

**HUMAN RIGHTS AND
WOMEN IN THE ARMED FORCES OF ARMENIA**

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Methodology for assessment of systemic human rights violations

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Abbr.

The ECtHR – European Court of Human Rights

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

The Convention – the European Convention on Human Rights and Freedoms

The GA Office – the Governmental Agent’s Office of the Republic of Armenia

The Department for Execution – the Department for the Execution of Judgments of the European Court of Human Rights, Directorate General “Human Rights and Rule of Law”, the Council of Europe

The CDDH – the Steering Committee of Human Rights

The PACE – the Parliamentary Assembly of the Council of Europe

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EXECUTIVE SUMMARY

The present Methodology describes tools for analysis and identification of systemic problems and/or patterns of human rights violations. Although, it envisaged to cover human rights violations in the Armed Forces of Armenia, no sufficient examples have been found for research purposes in this quite limited context. As a result, the area of research was enlarged in order to reach the principal Methodology's objective, which is to provide the Armenian Governmental Agent's Office with general guidance and practical tools to identify systemic violations of human rights in its current activity.

The Methodology explains two principal aspects concerning systemic problems. In the beginning, it focuses on explaining the meaning of systemic problems and only then it illustrates how and when to identify them. In this sense, the Methodology is conventionally separated in two parts. First part explores a variety of sources from which the understanding of systemic problems can be inferred. The second part exemplifies different techniques by the means of which the patterns of systemic problems could be found during ordinary working proceedings. In general, the Methodology illustrates both challenges in identification of such problems and tools to overcome them.

There is no all-inclusive definition of the systemic problems, which is the first and foremost challenge. Nor there are clear criteria for the identification of systemic patterns. However, the meaning of systemic problems could be deduced from the documents of the Council of Europe bodies, mainly from the ECtHR case-law and the CM's practice on supervision of execution of judgments. Other international organisations involved in human rights protection use this terminology with the reference to these sources.

The ECtHR, judging about systemic problem, usually refers to the large number of repetitive violations and potentially new upcoming applications. In the ECtHR's understanding, all systemic problems thus require introduction of remedies, either special or general in character. According to the ECtHR, a particular systemic problem lies, either or both, in the domestic legislation and incompatible practices. The CM, on the other hand, relies on the ECtHR reasoning on systemic problems, but it observes them more broadly. It can find them in other non-pilot cases disclosing complex and structural problems. However, the CM's practice shows that the so-called "systemic cases" are to be distinguished from other cases involving "structural" and or "complex" problems. It appears that in view of the CM human rights violations should be qualified as systemic when the domestic system of protection entails significant, long-term and multileveled changes, which are indeed both complex and structural in character. In this sense, changes of legislation and/or practices along with introduction of remedies to stop the flow of incoming cases would not be sufficient to tackle a systemic problem. In this sense, the methods of their assessment differ between the ECtHR and the CM, though they are roughly similar.

In lack of all-inclusive and agreeable definition, the Methodology proposes a non-exclusive list of criteria allowing to identify systemic problems in more or less conclusive manner. The principal idea of the Methodology is that systemic problems could not be defined other than by some already established criteria and by drawing inspiration from the methods of the ECtHR and the CM. In this sense, it explores other relevant problem-solving techniques, inclusively some of cognitive methods of assessment, suggesting them as tools to be used by the GA office in performing the task to identify the systemic problems.

INTRODUCTION

Background

The Council of Europe's Project on "*Human rights and women in the armed forces in Armenia*" ("the Project"), acting in close cooperation with the Armenian Government Agent's Office ("the GA Office"), implements, *inter alia*, activities to foster execution of the European Court of Human Rights ("the ECtHR") judgments and decisions. Within this framework, it commissioned a methodology for analysis and identification of systemic problems and/or patterns of human rights violations in the Armed Forces of Armenia ("the Methodology"). Its aim is to enhance the capacities of the GA Office, undergoing structural and institutional reform. It is also foreseen that the Methodology might be used by other domestic authorities in the activity of general implementation of the European Convention on Human Rights ("the Convention") and serve as basis for policy changes.

Terms of Reference

In brief, the Terms of Reference ("the ToR") outlined the following steps in elaboration of the Methodology:

- to articulate the problem based on the issues identified in the relevant ECtHR judgments against Armenia;
- to develop a hypothesis and then to test it in Armenian cases;
- to research and elaborate methodological tools for identifications of the causes of human rights violations in these cases.

According to the original scopes of the ToR, the Methodology should be preceded by a research focused on systemic human rights violations in the Armed Forces of Armenia. This Research envisaged in this respect expected 'to be based on the pilot analysis of the relevant [ECtHR] judgments against Armenia and to provide a guidance for proposing policy level changes'. It was thus assumed that there might be some systemic problems in the Armenian Armed Forces, hence needed that Research and the present Methodology. Both appeared to be limited in scope and area of investigation.

However, the Research did not find cases against Armenia pending before the ECtHR, nor any judgments, apparently disclosing systemic issues in the country. Nor Armenia has yet faced a pilot or quasi-pilot procedure before the ECtHR. More detailed analysis of these type of cases will follow below, but only one Armenian case seemingly resembles systemic issues¹, which is neither a pilot nor a quasi-pilot judgment. Furthermore, it does not concern human rights in the Armenian Armed Forces either.

In addition, the ToR envisaged elaborating the Methodology as a set of tools for identification of the root-causes in the situations of systemic human rights violations in Armed Forces. However, given the broader implication of such a methodology, it will inevitably outstep this specific military context. It will cover other areas of human rights where systemic violations could transpire and where the criteria for their identification could be drawn from. Indeed, as experience shows, most of the systemic violations occur in other, rather civil fields of activity and mainly outside of a narrow military context.

Moreover, among the above-mentioned scopes, the ToR outlined the need to focus on the tools for identification of the root-causes of systemic violations in the particular domestic context of Armenia. Yet, as noted above, the cases against Armenia did not provide with sufficient research material to draw

¹ ECtHR, *Chiragov and Others v. Armenia* [GC] (2015); *Chiragov and Others v. Armenia (Just satisfaction)* [GC] (2017).

valuable methodological recommendations. Nor the root-causes of human rights violations could be identified without a proper understanding of the meaning of systemic problem, in particular when no relevant cases or examples are available. Accordingly, other situations and cases were researched and relevant interferences were drawn therefrom. These findings were then applied to the Armenian cases to compare and exemplify the recommended methodological tools. Still, the conclusions on whether Armenia faces systemic problems, as well as the identification of their root-causes, if any, are neither the part of nor the scopes of the present Methodology. It remains for the Armenian authorities, in particular for the GA Office, to reach such conclusions basing on the methodological recommendations from the present document.

In these conditions, **both the Research and the Methodology have been extended** outside of the original ToR. They meant to exemplify the cases and systemic situations in other Member-States of the Council of Europe, as well as to cover arias of human rights other than hypothetical systemic issues in Armed Forces. In addition, they went beyond the initial scope, which is to identify the root-causes of systemic violations. The Research and the Methodology resulted in elaboration of recommendations on how to identify the meaning of those problems and then, with a proper understanding, to contemplate on their causes.

Objective

In view of the above explanations, the principal goal of the Methodology becomes wider than originally envisaged. It is to provide the stakeholders with **general guidance** about how to identify, assess and analyse patterns of human rights violations and distinguish systemic features in individual cases. In this later sense, the Methodology covers the GA Office's interest to elaborate its own policies and develop its own Service Operational Proceedings ("the SOPs") on assessment of systemic problems in a variety of cases and arias of human rights protection.

Evaluation of systemic problems is a complex question warranting an academic study. Despite of this broad and seemingly abstract character, the Methodology must be focused on **practical matters** rather than on theoretical deliberations. It should develop necessary skills for effective assessment of the existing practices, with due consideration of the current state-of-the-art, national legal framework and on-going judicial and/or administrative reforms.

Thus, the overall **objective** of the present Methodology is rather to assist and advise the GA Office in its endeavours, so it will eventually become self-confident to assess systemic problems by its own means, to identify their causes and to conceptualise on remedies if needed.

Structure

The Methodology distinguishes substantive and procedural rationales and thus it is composed by 2 parts. **The first part** reflects on the meaning of systemic problems and identification of their root-causes. **The second part** focuses on illustration of necessary skills, techniques and strategies of analysis. This structure was inspired by the problem-solving strategies as they share the same rationale. Each of these techniques proposes first to define a problem and then explains how to find solutions, using in this sense a number of techniques, steps of actions, cognitive methods, etc. Accordingly, the present Methodology upholds this rationale and separates the questions about **definition of systemic problems** from **the methods of their analysis**.

Terminology

The present Methodology uses the terms of “systemic problems” and “systemic patterns of violations” as similar and generic terms with the same semantic meaning. Moreover, as it will be seeing below, the Council of Europe bodies use other terms to label systemic problems, such as “structural problems” or “structural dysfunctions”. These terms are being constantly used by the ECtHR in its jurisprudence as well. Accordingly, the present Methodology follows the same terminological terms. Unless the special context requires to distinguish the terms to emphasise their different semantic meaning or legal effects², the Methodology uses them interchangeably.

² e.g. when the structural problem lies in legislative disfunction, like in the *Hutten-Czapska* or slightly different meaning of structural problems and systemic problems afforded by the CM.

PART 1. SUBSTANTIVE ASPECTS

This part of the Methodology focuses on the question “What are the systemic problems and/or patterns of violations?”. Understanding the problem is the first step in the way to know to assess it. In other words, the Methodology is pointless without learning about the meaning of systemic problems.

Challenges in delineating the meaning of systemic problems

The meaning of systemic problem is unclear. A variety of terms is being employed, such as “systemic problems”, “systemic patterns of violations”, “structural problems”, “systemic disfunctions”, etc. Moreover, as it will be seen below, the ECtHR and the CM have never been interested in giving a legal all-inclusive definition of systemic problems; they have rather sought to find causes and solutions thereto. Accordingly, a clear-cut explanation of the meaning of systemic problems could be hardly found in their practice and legal instruments; so far not from legal perspective. **Lack of legal definition** is the first challenge in dealing with the systemic problems.

Other challenge is that all relevant bodies and organisations have their own **perspectives and perception** of systemic problems. Hence, the meaning of systemic problems could vary in view of the diversity of opinions and scopes pursued by international organisations and state authorities etc. This aspect will be explained below in details.

The whole Methodology will be devoid of purpose without a definition of systemic problems. Indeed, it is within the scope of the present Methodology to **understand the systemic problem and to distinguish its patterns from other, non-systemic issues**. In this sense, this Methodology is as specific problem-solving process that uses generic or *ad hoc* methods in an orderly manner to find solutions to complex problems. And, as any problem-solving technique, **this process starts by defining the issue at hand and observing it from multiple perspectives**. This stage is often called “to pin the problem” and it is the first step in multi-stage problem-solving techniques.

Accordingly, in what follows the Methodology proposes to define the systemic problems from different perspectives before proposing the tools of how to do it in practice.

Semantic meaning of “systemic” and “pattern”

The semantic meaning of the word “systemic” is always taken as opposed to the word “particular”. It refers to something that is spread throughout, wide and extensive, affecting a group or a structure as a whole. It should not be confused with “systematic”, the word which refers to acting according to some plan or rules of a system.

