuric and Others v. Slovenia* (Third party observations were received by Equal Rights Trust, Open Society Justice Initiative, the Peace Institute and the Legal Information Centre of Non-Governmental Organisations, whom the President gave leave to intervene.).

²³⁹ See Article 36(2) ECHR.

²⁴⁰ In the U.S. class action context, adequacy of representation is frequently assessed when absentees come forward asserting that their interests have not been represented adequately. Geoffrey C. Hazard Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev 1849, 1945-46 (1998).

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applicants are also critical in the context of friendly settlements.²⁴¹ Currently, a friendly settlement need only “comprise a declaration by the respondent Contracting party,” enumerating the “implementation of the general measures” and the “redress to be afforded to other actual or potential applicants.”²⁴² There are no explicit mechanisms for these actual or potential applicants to comment on or object to the terms of this redress. Nor are there any guarantees that the applicant before the Court will represent the interests of these absent applicants in reaching a settlement with the respondent State.²⁴³

Finally, beyond assessing the adequacy of a particular applicant or applicants as representatives, the Court should also undertake an evaluation of the applicant’s counsel. Unlike the American mass-tort context, the ECtHR need not worry that counsel are willing to subvert their clients’ interests in order to reap “gigantic fees.”²⁴⁴ Nevertheless, it is crucial that counsel understand that the rights of absent applicants are at stake, and the Court must impose a similar duty on counsel to “loyally serve” the interest of these absent applicants – no less than the Court must ensure that the pilot applicant grasps her obligation to similarly situated applicants not before the Court.²⁴⁵ Additionally, and as in the American civil rights context, the EctHR must remember that needs, interests and goals of similarly situated applicants are not necessarily aligned, even where the representative applicant is apparently similar to those absent.²⁴⁶ Thus, the EctHR must ensure that the representative applicant’s counsel is attuned to the multiplicity of

²⁴¹ Such mechanisms could be similar to those used by U.S. district courts in the school desegregation context: i.e. creating community committees, and holding public hearings to receive views from interested persons, parties and councils. *See supra*, pt. II(C)(2).

²⁴² Rule 61(7).

²⁴³ *See* Rule 61(7).

²⁴⁴ *See, Ortiz v. Fireboard Corp.*, 527 U.S. 815, 856 (1999).

²⁴⁵ *See supra* notes xx-xx and accompanying text (discussion of Court’s analysis of council’s interests in the *Ortiz* settlement).

²⁴⁶ *See supra*, pt. II(C)(2).

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perspectives necessarily involved in a pilot judgment case. In this regard, the considerations imposed by Rule 23 may prove instructive for judges at the EctHR. Thus, the Court should look for counsel who have made an effort to identify, investigate and appreciate claims beyond those of the individual applicant, the counsel’s experience and knowledge of the applicable law and the nature of the underlying systemic violation, and the ability of the counsel to represent absent applicants.²⁴⁷

CONCLUSION

For decades, the ECtHR has served as a pole star in the global human rights regime, providing guidance and hope to practitioners, institutions and individuals in the international struggle to protect and preserve fundamental freedoms. The right of individual petition has played a crucial role in the Court’s jurisprudence – providing essential access to international justice for victims, and serving as a pivotal component of the “machinery for protecting the rights and freedoms” enshrined in the ECHR. It would be ironic indeed if in seeking to preserve the institution as a bulwark against tyranny, the ECtHR ultimately eroded this cardinal right of individual access.

At the same time, in a society increasingly and inexorably marked by mass phenomena, including mass harms, there will inevitably be many individuals ‘similarly situated’ in legal conflicts. This is particularly true where human rights are involved, as atrocities often impact hundreds or even thousands of victims, many of who have scant access to functioning legal systems.²⁴⁸ In such a world, any prospect of abolishing aggregate litigation for purely

²⁴⁷ See F.R.C.P. 23(g)(1).

²⁴⁸ William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U. Chi. Legal F. 353, 354 (2003).

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individualized forms of justice will ultimately prove a mere chimera.²⁴⁹ Yet, in the international arena, human rights institutions have remained reluctant to allow collective actions.²⁵⁰ The ECtHR has an opportunity to craft a form of mass action capable of ensuring justice for all victims of systemic violations. The cardinal role the ECtHR plays in the international human rights regime, no less than the rights of the 800 million individuals within its jurisdiction, require that the Court gets it right. As currently conceived and applied, the pilot judgment procedure helps preserve the Court in the face of an overwhelming tide of applications at the expense of individual applicants. By adapting the procedural rigors and efficiencies of the class action, the Court can correct this imbalance, and build an efficient mechanism for dispensing collective justice, while safeguarding the individual rights the Convention system was designed to protect.

²⁴⁹ Geoffrey C. Hazard Jr., John L. Gedid & Stephen Soble, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1858 (1998).

²⁵⁰ William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U. Chi. Legal F. 353, 354 (2003).