The “system” or “systemic”, in the context of the present Methodology, is understood as a set of rules and proceedings according to which law is being interpreted and enforced. This set of rules defines the rights and responsibilities of the parties within that system and governs their behaviour. But the system goes beyond that set of rules and incorporates many other collateral factors, such as social tendencies, mentality, legal culture etc.; in other words, everything that stands in the background and shapes the context of a particular problem.

A “pattern” means regularity, when the elements of a systemic repeat themselves in a predictable manner. While the semantic meaning of the word is clear, it however remains difficult to find “patterns” in human rights cases. Each and every one of these cases is individual and distinguishable. Moreover, the patterns of violations, when they exist in human rights cases, do not necessarily evolve into systemic. As

it was specified, the word “systemic” means “overall” or “general” and concerns a group of individuals assembled under certain structure.

It appears as a real challenge to assemble violations taken from individual perspective into groups of similar cases and identify systemic patterns therefrom. In other words, any violation of human rights is significant from the perspective of an individual. But in from large perspective it can be insignificant for to characterise the system overall. The violation is almost always unique, while from systemic point of view it could be just a small part of many other cases; another element in the chain. On the other hand, such an insignificant violation, with no clear signs of recurrence, may however disclose systemic disfunctions if seen from general perspective. The challenge is to unravell these signs of systemic problems from an apparently insignificant case, in particular when no other similar cases follows and thus a pattern is difficult to find.

How then one should understand the meaning of “systemic problems” in this dichotomy of individual *versus* general perspectives? The meaning lies rather in the **significance of a particular violation to the whole system**, in the contrary to many other similar cases that still remain insignificant from general perspective.

This logic could be compared with the method of evaluation in accounting and financial analysis called the “statistical significance”. Without too many technical details of this non-legal terminology, the statistical significance was defined as ‘the likelihood that a relationship between two or more variables is caused by something other than chance’³. It uses the statistical hypothesis testing to determine whether the result of a data set is statistically significant. In other words, statistical significance is the value used to accept or reject the assumption saying that there might be no relationship between measured variables (i.e. the null hypothesis). A data set becomes statistically significant when it is large enough to accurately represent the phenomenon being studied.

In human rights statistical data do not always matter; it is enough to have one case raising serious doubts about the system as a whole. It could be “significant” since the problems it unveils could lead to increase of statistical data in the future. Applying this logic to the current subject-matter, a researcher of systemic problems should start by negative assumption, i.e. that violations of human rights, even if large in numbers, do not necessarily disclose systemic patterns. Only after they have become recurrent or could potentially lead to recurrence the violation(s) could be regarded as a pattern as they stem from the same cause.

This is the basic semantic meaning granted to the systemic problems by the Council of Europe’s institutions; even in situations of multiple breaches of the Convention, **systemic violations of human rights should be regarded as exceptional situations where a pattern lies somewhere in the system of protection of human rights, not in a single occurrence**. This brings us to the necessity to research in depths the practice of the Council of Europe’s institutions.

The Council of Europe view on systemic problems

The first indications of the concept appeared within the context of the reforms of the ECtHR in the Brighton Declaration of 2012, which underlined first that the ‘[r]epetitive applications mostly arise from

³ W. Kenton, ‘Why Statistical Significance Matters’.

systemic or structural issues at the national level⁴. In this sense ‘the States Parties, the Committee of Ministers and the Court are being encouraged to work together to find ways to resolve the large numbers of applications arising from [these] systemic issues [as] identified by the Court’⁵.

Thus, the task of identification of systemic issues has been primarily ascribed to the ECtHR, which started doing so in its pilot-proceedings. It needs to be mentioned that neither the Brighton Declaration nor other subsequent High-Level Declarations link the concept of “structural or systemic issues” with the pilot-judgment procedures. For example, the Brussels Declaration simply mentions ‘judgments raising structural problem’⁶, while the Copenhagen Declaration operates with general terms of “systemic and/or structural human rights problems”, sometimes assuming them as different concepts⁷. Accordingly, since the definition of these concepts was attributed to the ECtHR jurisdiction, the identification of their meanings begins by analysis of the ECtHR’s jurisprudence.

The European Court of Human Rights

The ECtHR does not give express definition of systemic problems or patterns. Nor it distinguishes the terms of “structural problems”, “systemic issues” or “systemic disfunctions”, etc. using them mostly as metonyms. The ECtHR analyses the existence of systemic problems on case-by-case basis and, despite of its already extensive pilot-jurisprudence, it does not conceptualise these problems by means of an abstract and/or all-inclusive definition. However, some clues of such definition could be found mostly in the pilot-judgments.

Pilot-judgments

In its first pilot-judgment *Broniowski* the ECtHR reasoned that ‘the existence and the systemic nature of that problem have already been recognised by the Polish judicial authorities, as has been confirmed by a number of [domestic authorities’] rulings’. Thus, the first clue of systemic problem was its recognition by the domestic authorities, notably by the courts, according to the principle of subsidiarity⁸. The second indication of the systemic nature of the problem was ‘the Court’s caseload, particularly as a result of series of cases deriving from the same structural or systemic cause’⁹. The third clue could be considered the lack of remedies, as the ECtHR noted that it is incumbent to State both under Article 13 and Article 46 of the Convention to introduce such measures ‘as 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’¹⁰.

⁴ ‘High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration’ (2012) para. 18.

⁵ ‘High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration’, para. 20(c).

⁶ ‘...attach particular importance to ensuring full, effective and prompt follow-up to those judgments raising structural problems.’ ‘High-level Conference on the “Implementation of the European Convention on Human Rights, our shared responsibility” Brussels Declaration 27 March 2015’ (2015), p. 9 para. 2.d)

⁷ See in particular ‘Calls upon the States Parties to continue strengthening the implementation of the Convention at the national level ...; in particular by: a) creating and improving effective domestic remedies, especially in situations of serious systemic or structural problems...’ ‘High Level Conference meeting in Copenhagen on 12 and 13 April 2018 at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe’ (2018).

⁸ *Broniowski v. Poland [GC]* (2004) para. 189

⁹ *Broniowski*, para. 190

¹⁰ *Broniowski*, para. 193

In summary, the *Broniowski* judgment referred to the systemic violation as a situation where ‘

“...the facts of the case disclose ... within the [domestic] legal order ... a shortcoming as a consequence of which a whole class of individuals have been or are still denied [their Convention rights or freedoms]” and where “the deficiencies in national law and practice identified in the applicant’s individual case may give rise to numerous subsequent well-founded applications”.¹¹

Lately, the ECtHR abandoned this acknowledgment of problems by the respondent State as one of the mandatory criteria revealing systemic nature. It became optional in assessing systemic problems. In doctrine this element was called as ‘the willingness to cooperate on part of the defendant state’, which is illustrated by different state’s attitudes towards pilot proceeding¹². For example, in *Olaru* the Government acknowledged the systemic problem¹³, while in *Hirst* and *Greens* the respondent State questioned the ECtHR jurisdiction to disqualify the domestic law.

In *Hutten-Czapska* the ECtHR was more or less explicit in identification of systemic problems regardless of the respondent state views. It associated identification of systemic problems with the number of similar violations, not only already produced by the structural problem but also those that could potentially arise therefrom. It noted that one should consider not only the number of already pending applications but also the potential inflow of new cases in the future¹⁴. It also saw the systemic problems from other, more comprehensive perspective. The ECtHR observed the systemic problem:

‘as a combination’ of implementation measures along with “the malfunctioning of [domestic] legislation”¹⁵.

This means that systemic patterns could be found in the situation when compatible legislation faces problematic implementation. Indeed, almost all pilot judgments identify structural problems in connection with, either or both, the deficiencies in legislation and failures to implement it. For example, the *Greens* judgment underlined that the structural problem consists in failure to repeal legislation five years after the ECtHR had classified it as incompatible, because of the blanket disenfranchisement of prisoners¹⁶, thus giving rise to thousands of repetitive applications¹⁷. Another relevant example is the

¹¹ *Broniowski*, para. 189.

¹² ‘Whereas in *Broniowski* the Polish government was fully willing to cooperate, in *Hutten-Czapska* the same state contested that a pilot procedure should be used at all.’ A. Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges* (2009).

¹³ ‘The above findings and the Government’s acknowledgement of the existence of a structural problem allow the Court to conclude that the violations found in the present judgment reflect a persistent structural dysfunction and that the present situation must be qualified as a practice incompatible with the Convention’ *Olaru and other v. Moldova* (2009) para. 56.

¹⁴ ‘...At any rate, the identification of a “systemic situation” justifying the application of the pilot-judgment procedure does not necessarily have to be linked to, or based on, a given number of similar applications already pending. In the context of systemic or structural violations the potential inflow of future cases is also an important consideration in terms of preventing the accumulation of repetitive cases on the Court’s docket, which hinders the effective processing of other cases giving rise to violations, sometimes serious, of the rights it is responsible for safeguarding.’ *Hutten-Czapska v. Poland [GC]* (2006) para. 236

¹⁵ *Hutten-Czapska*, para. 237

¹⁶ *Hirst v. the United Kingdom (no. 2) [GC]* (2005) para. 82

¹⁷ *Greens and M.T. v. the United Kingdom* (2010) para. 105

Atanasiu judgment, where the ECtHR saw systemic ineffectiveness of compensation or restitution leading to recurring and widespread problem in the country concerned¹⁸.

The examples could follow. However, taken as a whole, the ECtHR jurisprudence in the pilot-cases mostly refers to the causes of systemic problems. It sees them lying in disfunctions on the level of implementation of legislation or persistence of consistent administrative practices incompatible with the Convention. In other words, the systemic problems mostly occurred in States where neither their willingness to cooperate with the ECtHR nor their commitments to respect the Conventions have ever been questioned. They all benefited from more or less good legislation but the practice was still uncertain. Situations when the domestic legislation was the source of systemic dysfunction were very rare. Still the ECtHR pilot-case-law shows that incompatible legislation could be the source of systemic problems.

As scholars rightly put it, the pilot-judgment ‘could be said to address a general problem by adjudicating a specific case... by going beyond the mere determination that the Convention has been violated’.¹⁹ Or, as the ECtHR sees the pilot-judgment procedure as a technique of identifying the structural problems underlying repetitive cases and imposing an obligation on States to address those problems²⁰. The *Burmych* judgment extended this rationale where the ECtHR emphasised that the introduction of the pilot-judgment procedure was designed to deal with the phenomenon of repetitive cases arising from proliferated structural and systemic problems, having added a new dimension to the roles of the parties and Convention institutions²¹. However, it brought nothing new from the perspective of identification of systemic problems in itself, apart from the reason that a **continuous failure to tackle root-causes of the problem may amount in itself into a structural problem**. It repeats the situation of the *Scordino* precedents when systemic problems gave rise to another and yet another challenges. In *Scordino no. 1* the ECtHR found double systemic problems concerning ineffectiveness of compensation for expropriation and then excessively long proceedings awarding insufficient compensations²². The systemic problems in *Scordino no. 3* originated in a widespread problem arising out of unlawful conduct of the authorities arbitrarily overtaking possession of property while attempting to secure execution of previous ECtHR judgments.

In terms of systemic dysfunction, these cases revealed another pattern; not only as they were difficult from the perspective of executional obligations but also the exponentially growing number of new violations appears to be the real challenge. Eventually, the authorities faced the so-called “snowball effect”, when at the initial state a small number of cases of a small significance started building upon themselves becoming larger in time thereby amounting into a potentially dangerous vicious circle. In other words, like in *Burmych* and *Scordino*, as well as in a number of other pilot-proceedings, systemic problems can be regarded as multiplying themselves, i.e. remain the root-cause of violations and generate other systemic issues.

With this reasoning and a great number of pilot judgments²³, the ECtHR linked the determination of systemic problem with such a **‘structural dysfunction in the country concerned [that] has given or could**

¹⁸ *Maria Atanasiu and Others v. Romania* (2010) para. 216

¹⁹ Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights*.

²⁰ ‘Factsheet – Pilot judgments’ (2019).

²¹ *Burmych and Others v. Ukraine [GC]* (2017) para. 141.

²² See also Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights*.

²³ See for details ECtHR, Press unit, ‘Factsheet – Pilot judgments’.

give rise to similar applications²⁴. It is to be noted that the ECtHR does not operate with the terminology of similar “violations” but “applications” whether or not meritorious. Thus, the purpose of a pilot-judgment as per Rule 61 of the Rules of the Court, is however to compel states to introduce remedies, not only to classify problems as systemic or to identify their root-causes. The primary scope of the pilot-procedure-tool is actually to reduce the ECtHR backlog of cases. It goes along with other correlative scopes of this type of proceedings, which are meant to provide the Member-States with certain advice and guidance in dealing with systemic issues. However, these scopes of the pilot-judgment procedures fall outside of the present Methodology. The only element relevant for the present Methodology is whether the classification of systemic problems could be done solely by the ECtHR and/or by the domestic authorities and, if yes, on basis of what criteria.

From the Research of pilot-cases, these criteria could be preliminary identified as existence of **large number of applications** stemming from the same cause, **lack or ineffectiveness of remedies** and the recurrent character of the problem that lies either or both in **legislation and practice**. It remains unclear whether the ECtHR sees these criteria as alternative or cumulative, though it could be inferred that the ECtHR observe them holistically. Moreover, the criteria are not straightforward at all times. While the first two criteria are more or less clear and could be evaluated by statistics, the last is mainly qualitative and thus the most difficult to assess. Truly, it remains controversial and challenging to evaluate the quality of law and practice. Besides, the pilot-judgment procedure does not always answer this challenge and it is not the sole judgment that may reach negative conclusions on the quality of legislation or practice. In what follows, the Methodology will describe these criteria and the difficulties associated with their delineation. But before doing that, another aspect merits attention, i.e. whether the systemic violations are connected or not with some particular rights guaranteed by the Convention.

Type of pilot-violations

The analysis of pilot-judgments issued by the ECtHR will be partial without assessment of the **type of violations** that mostly called for such a procedure. This assessment could answer the question whether some **specific rights guaranteed by the Convention could be or not potentially breached systematically**. It is not apparent, what are these rights, if any, and whether the whole Convention could become potentially breached in systemic way.

The answer to this question is difficult to grasp. More detailed explanations in relation with this question will be provided below, in the Section describing non-pilot-cases yet disclosing systemic patterns. This Section of the Methodology however concerns the pilot-cases, where the answer is less difficult to find out. There is already a well-established pilot-case-law concerning some specific types of violations calling for systemic evaluation. It could be said that it is enough to make a classification of pilot-cases to see what type of violations the ECtHR regarded as capable to evolve into structural problem.

For example, the pilot-judgments identified the following problems, briefly described in the *Burmych* case²⁵:

- legislative dysfunctions or defective practices affecting property rights²⁶;
- excessive length of proceedings;

²⁴ ECtHR, ‘Rules of Court’ (2020) Rule 61 (1).

²⁵ *Burmych*, para. 162

²⁶ *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia [GC]* (2013); *Atanasiu*.

- inadequate conditions of detention²⁷;
- non-enforcement of final domestic judgments and decisions²⁸;

to which it could be added:

- exclusion of convicted prisoners from voting by blanket legislative ban²⁹
- the failure to grant residence status of persons unlawfully removed from the register of permanent residents (“erased persons”)³⁰
- continued detention of offenders with mental disorders without appropriate treatment and remedies capable of affording redress³¹
- hindrance from returning to homes and properties located in disputed territories, under the control of non-state actors³²
- statutory intervention preventing re-assessment of compensation despite pending judicial proceedings³³
- excessive length of pre-trial detention as a result of frequent use of detention orders by the domestic courts despite of restrictive legislation³⁴

From this list of violations, it could be deduced that all systemic disfunctions identified in the pilot-cases are complex in character. However, the number of potential victims is what unites them all. In other words, they are connected mostly by the consequences of these violations, not by the specific nature of the rights concerned. The violated in systemic way rights vary and a pattern between these variety could be hardly found. However, it remains to be seen whether some patterns could be distinguished from the common roots of the problem. These root-causes of pilot-violations require separate examination, which follows below.

Root-causes in pilot-violations

Almost in all structural violations the root-causes always lie either or both in incompatible legislation and practices. In this sense, the structural problems could be **normative** or **practical** in character. For example, the bans to vote are legislative in nature while the non-enforcement of judicial decisions is mainly a problem of deficient practice. Moreover, all systemic violations are **continuous** or at least **continuously** produce consequences. In this sense almost all above-mentioned problems could be given as example, such as the excessive length of judicial proceedings or detention, continued hindrance to have access to propriety, lack or re-assessment pending long judicial proceedings, continued ban to vote or lengthy non-enforcement, etc. At last, all systemic violations by definition are **institutionally attributable**, which means that the responsibility lies on rather institutional level and not in individual liability of an agent of state or a public servant acting individually on behalf of the state. In other words, none of the violations mentioned above could have been caused by a single individual but by inappropriate, incompatible system as a whole. For example, the unreasonable length of proceedings, non-enforcement, excessive use of

²⁷ *Torreggiani and Others v. Italy* (2013); *Ananyev and Others v. Russia* (2012)

²⁸ e.g. *Olaru*

²⁹ *Greens*

³⁰ *Kurić and Others v. Slovenia [GC]* (2014).

³¹ *W.D. v. Belgium* (2016)

³² *Xenides-Arestis v. Turkey* (2005).

³³ *M.C. et autres c. Italie* (2013)

³⁴ *Kauczor v. Poland* (2009)

detention or lack of recognisable status of granted to “erased persons” could not be attributed to omission of a one individual but to a group of public officials or institutions *en masse*.

Non-pilot cases

The pilot-judgment-procedure is not the only one to reveal systemic or structural problems. Usually, a pilot-judgment is preceded by a number of key-judgments pointing out on the root-causes that may potentially increase the number of applications. However, these key-judgments not necessarily elevate into the pilot-procedure; still they will be sufficient to disclose a problem of systemic nature. These cases in particular refer to some inherent obligations of States under Article 46 of the Convention. Other key-cases identify structural incompatibilities both in legislation or in practices. Sometimes they could be called as “quasi-pilot” judgments but on what criteria they are being distinguished from pilot-procedures remains unclear.

There is a constant practice both at the ECtHR and at the CM to regard a judgment as quasi-pilot if Rule 61 of the Rules of the Court has not been officially applied, yet the judgment still reveals serious systemic problems having the same effects as any other pilot-judgment. One judge drew a distinction between these types of judgments on basis of the operative instructions given by the ECtHR, asserting that “quasi-pilot judgments”... [identify] systemic problems in the national legal system or practice which may be a source of repeated breaches of the Convention, but [the ECtHR] does not normally prescribe general measures in the operative part of the judgment³⁵. Lately, some judges agreed that both ‘pilot-judgment and the quasi-pilot judgment procedures are typical constitutional review instruments which play a critical role in resolving the dysfunctional operation of domestic law or the legislator’s failure to regulate systemic dysfunctions’³⁶. However, the ECtHR formally does not embrace the terminology of “quasi-pilot” proceedings or judgments; it remains to be used mostly in the common legal parlance of the Department for Execution³⁷, in the opinions of the ECtHR judges and rarely in the official documents of the CM³⁸.

The most representative of these cases are those questioning some constitutional and primary principles of domestic legal systems. For example, the case of *Olexandr Volkov* the applicant has been dismissed as a result of systemic dysfunction in handling judicial discipline based both on the legislation and practice. The case disclosed serious systemic problems regarding the functioning of the Ukrainian judiciary, which did not ensure the sufficient separation of the judiciary from the other branches of State power. Other high-profile cases, disclosing rather complex constitutional and international legal problems, also fall into this category. For example, the case of *Sejdić and Finci* qualifying the discriminatory nature of the electoral system in Bosnia and Herzegovina, enshrined in its Constitution drafted on “Dayton Agreements” putting end to inter-ethnic war³⁹. The case of *Paskas* concerning permanent ineligibility of impeached president or the case of *Tănase* about legislative ban to stand for election as MP on account of double citizenship - all are illustrative examples of complex cases. They all appeared to mark systemic problems but remained unclassified as either pilot or even quasi-pilot-judgments. Nevertheless, the problems identified in these

³⁵ Partly Concurring, Partly Dissenting opinion of Judge Pinto de Albuquerque in the case of *Allianatos and others v. Greece [GC]*, (2013), footnote 35 or his Concurring opinion in the case of *Fabris v. France [GC]*, (2013), footnote 10.

³⁶ Concurring opinion of judge Pinto de Albuquerque, joined by judges Hajiyev, Pejchal and Dedov in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland [GC]*, (2016), § 60.

³⁷ E.g. the case description of the case of *Gaglione And Others v. Italy [GC]*, at <http://hudoc.exec.coe.int/enq?i=004-28258>

³⁸ E.g. the CM Notes of the 1362nd meeting (December 2019) - H46-19 Rezmiveş and others and Braquadireanu group v. Romania (Applications Nos. 61467/12 and 22088/04)

³⁹ *Sejdić and Finci v. Bosnia and Herzegovina [GC]* (2009).

judgments are so embedded in the domestic legal systems that they could potentially lead to a number of repetitive applications before the ECtHR. This element characterises them all. The violations in these cases would continue after the findings of the ECtHR and appears to be the source of new serious breaches of the Convention if their cause(s) will not be erased.

Again, illustrative in this sense is the following example. The developments of the *Sejdić and Finci* case in which the failure to lift the constitutional discriminatory ban to stand elections, has led to further repetitive cases. The cases of *Zornić, Šlaku* and *Pilav* reiterated concerns about systemic issues. The ECtHR went to indicate that ‘the failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with [the Convention] is not only an aggravating factor as regards the State’s responsibility under the Convention for an existing or past state of affairs but also represents a threat to the future effectiveness of the Convention machinery’⁴⁰.

Other, rather positive example appears to be the evolution of the *Olexandr Volkov* case. The change of incompatible legal system confined the systemic problem and thus halted the flow of repetitive violations, like in the case of *Kulykov and others*. In that case, the judgment clearly states that no general measures needed as they were implemented following the *Olexandr Volkov* judgment. There is no indication that the applicants would have their rights impaired by new judicial reform, since “...it cannot be concluded that this substantially new background renders the relevant domestic procedures *prima facie* futile and useless”⁴¹.

Some cases such as *Roman Zakharov* or *Iordachi and others* identified shortcomings in legal framework governing secret surveillance of telephone communications and reiterated the status of applicants as potential victims. This type of violations concerns the incompatibility of legislation which also discloses systemic features of the problems. The ECtHR’s holds in these cases that ‘the mere existence of laws and practices which permitted and established a system for effecting secret surveillance of communications entailed a threat of surveillance for all those to whom the legislation might be applied’⁴². The “affecting all” or “threatening-all” scenario appears to be systemic, since the number of victims of violations remains unaccounted.

The cases questioning the quality of legislation and legal certainty, notably in criminal matters, usually disclose the same problems of unaccounted risk of violations. In this sense, such cases raise serious concerns about systemic character of violations, though the ECtHR would never go to state that directly. For example, in the *Kokkinakis* case the ECtHR noted that Article 7 embodies more generally, the principle that only the law can define a crime and prescribe a penalty⁴³. The law should fulfil certain criteria of quality (accessibility, clearness and foreseeability) under the Convention, otherwise it would affect large number of individuals whose behaviour it should regulate⁴⁴. Doubts concerning the quality of legislation could be observed in the case of *Boicenco*, where the ECtHR directly highlighted certain legislative incompatibilities. It questioned the quality of criminal procedure legislation banning release on bail because of the gravity of criminal accusations. The ECtHR noted that ‘the right to release pending trial

⁴⁰ *Zornić v. Bosnia and Herzegovina* (2014) para. 40; *Šlaku v. Bosnia and Herzegovina* (2016) para. 37.

⁴¹ *Kulykov and Others v. Ukraine* (2017) para. 148.

⁴² *Roman Zakharov v. Russia [GC]* (2015) para. 168.

⁴³ *Kokkinakis v. Greece* (1993) p. 52; *Vasiliasauskas v. Lithuania [GC]* (2015) p. 154.

⁴⁴ ‘...It is a logical consequence of the principle that laws must be of general application that ...’ *Del Río Prada v. Spain [GC]* (2013) p. 92.

cannot, in principle, be excluded in advance by the legislature⁴⁵. From this rationale it could be inferred that any person in detention could be potentially a victim of the violation because of such legislative ban, thus the numbers of violations are unpredictable.

Yet again, the reasons behind this systemic thinking is that a non-qualitative law affects not only one individual but in general it produces widespread consequences against any person who happened to found himself in the same situation as the victim of incompatible legislation. Thus, the legislative shortcomings may affect a variety of victims and be applicable in various situations with implications over various rights guaranteed by the Convention. However, despite of this variety, the only common feature of these non-pilot-cases is that an incompatible legislation may potentially affect large number of victims. This common element must be examined in detail in connection with the question what kind of violations may elevate into systemic or structural breaches.

Types of non-pilot-violations

In the above Section it was easy to find out the categories of the systemically violated rights, thus answering the question about the typology of systemic disfunctions in pilot-cases. It was also underlined that the answer is difficult to find in the non-pilot cases. Firstly, this is because the ECtHR never formally acknowledges a systemic problem or disfunction except in pilot-cases. Even quasi-pilot-cases often do not contain express references to structural or systemic problems, not to mention other ordinary judgments. Secondly, the difficulty is due to the fact that human rights violations are primarily individual in character, which is directly opposite to the general characteristics of systemic violations. The individual *versus* systemic dichotomy prevents to ascertain the typology or rights capable of becoming systemic violations, if the ECtHR would not apply pilot-procedure. Thirdly, the human rights are dynamic and could change over time, which makes evaluation of systemic patterns even more difficult. What could be a violation at one time and context, would not necessarily be the same violation in a while. Conversely, what was not a violation of human rights in the past could become so later on.

These two last aspects should be analysed further in detail with the purpose to find out whether the patterns of systemic violations could be found despite of these mainly circumstantial features of human rights violations.

It is obvious that human rights are by definition individual in character. The ECtHR admissibility criteria require an individual to have victim status in order to be able to claim violation of human rights. The Convention does not allow *actio popularis* complaints, i.e. acting solely in the general interest without being personally affected by violation⁴⁶. In other words, the violation could not be claimed solely on the basis of general existence of incompatible law or practices, without real harm suffered or potentially capable to be inflicted. In this sense, violations of human rights could not be systemic because of this individuality of harm; every violation is subjective and has its own peculiarities distinguishing it from other similar violations. Systemic violations on the other hand call for wholistic approach, which by definition is focused on the patterns in the relationships between large groups of individuals, going beyond just one private interest or a minority from this group. They are able to bring general harm. In the systemic violations the interests are general, meaning that other individuals could become victims, even if they have not been yet affected by the systemic disfunction.

⁴⁵ *Boicenco v. Moldova* (2006) paras 134–136.

⁴⁶ ECtHR, *Vallianatos and Others v. Greece* (2013) para. 47 et seq.

In the later sense, the ECtHR operates with the notion of “potential victims” who can contend that a law, a policy or an act violates his or her rights in the absence of an individual measure of implementation. Such type of violations still remains individual in character but they closely resemble systemic patterns. A measure of general interest, usually written in the domestic law, could be appealed by an individual by *actio popularis*, if ‘he or she is required either to modify his or her conduct or risks being prosecuted or if he or she is a member of a class of people who risk being directly affected by the legislation’⁴⁷. The later consideration about the “class of people” appropriates this type of violation to the systemic.

However, it is not enough to dispel doubts about the character of individual violation solely on the basis that it could possibly affect the whole “class of people”. The extensive applicability of the Convention rights makes identification of issues capable to become systemic even more difficult. Evolutive interpretation extends the rights to some problems that originally had not been foresaw by the drafters of the Convention. Another difficulty is that the nature of the Convention rights is dynamic and could change over time. Some of the rights are solely individual in character (e.g. privacy) other are collective (e.g. prohibition of collective expulsion). Some rights are prohibitive and require abstention, other call for positive actions. However, continuous interpretation of the Convention may slightly change these rights by giving them more general perspective, transforming them into collective, thus able to become systemic (e.g. see the last case of *Big Brother* case⁴⁸ concerning secret surveillance intergovernmental cooperation, which raises among other things questions concerning the balance between the general interests and privacy). Evaluating whether a particular right could become systemically violated due consideration should be paid to the current interpretation and possible evolutions of the case-law of the ECtHR. It could considerably shape the conclusions concerning the systemic character.

In summary, not only in the pilot-cases some clues of systemic patterns could be found. With certain degree of speculation, the Research of non-pilot cases showed that the following **situations where violations have greater potential to become systemic**:

- violations of **substantive rights** resulting from the breach of **legality principle**⁴⁹, when
 - o the quality of the domestic law falls short of the Convention requirements or
 - o the law is incompatible with the Convention;
- violations of **procedural rights attributable to the authorities** as a whole⁵⁰ rather than to individuals or agents of states acting in individual capacity, which are often
 - o continuous violations⁵¹ and / or,
 - o failures to act according to positive obligations⁵²;

⁴⁷ ECtHR, *Tănase v. Moldova [GC]* (2010) para. 104; *Sejdić and Finci*, para. 28.

⁴⁸ ECtHR, *Big Brother Watch and Others v. the United Kingdom (referred to the Grand Chamber)* (2018).

⁴⁹ e.g. unlawfulness of detention under Article 5; lack of legal provisions allowing interference into some qualified rights, such as privacy, home inviolability (Article 8), freedom of expression (Article 10); etc.

⁵⁰ e.g. independence of judiciary under Article 6, effectiveness of investigations under Article 2, 3 and sometimes Article 8, lengthy proceedings in breach of reasonable time requirements or blanket limitation of the right to access to justice under Article 6, etc.

⁵¹ e.g. lengthy proceedings or investigations

⁵² e.g. failure to protect victims of domestic violence

- violations of **specific domestic context** stemming from local customs, social prejudice, mentality⁵³, **legal culture**⁵⁴, etc. deeply imbedded into law-enforcement, administrative, prosecutorial or judicial **practices**;

These above-mentioned situations show 3 principal patterns when an individual violation could become systemic. They could be alternative but mostly they are cumulative leading criteria to evaluate whether the case reveal systemic problem. One should cautiously analyse the ECtHR reasoning in the judgment concerned or the circumstances of the given case, if the assessment is being made pending proceedings. The following example illustrates this technique, i.e. how to identify systemic issues in individual cases basing on one or more situations described above.

In the case of *Litschauer*⁵⁵, the ECtHR tested the quality of domestic legislation substantiating reasonable suspicions for pre-trial detention. It disputed the material criminal legislation regulating the basis for criminal responsibility; not the legislation regulating proceedings of remand detention. The ECtHR concluded that ‘the relevant legal rules [of the Criminal Code of the Republic of Moldova] did not provide sufficient guidance and were not formulated with the degree of precision required by the Convention so as to satisfy the requirement of “lawfulness” set out by the Convention’⁵⁶. In this sense, there has been no “reasonable suspicion of having been a criminal offence committed” as required by Article 5 § 1 (c). The ECtHR went to decide that the whole detention was unlawful because the crimes were not clearly defined by the Criminal Code. Thus, the ECtHR questioned **the quality of material criminal legislation** in the particular context of the Republic of Moldova, where the overuse of detention is widespread problem⁵⁷. This example demonstrates that the violation remained mainly individual but, because of the quality of law it could have become systemic⁵⁸ if the criminal law would have not been repealed. The case was closed by the Committee of Ministers because of these amendments preventing recurrence of violation in future cases⁵⁹.

Using the ECtHR classification of the rights under the Convention, the 3 patterns described above could be developed in more detailed list of potential systemic violations. The ECtHR makes this classification by “keywords”, that is to say certain elements of the rights associated to ‘legal issues dealt with in each case ... a thesaurus of terms taken ... directly from the text of the [Convention]’⁶⁰. The ECtHR uses them for search of the case-law with the same legal content, but in the framework the present Methodology these keywords could be associated with the issues that could potentially become systemic. The table below **illustrates only partially** how such assessment works; since limitations of the present Methodology do not allow for full description of all issues (keywords).

⁵³ e.g. domestic violence cases or violations based on sexual orientation, certain degree of tolerance to police abuses, or otherwise intolerance based on highly suspicions discrimination grounds (racial, ethnical, sexual orientation, etc.);

⁵⁴ e.g. ban of prisoner rights to vote or overuse of detention pending trial, incoherent inconsistent judicial practice leading to legal uncertainty

⁵⁵ ECtHR, *Litschauer v. the Republic of Moldova* (2018).

⁵⁶ ECtHR, *Litschauer*, para. 35.

⁵⁷ *Report on the assessment of needs with respect to the criminal justice system of the Republic of Moldova in the light of the principles of humanisation and restorative justice* (2018) para. 44.

⁵⁸ Two repetitive cases were communicated by the ECtHR after this judgment, see the *Baraboi and Gabura*, no. 75787/17.

⁵⁹ Committee of Ministers, ‘Resolution CM/ResDH(2019)303 Execution of the judgment of the European Court of Human Rights *Litschauer* against Republic of Moldova’ (2019).

⁶⁰ ECtHR, ‘HUDOC keywords’.

Table 1. Example of assessment of the key-issues using 3 patterns of systemic violations

Key-issue	Can become systemic?	Reasoning
Article 1 [Obligation to respect human rights]		
High Contracting Party	NO	Article has no self-standing
Responsibility of States	NO	Article has no self-standing
Jurisdiction of States	NO	Article has no self-standing
Article 2 [Right to life]		
Expulsion (2)	RARELY YES	If legal framework is deficient running counter the non-refoulement principle
Extradition (2)	RARELY YES	Ibid.
Positive obligations (2)	YES	By definition involves institutional responsibility to protect (<i>Osman, Opuz</i>)
Paragraph 1		
....		
Prescribed by law (2)	YES	Could be a breach of legality principle, which is by definition results in mass-effects
Accessibility (2)	YES	Ibid.
Foreseeability (2)	YES	Ibid.
Safeguards against abuse (2)	YES, RARELY	If the law does not regulate use of force (see below)
Competent court (2)	YES	If it does not fulfil minimum guarantees of institutional independence
Effective investigation (2)	YES	Institutional responsibility for failures and lengthy proceedings
Paragraph 2		
Use of force		If the law does not regulate use of force or institutional Service Operational Proceedings falls short of minimum requirements (see <i>per a contrario Armani Da Silva</i>)
...		
Quell riot or insurrection	YES	Institutional responsibility for organising an effective system to prevent
Article 3 [Prohibition of torture]		
Torture	RARELY	High level of institutional tolerance is needed.
Inhuman treatment	RARELY	If employs rather institutional responsibility; the most relevant example is detention in inhuman conditions of detention and lack of proper medical assistance while in detention
Degrading treatment	RARELY	ibid
Effective investigation (3)	YES	Implies institutional responsibility and serious requirements to organise system of investigation, thus by definition is capable to become systemic violation.
Positive obligations (3)	YES	Similar with the reasoning on the same key-issue under Article 2 above; by definition is systemic.
...		
Article 5 [Right to liberty and security]		

Paragraph 1		
...		
Procedure prescribed by law	YES	By definition requires a normative system, which should be compatible. If not the violation of this key-issue has high potential to become systemic
Lawful arrest or detention	YES	Ibid.
...		
Paragraph 5		
Compensation (5)	YES	This provision of Article 5 is its own remedy and any ineffectiveness of compensation mechanism could become systemic...
Article 6 [Right to a fair trial]		
...		
Access to court	YES, RARELY	If there is a blanket ban, for example due to excessive court fees.
...		
Reasonable time	YES	The responsibility is institutional
Independent tribunal	YES	Independent judiciary is constitutional requirement and it is regulated by law and implies institutional responsibility.
Impartial tribunal	NO	Violations of this key-issue usually are individual in character; moreover, the assessment of impartiality refers to the conduct of an individual judge in a given case (subjective and objective approaches).
Tribunal established by law	YES	It is an institutional requirement
Public judgment	YES, RARELY	If the procedural law does not allow for publicity in particular trials (for example state security cases or juvenile justice, etc.)
...		

Root-causes in the non-pilot cases

In these cases, the root-causes of violations vary to such a degree that no patterns could be found. However, all above considerations concerning the typology of violations in the pilot-cases proved that all root-causes of systemic violations in non-pilot cases lie either or both in **deficient legislation or practices**. The specific context of the cases is however circumstantial; it varies on case-by-cases cases and could not be generalised. Patterns could be linked only with the specific context and the case-background. So, the root-causes should be identified in every given case individually.

Other relevant cases

In this sub-chapter, the Methodology compares the above-mentioned categories of pilot- and non-pilot judgments with some other ECtHR cases implying comparable terminology or similar reasoning concerning systemic violations. The present comparison starts from the assumption that whereas the ECtHR is primarily a court delivering individual justice, in doing so it however resembles features of constitutional justice; or it is claimed to be so⁶¹. This role of the ECtHR remains debatable among

⁶¹ Council of Europe and PluriCourts, 'Conference on the long-term future of the European Court of Human Rights / Conférence sur l'avenir à long terme de la Cour européenne des droits de l'homme / Proceedings / Actes Oslo, 7-8

academicians and practitioners since the *Loizidou* that speaks of “the Convention as a constitutional instrument of European public order”⁶². However, for the present Research it is sufficient to underline that occasionally the ECtHR unavoidably enters into constitutional domain while dealing with individual applications. In other words, what interests the present Methodology is the terminology somehow correlated to the concept of “systemic problems”, and which, thus, could help to understand its meaning.

Inter-state and quasi-inter-State

Inter-State cases, apart from pilot- and quasi-pilot judgments, are the first category that pops up into the mind when speaking about “systemic problems”. This type of case are being based on complaints about a pattern of official conduct giving rise to continuing breaches of the Convention. They are broader by definition than individual complaints as they relate to systemic failures rather than to individual violations⁶³. Truly, as it was summarised (emphasis added):

... In inter-State cases a distinction needs to be made between two completely different situations,

...

3. The first situation is where the applicant State complains of a violation of certain fundamental rights of one or more of its nationals – individuals who are identified and named – by another Contracting

*4. The second situation ... is where the applicant State complains, essentially and in general terms, about systemic problems and shortcomings or administrative practices in another Contracting Party, and where the aim is primarily to uphold the European public order, even though the State in question may also be pursuing its own clear political interests ...*⁶⁴

In this sense, it should be ascertained what is the meaning of these “systemic problems and shortcomings” or “administrative practices” in the inter-State cases. These characterisations could be drawn from the texts of such judgments. The principal terminology used there is “consistent administrative practice incompatible with the Convention but officially tolerated by the respondent State. The ECtHR underlined that such an administrative practice comprises two elements: the “repetition of acts” and “official tolerance”⁶⁵.

The first element, is described as ‘an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system’⁶⁶.

The second element, means that ‘illegal acts are tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied’. To this last element it was added that “any action taken by the higher authority

April / avril 2014’ (Oslo: Council of Europe and PluriCourts, 2014) chap. “Rule of law: ‘Constitutional Court’ or ‘guardian of individuals’”.

⁶² ECtHR, *Loizidou v. Turkey (preliminary objections)* (1995) para. 75.

⁶³ *Cyprus v. Turkey [GC] (just satisfaction)* (2014) para. 37 with the reference to *Austria v. Italy*, no. 788/60, Commission decision of 11 January 1961, Yearbook 6, p. 116.

⁶⁴ *Cyprus v. Turkey (just satisfaction)* Partly concurring and partly dissenting opinion of judge Casadevall.

⁶⁵ Commission (Plenary), *France, Norway, Denmark, Sweden and the Netherlands v. Turkey (Dec.)* (1983) para. 49; ECtHR, *Cyprus v. Turkey [GC]* (2001) para. 99.

⁶⁶ *Ireland v. the United Kingdom* (1978) para. 159; *Cyprus v. Turkey*, para. 115.

must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system”⁶⁷.

Both elements operate with systemic problems. From these, the later element appears to be more or less *mala fides* in character, thus making the inter-State application stronger than any other individual application disclosing similar patterns of “systemic violations”. The relevant example of this meaning is the case of *Georgia v. Russia (I)*, where it is apparent that the ECtHR regarded the syntagma “official tolerance” rather as formally well-coordinated state “policies”⁶⁸.

The 2nd element - “official tolerance” - is mainly characteristic to the inter-State cases and reveals a certain degree of collective and/or institutional responsibility of the respondent state. Still, the 1st element – “repetition of acts” - remains the most relevant to characterise “systemic patterns” in the context of the present Methodology. Indeed, repetition of acts at massive scales because of systemic patterns have been presumed to be involuntary on part of the State authorities. At least this was initial sense given to systemic disfunctions by the *Briownowski* judgment that however mentioned certain degree of such an “official tolerance”⁶⁹. The followed case-law has abandoned this element and almost has never referred to the alleged “official tolerance”. It has preferred to focus on the “repetitiveness” element⁷⁰. In all other pilot cases, the ECtHR has actually introduced more mitigated language for characterisation of the State conduct and/or its attitude towards systemic problems. For example, it could be often observed that the ECtHR uses the concept of a “failure on part of the respondent state to struck a fair balance between various interest at stake”⁷¹. In other situations, the ECtHR underlines the respondent State unilateral acknowledgment of its own failures⁷². This turnover of the ECtHR reasoning is characteristic to pilot- and quasi-pilot judgments. It highlights *bona fides* conduct on part of the respondent States facing systemic problems, in the opposite to the inter-State cases.

Another category of cases, the so-called “quasi-inter-State” applications, does not appear in formal legal language. The concept seems to be a result of lawyers’ common tongue; a kind of legalism. In the nutshell,

⁶⁷ Commission (Plenary), *France et al. v. Turkey*, para. 49.

⁶⁸ ‘... the Court concludes that from October 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals was put in place in the Russian Federation which amounted to an administrative practice for the purposes of Convention case- law...’ ECtHR, *Georgia v. Russia (I)* [GC] (2014) para. 159.

⁶⁹ ‘..In the Court’s opinion, such conduct by State agencies, which involves a deliberate attempt to prevent the implementation of a final and enforceable judgment and which is, in addition, tolerated, if not tacitly approved, by the executive and legislative branch of the State, cannot be explained in terms of any legitimate public interest or the interests of the community as a whole. ...’ *Broniowski*, para. 175.

⁷⁰ ‘... It was true that the Polish State, which inherited from the communist regime an acute shortage of flats available for lease at an affordable level of rent, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests. It had to secure the protection of the property rights of landlords and respect the social rights of tenants, who were often vulnerable individuals. Nevertheless, the legitimate interests of the community in such situations called for a fair distribution of the social and financial burden involved in the transformation and reform of the country’s housing supply. That burden could not, as in the applicant’s case, be placed on one particular social group, however important the interests of the other group or the community as a whole.’ ECtHR, *Hutten-Czapska*, para. 225.

⁷¹ ‘... Hence, an overhaul of the legislation in order to create clear and simplified rules of procedure would make the compensation scheme more foreseeable in its application compared with the present system, the provisions governing which are contained in a number of different laws, ordinances and decrees. Setting a cap on compensation awards and paying them in instalments over a longer period might also help to strike a fair balance between the interests of former owners and the general interest of the community...’ *Atanasiu*, para. 235.

⁷² *Ananyev*, para. 188; *Olaru*; *Burmych*.

these are the cases initiated by an individual but actually sponsored by the State and thus elevating into a genuine inter-State dispute⁷³. In lack of the space and time in the present Methodology, this type of cases will not be dedicated much attention. It is enough to say, that they resemble inter-State cases, precisely because they raise “systemic questions”, mostly resulting from inter-State disputes over the control of territories⁷⁴ or in *post-bellum* situations⁷⁵. Each of these cases, apart from inter-State interests, underlines systemic patterns leading to multiple repetitive violations. For example, this character was emphasised by the ECtHR in the *Chiragov* and *Sargsyan* cases, literally using in the same language towards two dissenting States:

*The Court is thus dealing with a continuing situation which has its roots in the unresolved conflict over Nagorno-Karabakh and the surrounding territories and still affects a large number of individuals. More than one thousand individual applications lodged by persons who were displaced during the conflict are pending before the Court, slightly more than half of them being directed against Armenia and the remainder against Azerbaijan. The applicants in these cases represent just a small portion of the persons, estimated to exceed one million, who had to flee during the conflict and have since been unable to return to their properties and homes or to receive any compensation for the loss of their enjoyment.*⁷⁶

The language used in this quasi-inter-State dispute, is indeed characteristic to the ECtHR reasoning in the pilot-judgments referring to systemic problems.

Repetitive applications and / or cases

This term could be associated with “violations”, “cases” or “judgments” etc., but the ECtHR habitually uses it with the reference to “applications”. The concept of “repetitive application” is usually associated with the systemic problems and it is written more than often in the ECtHR judgments. However, its meaning is neither defined nor clearly determined in these judgments. It could be only implied that the ECtHR perceives the term “repetitive” with the reference to the “same question of law” rather than to the another, follow-up case originating from the same problem. In its explanations of statistical data, the term “repetitive” is connected to the ‘applications where the Court’s case-law is well-established’⁷⁷ and which falls into the Category V of priority. The latter category is described as “Applications raising issues already dealt with in a pilot/leading judgment (“well-established case-law cases”)⁷⁸. It thus appears that the ECtHR sees the “repetitiveness” as something doing several times, in tedious or even boring way.

Other Convention bodies understand the meaning of “repetitive” broadly, with the reference to the origins from the same problem. It could be argued that they see its semantic meaning as “constant” or “recurrent”, i.e. as happening in the same way many times. For example, the CM considers a case to be repetitive if it relates to ‘a structural and/or general problem already raised before the Committee in the

⁷³ L. Apostol, ‘The Role of the ECHR and Other Human Rights Bodies During the Ukrainian Conflict, Its Eventual Settlement and Aftermath’ (2017) *SSRN Electronic Journal* at 65 et seq.

⁷⁴ *Loizidou v. Turkey* (1996); *Güzelyurtlu and Others v. Cyprus and Turkey [GC]* (2019); ECtHR, *Sargsyan v. Azerbaijan [GC]* (2015); ECtHR, *Chiragov et al.; Ilaşcu and Others v. Moldova and Russia* (2004); *Catan and Others v. Moldova and Russia* (2012); *Mozer v. the Republic of Moldova and Russia [GC]* (2016); *Ališić et seq.*

⁷⁵ *Banković and others v. Belgium and others (inadmissibility decision) [GC]* (2001); *Al-Skeini and Others v. the United Kingdom [GC]* (2011); *Al-Jeda v. the United Kingdom [GC]* (2011); *Jaloud v. the Netherlands [GC]* (2014); *Hassan v. the United Kingdom [GC]* (2014) et seq.

⁷⁶ *Chiragov et al. (just satisfaction)*, para. 46; *Sargsyan v. Azerbaijan (just satisfaction) [GC]* (2017) para. 28.

⁷⁷ ECtHR, ‘Understanding the Court’s statistics’ (2019) p. 10.

⁷⁸ ECtHR, ‘The Court’s Priority Policy’ (2017) 1.

context of one or several leading cases' to which this case is affiliated to⁷⁹. The CDDH on its part expressly underlines that "repetitive applications" are those arising from systemic or structural issues at the national level' and observes them 'to be somehow broader, in that way that they refer to "large numbers of applications", which would include both repetitive applications and groups of applications raising *prima facie* systemic issues that the Court has not yet addressed in a judgment.⁸⁰

In view of the present Methodology, for the purposes of identification of a systemic problem the second meaning, reflecting both quantitative and qualitative connotations, is more appropriate.

The Committee of Ministers of the Council of Europe ("The CM")

The CM referred to systemic problems in 2004 for the first time and saw them as something that 'it is likely to give rise to numerous applications' before the ECtHR. It however regarded the determination of systemic problems, as well as identification of their root-causes, as inherent part of judicial function. Thus, the CM left these questions to be decided by the ECtHR. The CM invited the ECtHR to 'specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem'⁸¹.

Lately, in 2006, the CM gave priority in its proceedings to supervision of execution of judgments underlining systemic problems, still without attempting to identify the meaning of this last concept. It preferred to leave this task to the ECtHR⁸².

After the Interlaken and Brighton processes the CM introduced new modalities of supervision of execution. To recall, these were the reforms of the Convention mechanism that introduced the concepts of systemic and/or structural issues. These concepts were embraced by the CM in its twin-track system of supervision. The CM's *iGuide* operates with these concepts saying that 'an enhanced procedure for certain cases' should be set up⁸³. The classification of these cases is being made under the following indicators:

- judgments requiring urgent individual measures;
- pilot judgments;
- judgments disclosing major structural and/or complex problems as identified by the Court and/or the CM;
- interstate cases.

All these indicators warrant classification of cases under the enhanced supervision. While the 1st, 2nd and the 4th criteria do not normally raise complications for classification the 3rd indicator is completely opposite. The meaning of "structural and/or complex problems" remains unclear and could not be

⁷⁹ See, inter alia, Glossary in *2018 Supervision of the execution of judgments and decisions of the European Court of Human Rights. 12th Annual Report of the Committee of Ministers* (2019) p. 91.

⁸⁰ CDDH and DH-GDR, *CDDH Report containing conclusions and possible proposals for action on ways to resolve the large numbers of applications arising from systemic issues identified by the Court [CDDH(2013)R78 Addendum III]* (2013) para. 4.

⁸¹ 'Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session)' (2004)

⁸² Rule 4 of the 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275th meeting of the Ministers' Deputies)' (2006).

⁸³ *iGuide on the procedures and working methods of the Committee of Ministers'* sec. 19

defined, as the drafting proceedings of the Rules prove that⁸⁴. Pending preparatory work, the CM Delegates abandoned some drafting proposals attempting to clarify this criterion, including the alternative proposals to classify cases according to “the seriousness of violation”⁸⁵. Accordingly, while retaining some powers to classify cases according to the criterion of other “structural” or “complex” problem, the CM still prefers to rely on the ECtHR judgments in this respect. However, it has its own understanding of the systemic and/or structural problems and it could do this classification without the ECtHR. For example, in its 2011 Annual report the CM did not link structural or systemic problems with pilot judgments or repetitive cases, rightly pointing out that such a problem may arise from an isolated non-pilot judgment⁸⁶.

In this sense, the CM still prefers to define structural or systemic problems relying on the need of remedies and the principle of subsidiarity; as these problems raise many repetitive applications which should be filtered by the domestic authorities. In its annual reports the CM explains its own understanding of these problems from different perspectives, including with emphasis on the remedial element of the systemic problem but also with the reference to its origins. For example, in its Annual Report of 2017 it defined general measures as those ‘needed to address more or less important structural problems revealed by the Court’s judgments to prevent similar violations to those found or put an end to continuing violations’. According to CM, they ‘imply a change of legislation, of judicial practice or practical measures such as the refurbishing of a prison or staff reinforcement, etc’. Yet again, the CM refers to its Recommendation (2004)6 saying that introduction of ‘domestic remedies is an integral part of general measures’ in situation of structural and / or systemic problems⁸⁷. In this sense, it still keeps the meaning of problems derived from pilot judgments, ‘when the Court identifies a violation which originates in a structural and / or systemic problem which has given rise or may give rise to similar applications against the respondent State’⁸⁸.

However, the working methods of the CM prove that it regards structural problems in much broader fashion, not always connected with the understanding given by the pilot and/or quasi-pilot judgment. For

⁸⁴ ‘...The Deputies have however expressed the wish that one of the proposed indicators, namely that concerning judgments raising structural and/or complex problems identified by the Court or the Committee of Ministers should be more precise...’ Committee of Ministers, ‘CM/Inf/DH(2010)45-final 07/12/2010—Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Outstanding issues concerning the practical modalities of implementation of the new twin track supervision system - Document prepared by the Department for the Execution of Judgments of the European Court of Human Rights (DG-HL) with a view to its examination at their 1100th meeting (December 2010) (DH)’ (2010) p. 2.

⁸⁵ ‘7. During discussions it was also proposed to add a new indicator, namely “cases raising serious violations of the ECHR”. ... 8. It should be stressed in this respect that, in its long experience ..., the Committee of Ministers has never considered it appropriate to introduce such an indicator explicitly, instead preferring a pragmatic approach, taking fully into account the conclusions of the Court in its judgments. ... 9. As ... rightly pointed out, serious violations are a priori covered by the indicators already suggested, particularly those concerning cases “requiring urgent individual measures” or “raising complex problems”. It has also been emphasised that the fact that any case may be examined under the enhanced procedure by decision of the Committee of Ministers at the initiative of a member state or the Secretariat represents in itself a sufficient guarantee to cover cases of “serious violations” in the light of the circumstances of the case and the Court’s considerations in the judgment at issue. It thus seems unnecessary to introduce such an additional indicator.’ ‘CM/Inf/DH(2010)45-final 07/12/2010’.

⁸⁶ Committee of Ministers, *Supervision of the execution of judgments and decisions of the European Court of Human Rights. Annual report, 2011* (2012) p. 40 Footnote 25.

⁸⁷ Committee of Ministers, *2017 Supervision of the execution of judgments and decisions of the European Court of Human Rights. 11th Annual Report of the Committee of Ministers* (2018) p. 54.

⁸⁸ Committee of Ministers, *Annual Report 2017*, p. 55.

example, the cases are assembled in groups by the CM under similar violations or being linked to the same structural or systemic problem⁸⁹. But the most illustrative example of the CM's extensive understanding of the systemic problem is the meaning of "a leading case" from these groups. It defined the leading case as a:

*...case which has been identified as revealing new structural and / or systemic problems, either by the Court directly in its judgment, or by the Committee of Ministers in the course of its supervision of execution. Such a case requires the adoption of new general measures to prevent similar violations in the future. Leading cases also include certain possibly isolated cases: the isolated nature of a new case is frequently not evident from the outset and, until this nature has been confirmed, the case is treated as a leading case.*⁹⁰

This definition includes certain elements of systemic thinking such preventive effects for the future. In other words, the structural problem is being observed in its posterity, as a problem giving birth to new violations. For these reasons, the CM sees the need to introduce general measures for prevention as the systemic violations might be continuous or recurring in character. On the contrary, an isolated case is that 'where the violations ... appear closely linked to specific circumstances, and [do] not require any general measures'⁹¹. Such a case requires only individual measures, i.e. those 'that the respondent States' authorities must take to erase, as far as possible, the consequences of the violations for [a particular applicant(s)]'⁹².

Many tend to consider a systemic problem as closely linked with repetitiveness. For example, some Council of Europe officials say that:

*A major continuing problem closely linked with structural problems is that of repetitive cases. It goes to the heart of the effectiveness of the system and the principle of subsidiarity. The Court has marked in different ways, notably through the pilot judgment procedure, that it is not its role to provide redress in face of great numbers of repetitive cases*⁹³.

Repetitive cases, indeed are the most illustrative consequences of systemic problems. Yet, they are not the only indicators that would prove that such a problem exists. The CM defines them as an echo of leading cases disclosing structural problems⁹⁴. But the lack of repetitive cases does not necessarily mean that a particular judgment is isolated and reveals no systemic problem. The systemic problem is perceived by the CM in the substance; i.e. what effects the violation leads to or would potentially elevate into. This is again is proven by the above-quoted CM's definition written in each of its Annual reports since 2011⁹⁵. In its last report the CM reiterated that:

...The fact that some cases/groups have engendered relatively few repetitive cases does not lessen the importance of underlying structural problems, as the violations established may nevertheless

⁸⁹ Committee of Ministers, *Annual Report 2017*, p. 54 'Group of cases' definition.

⁹⁰ Committee of Ministers, *Annual Report 2017*, p. 55.

⁹¹ Committee of Ministers, *Annual Report 2017*, p. 54.

⁹² Committee of Ministers, *Annual Report 2017*, p. 54.

⁹³ Committee of Ministers, *Annual Report 2017*, p. 13 Remarks by the Director General of the Directorate General of Human Rights and Rule of Law.

⁹⁴ Committee of Ministers, *Annual Report 2017*, p. 55.

⁹⁵ See Footnote 86

have a great potential to generate repetitive cases (notably so “pilot” judgments), and/or because of the general importance of the problem at issue.⁹⁶

It seems that the CM observes “systemic problem” more clearly than the meaning of “complex problem”, which remains a bit blurred. No clues or definitions could be found in the CM documents. Only its Rules of classification briefly mention that the judgments disclosing this type of problems require enhanced supervision by the CM. Often, the terms of “structural” problem and the “complex problem” are being used interchangeably⁹⁷. In addition to that, the CM links these problems with its powers to render Interim resolutions, a ‘form of decision ... aimed at overcoming **more complex situations requiring special attention**⁹⁸. However, it remains unclear what that “special attention” means and on what criteria the CM devotes “such a special treatment” to a particular case at the expense of other judgments.

As it was mentioned above, complex problems could be raised by any non-pilot judgment and the criteria for classification of cases under this determinant are random. The CM did not define structural or systemic problems other than with the reference to repetitiveness and the likelihood of new recurrent violations stemming from the same cause. That was said about structural or systemic problems but not in respect of the complex problems.

In order to define the criteria used by the CM in evaluating the “complexity” criterion, the present Research attempted to find patterns in classification of cases under this determinant. The search of cases classified under enhanced procedure according to the “complex problem” indicator revealed almost 260 leading cases currently pending supervision before the CM. The oldest one is the case of *Loizidou* and the last one is *Strand Lobben et al.*⁹⁹ The merits of all these cases and the problems vary and it is almost impossible to find a pattern how and why these cases fall into the category of complex cases. For example, the well-known *Loizidou* case concerns the right to propriety linked with the determination of jurisdiction in the uncontrolled territories. This case is being examined together with another inter-State case¹⁰⁰, which makes it complex because of the difficult context and background. Similar arguments support the complexity of another case, which concerns the breach of the right to life following lack of cooperation in the investigation of homicide, also in connection with the exercise of jurisdiction in the uncontrolled territories¹⁰¹. On the other hand, the *Strand Lobben et al.* judgment is complex because of the legal problem it raises, which is the difficulty to find a genuine balancing exercise between the interests of the child and his biological family. Another complex case is that of the *Ozdil et al.*¹⁰², concerning extra-legal transfer of persons to their State of origin, circumventing domestic and international law. Again, the context of this transfer is complex and the case becomes so, though from a pure legal perspective the legal

⁹⁶ Committee of Ministers, *Annual Report 2017*, p. 89 Footnote 228; *Annual Report 2018*, chap. Appendix 3-Glossary and references in the text.

⁹⁷ ‘... As regards developments with respect to specific groups of cases, it is worth noting the major advances made on a number of major and longstanding structural problems. The capacity of the supervision process to maintain pressure and provide support over long periods of time has here been instrumental in keeping the solution of these complex problems high on the agenda of successive governments...’ Committee of Ministers, *Annual Report 2018*, p. 12.

⁹⁸ See Committee of Ministers, *Annual Report 2018*; Committee of Ministers, *Annual Report 2017* Appendix 3 – Glossary.

⁹⁹ *Strand Lobben and Others v. Norway* (2019).

¹⁰⁰ *Cyprus v. Turkey*.

¹⁰¹ *Güzelyurtlu and Others v. Cyprus and Turkey [GC]*.

¹⁰² *Ozdil and Others v. the Republic of Moldova* (2019).

questions under the Convention are not so difficult to resolve. The examples may follow as every case from all current 260 complex cases seems to be specific and individual.

Only one element appears to be recurrent - all complex cases under the supervision of the CM usually fall into the category of the highly important cases according to the ECtHR classification of the case-law; the so-called “key cases”, the 1st and/or the 2nd importance. Briefly, the ECtHR informally classifies its cases into 4 levels of importance. The principal criterion for classification of the level of importance is what contribution a particular case makes to the development, clarification or modification of the ECtHR’s case-law, either generally or in relation to a particular State’, The highest level from these occupy those case selected to be published in the ECtHR Reports¹⁰³, but these are all cases of the 1st level of importance. The 2nd level includes the cases ‘which, while not making a significant contribution to the case-law, nevertheless go beyond merely applying existing case-law’¹⁰⁴.

It should be noted that the “importance” of a case should not be confused with the classification by “priority policy” of the ECtHR, which mainly refers to the time-management and administration of pending cases¹⁰⁵. It is noted that under this priority policy the cases of the 1st and 2nd level of importance fall into the Category II, which includes cases concerning systemic problems and questions of general interest. It is interesting that that in this situation the ECtHR provides for a brief explanation what these concepts mean. In this framework, the ECtHR sees structural problem as associated with the risks to impact the effectiveness of the Convention system, while the questions of general interest are those affecting domestic or European legal systems¹⁰⁶.

Almost all cases regarded as complex by the CM usually are classified by the ECtHR as high or the highest level of importance. This implies that the problems in these cases are difficult from the executional point of view. However, even being so, the complex cases do not necessarily indicate existence of systemic or structural problems. In other words, a judgment raising systemic or structural problems is indeed complex, but not all judgments with complex problems equally disclose systemic and/or structural problems. Only 40% of complex cases under supervision of the CM are being followed by repetitive cases, which may be an indicator of a structural problem¹⁰⁷. The rest 60% are isolated cases, however they remain classified as

¹⁰³ ‘A selection of the most important cases made by the Bureau (see Chapter II of Rules of Court) following a proposal by the Jurisconsult is only published online since 2016. This selection was previously published in the Reports of Judgments and Decisions.’ ECtHR, ‘Reports of Judgments and decisions’.

¹⁰⁴ ECtHR, Research and Library division, Directorate of the Jurisconsult, ‘HUDOC User Manual’ (2017) p. 8.

¹⁰⁵ ‘...In June 2009 the Court adopted a priority policy with a view to speeding up the processing and adjudication of the most important, serious and urgent cases. It established seven categories ranging from urgent cases concerning vulnerable applicants (Category I) to clearly inadmissible cases dealt with by a Single Judge (Category VII)...’ ECtHR, ‘The Court’s Priority Policy’.

¹⁰⁶ ‘Category II : Applications raising questions capable of having an impact on the effectiveness of the Convention system (in particular a structural or endemic situation that the Court has not yet examined, pilot-judgment procedure) or applications raising an important question of general interest (in particular a serious question capable of having major implications for domestic legal systems or for the European system).’ ECtHR, ‘The Court’s Priority Policy’.

¹⁰⁷ Such as *LULI AND OTHERS v. Albania*, *EMIN HUSEYNOV v. Azerbaijan*, *MAHMUDOV AND AGAZADE v. Azerbaijan*, *KEHAYOV v. Bulgaria*, *AUAD v. Bulgaria*, *M. AND OTHERS v. Bulgaria*, *STANEV v. Bulgaria*, *HARAKCHIEV AND TOLUMOV v. Bulgaria*, *GAVAZOV v. Bulgaria*, *BORIS KOSTADINOV v. Bulgaria*, *C.G. AND OTHERS v. Bulgaria*, *KOLEVI v. Bulgaria*, *TSINTSABADZE v. Georgia*, *ENUKIDZE AND GIRGVLIANI v. Georgia*, *MEMBERS OF THE GLDANI CONGREGATION OF JEHOVAH’S WITNESSES AND OTHERS v. Georgia*, *BEKIR-OUSTA AND OTHERS v. Greece*, *RAHIMI v. Greece*, *SHARIFI AND OTHERS v. Italy and Greece*, *HAGYO v. Hungary*, *CIPOLLETTA v. Italy*, *ARNOLDI v. Italy*,

complex. The violations found in these later cases also vary; from discrimination issues¹⁰⁸, family life¹⁰⁹, exercise of freedoms¹¹⁰ to more serious violations such as those or the right to life¹¹¹, ill-treatments¹¹² or

TRAPANI v. Italy, MUSO v. Italy (no. 1), OLIVIERI AND OTHERS v. Italy, COLLARILE v. Italy, AMATO GAUCI v. Malta, GHIGO v. Malta, BELLER v. Poland, FERNANDES DE OLIVEIRA v. Portugal, VICENTE CARDOSO v. Portugal, SARBAN v. the Republic of Moldova, EDUARD POPA v. the Republic of Moldova, I. D. v. the Republic of Moldova, T.M. AND C.M. v. the Republic of Moldova, LEVINTA v. the Republic of Moldova, VLAD v. Romania, TICU v. Romania, SOARE AND OTHERS v. Romania, MARCU v. Romania, BRAGADIREANU v. Romania, KLYAKHIN v. Russia, KOLYADENKO AND OTHERS v. Russia, SAVRIDDIN DZHURAYEV v. Russia, GARABAYEV v. Russia, FEDOTOV v. Russia, KALASHNIKOV v. Russia, SVINARENKO AND SLYADNEV v. Russia, BELYAYEV v. Russia, KULYUK AND OTHERS v. Russia, NATALYA GERASIMOVA v. Russia, SHPAKOVSKIY v. Russia, MALINOVSKIY v. Russia, TETERINY v. Russia, MAKAROVA v. Russia, POPOV v. Russia, NAVALNYY v. Russia, ABUYEVA AND OTHERS v. Russia, MEDOVA v. Russia, ZARA ISAYEVA v. Russia, BUNTOV v. Russia, GENERALOV v. Russia, YUDINA v. Russia, KUZMENKO v. Russia, KOPYLOV v. Russia, GLADYSHEV v. Russia, MENESHEVA v. Russia, SALIKHOV v. Russia, BELOZOROV v. Russia and Ukraine, RAFAILOVIC v. Serbia, KINSTIB AND MAJKIC v. Serbia, R. KACAPOR v. Serbia, ONER AND TURK v. Turkey, HASAN KOSE v. Turkey, ISAAK v. Turkey, BATI AND OTHERS v. Turkey, AKARSUBASI v. Turkey, ATAYKAYA v. Turkey, YAKOVENKO v. Ukraine, MELNIK v. Ukraine, SALAKHOV AND ISLYAMOVA v. Ukraine, TARASOV v. Ukraine, NECHIPORUK AND YONKALO v. Ukraine, KOVAL AND OTHERS v. Ukraine, MIKHALKOVA AND OTHERS v. Ukraine, ZHYZITSKYI v. Ukraine, SHCHOKIN v. Ukraine, YAREMENKO v. Ukraine, MATUSHEVSKYY AND MATUSHEVSKA v. Ukraine, FEDORCHENKO AND LOZENKO v. Ukraine, IGNATOV v. Ukraine, BELOUSOV v. Ukraine, TYMOSHENKO v. Ukraine, LUTSENKO v. Ukraine, ZHOVNER v. Ukraine, AGROKOMPLEKS v. Ukraine, BURMYCH AND OTHERS v. Ukraine, YURIY NIKOLAYEVICH IVANOV v. Ukraine, BALITSKIY v. Ukraine, SVETLANA NAUMENKO v. Ukraine, ISAYEV v. Ukraine, MCCAUGHEY AND OTHERS v. the United Kingdom.

¹⁰⁸ *YILDIRIM v. Turkey, BERDZENISHVILI AND OTHERS v. Russia, SEJDIC AND FINCI v. Bosnia and Herzegovina, ALEKSEYEV v. Russia, BAYEV AND OTHERS v. Russia, BALSAN v. Romania, IDENTOBA AND OTHERS v. Georgia, VIRABYAN v. Armenia, TALPIS v. Italy, M.C. AND A.C. v. Romania, SECIC v. Croatia, HORVATH AND KISS v. Hungary, D.H. AND OTHERS v. the Czech Republic, OPUZ v. Turkey*

¹⁰⁹ *OZMEN v. Turkey, R.R. v. Poland, ZORICA JOVANOVIĆ v. Serbia, STRAND LOBBEN AND OTHERS v. Norway*

¹¹⁰ *OGNEVENKO v. Russia, ORTHODOX OHRID ARCHDIOCESE v. the former Yugoslav Republic of Macedonia, HOUSE OF MACEDONIAN CIVILIZATION AND OTHERS v. Greece, VENIAMIN TYMOSHENKO AND OTHERS v. Ukraine, UMO ILINDEN AND OTHERS v. Bulgaria, ALTUG TANER AKCAM v. Turkey, DMITRIYEVSKIY v. Russia, MURADOVA v. Azerbaijan, BUCUR AND TOMA v. Romania, KHADIJA ISMAYILOVA v. Azerbaijan, BERKOVICH AND OTHERS v. Russia, DE TOMMASO v. Italy, ISIKIRIK v. Turkey, ASSOCIATION CASE OF SOLIDARITY WITH JEHOVAH WITNESSES AND OTHERS v. TURKEY, IZZETTIN DOGAN AND OTHERS v. Turkey, CUMHURİYETÇİ EĞİTİM VE KÜLTÜR MERKEZİ VAKFI v. Turkey*

¹¹¹ *GÜZELYURTLU AND OTHERS v. Turkey, MAZEPA AND OTHERS v. Russia, KOSMATA v. Ukraine, DOBRIYEVA AND OTHERS v. Russia, GOROVENKY AND BUGARA v. Ukraine, SKENDZIC AND KRZNNARIC v. Croatia, MIKAYIL MAMMADOV v. Azerbaijan, KHAYLO v. Ukraine, SERGEY SHEVCHENKO v. Ukraine, MCKERR v. the United Kingdom, ASSOCIATION '21 DECEMBRE 1989' AND OTHERS v. Romania, ARSKAYA v. Ukraine, NENCHEVA AND OTHERS v. Bulgaria, DINK v. Turkey, KASA v. Turkey, MURADYAN v. Armenia, FINOGENOV AND OTHERS v. Russia, KAKOULLI v. Turkey*

¹¹² *CORALLO v. the Netherlands, LOGVINENKO v. Ukraine, MANDIC v. Slovenia, NISIOTIS v. Greece, ENACHE v. Romania, KAVERZIN v. Ukraine, GUBACSI v. Hungary, AFANASYEV v. Ukraine, PETUKHOV v. Ukraine (no. 2), KHAN v. France, DORNEANU v. Romania, GURBAN v. Turkey, PARASCINETI v. Romania, ULKE v. Turkey, KHASHIYEV AND AKAYEVA v. Russia, GONGADZE v. Ukraine, ASHOT HARUTYUNYAN v. Armenia, ATAMAN v. Turkey, MAMMADOV (JALALOGLU) v. Azerbaijan, KARABET AND OTHERS v. Ukraine, KHANI KABBARA v. Cyprus, MIKHEYEV v. Russia, MAKARATZIS v. Greece, M. G. C. v. Romania, E.B. v. Romania, OYAL v. Turkey, M.S.S. v. Greece, M.A. v. France*

slavery and deprivations of liberty¹¹³. Many complex cases concern fair trial guarantees and breaches of the rights to a peaceful possession¹¹⁴.

On the contrary the complex problems revealed by the quasi-inter-state disputes¹¹⁵ will be always capable of elevating into repetitive cases. However, this does not make them by default systemic cases. Whether such a case is complex or systemic has to be ascertained on case-by-case basis.

All these examples prove the difficulty to find a pattern in classification of cases under the indicator of “complex problem”. It could be argued that, despite of being complex, none of these would be necessarily followed by repetitive cases. Still, these cases, even if isolated, could become systemic without appropriate execution. The complex problems may elevate into structural and/or systemic problem if the respondent State is not careful to implement general measures. Indeed, the examples described above, with the reference to *Sejdic and Finci* and the *Olexandr Volkov* cases, prove the importance of implementation of general measures to confine evolution of a complex problem into systemic.

This reasoning concerning the need of executional general measures is actually what distinguishes systemic cases from the complex cases. It was noted above that any systemic case is by implication a complex one. However, not every complex case is systemic, even if it reveals a problem amounting to some extent into repetitive cases. Something other than the repetitiveness differentiates systemic problems from complex issues. This element is the **complexity of the general measures** needed to be implemented by the respondent State to tackle the problem raised by a particular judgment, systemic or otherwise. In other words, the classification of the problem into either systemic or complex could be made only from executional perspective.

Systemic problems require complex, yet extensive and all-inclusive general executional measures, implying reformation of entire systems and/or sub-systems, multi-layered amendments of legislation and long-term changes of practices. Complex problems, on the other hand, could be delicate in themselves but the solution to them is easier to find. Apart from some collateral factors, such as sensitivity, special cultural context or political willingness, complex problems do not require overall reforms, amendments of legislation or practices.

For example, the *Burmych* systemic case requires a wide range of measures, i.e. to set up an efficient enforcement system, to lift moratoria and socially-oriented domestic legislation preventing continuous flow of new violations and to introduce effective remedies. These are definitely complex and structural

¹¹³ *CHOWDURY AND OTHERS v. Greece, OZDIL AND OTHERS v. the Republic of Moldova, P. AND S. v. Poland, MERGEN AND OTHERS v. Turkey, KATS AND OTHERS v. Ukraine, LASHMANKIN AND OTHERS v. Russia, ALPARSLAN ALTAN v. Turkey, L.B. v. Belgium, AL NASHIRI v. Poland, AL NASHIRI v. Romania, ABU ZUBAYDAH v. Lithuania, NASR AND GHALI v. Italy, VARNAVA AND OTHERS v. Turkey*

¹¹⁴ *BAKA v. Hungary, INSANOV v. Azerbaijan, MUTU AND PECHSTEIN v. Switzerland, MUSHEGH SAGHATELYAN v. Armenia, GAGLIONE AND OTHERS v. Italy, MAJEWSKI v. Poland, ABENAVOLI v. Italy, BELL v. Belgium, BAK v. Poland, LEDONNE v. Italy (no. 1), MERIT v. Ukraine, NEDIM SENER v. Turkey, KORNEYKOVA v. Ukraine, M.A. v. Cyprus, KHLAIFIA AND OTHERS v. Italy, KIM v. Russia, GRABOWSKI v. Poland, SACALEANU v. Romania, MIRZAYEV v. Azerbaijan, HUMBATOV v. Azerbaijan, GIZZATOVA v. Russia, KUNIC AND OTHERS v. Bosnia and Herzegovina, TARVERDIYEV v. Azerbaijan, BEKA-KOULOCHERI v. Greece, ZELENCHUK AND TSYTSYURA v. Ukraine, APAP BOLOGNA v. Malta, BITTO AND OTHERS v. Slovakia, APOSTOLIDI AND OTHERS v. Turkey, EAST WEST ALLIANCE LIMITED v. Ukraine, JOANNOU v. Turkey, MAGO v. Bosnia and Herzegovina, DOKIC v. Bosnia and Herzegovina, LOIZIDOU v. Turkey, SARGSYAN v. Azerbaijan, CHIRAGOV AND OTHERS v. Armenia*

¹¹⁵ *Catan and Others v. Moldova and Russia*; ECtHR, *Mozer*; ECtHR, *Chiragov et al.*; ECtHR, *Sargsyan v. Azerbaijan [GC]*; *Güzelyurtlu and Others v. Cyprus and Turkey [GC]*.

measures needed to resolve the long-recurring problem of non-execution in the State concerned. Conversely, another example, the case of *Hirsi Jamaa* appears at the first look as complex and seemingly systemic, because it involves potential repetitiveness. It seemingly required a variety of measures, including changing laws and practices, as well as seeking international assurances. However, this case has never been attributed to systemic, though it was kept under the classification as a complex case¹¹⁶. It was clear from the beginning what Italy should implement as general measures, i.e. to suspend incompatible bilateral agreements and to strengthen human rights awareness in view of preventing “push-ups” practices¹¹⁷. Accordingly, even though the case involved complex issues they were never regarded as systemic. Once the required measures were implemented, the supervision of execution was closed¹¹⁸. This does not mean that the problem was fully confined and the risk of recurrence disappeared. No absolute execution exists but the risk of new violations has been reduced at minimum. What worked in this case will not be the same in the first example. In the *Burmych* case, contrary to *Hirsi Jamaa*, the problem cannot be confined by simple changes in legislation, annulment of laws or change of practices. Its execution is more complex, multi-layered and long-termed; the measures require a strategy¹¹⁹ which makes the case systemic.

Exploring the relationship between complex and systemic problems it could be argued that they could be distinguished by the complexity of executional measures they require. **Systemic cases are complex cases giving raise to repetitive patterns of violations and that require structural changes. Complex cases ask for executional measures less complex than the problem itself.** This distinction could be hardly observed in abstract terms and should be drawn only on case-by-case basis.

Systemic problems should not be blindly equated with structural issues. Once, a case requires structural changes this could be a strong indication that the case might be systemic. Yet again, the CM practice on supervision proves that even in cases of structural problems such a case is not necessarily systemic.

For example, currently the CM classified 29 cases under the enhanced procedure according to the indicator of “structural problem”¹²⁰ All examples of cases involve both complex and structural problems.

¹¹⁶ Committee of Ministers, *Hirsi Jamaa et al. v. Italy* (2012) supervision of execution closed in 2016.

¹¹⁷ Committee of Ministers, ‘1150 (DH) meeting/réunion, 24-26 September/septembre 2012 - Decision cases No. 13 / Décision affaires n° 13 - Hirsi Jamaa and others against Italy / Hirsi Jamaa et autres contre Italie 27765/09 [CM/Del/Dec(2012)1150/13]’ (2012) para. 5; ‘1164 (DH) meeting/réunion, 5-7 March/mars 2013 - Decision cases No. 14 / Décision affaires n° 14 - Hirsi Jamaa against Italy / Hirsi Jamaa contre Italie 27765/09 [CM/Del/Dec(2013)1164/14]’ (2013) paras 3 and 4; ‘1208 DH meeting/réunion - 23-25 September/septembre 2014 - Decision cases No. 9 / Décision affaires n° 9 - Hirsi Jamaa and others against Italy / Hirsi Jamaa et autres contre Italie (27765/09) [CM/Del/Dec(2014)1208/9]’ (2014) para. 2.

¹¹⁸ Committee of Ministers, ‘Resolution CM/ResDH(2016)221 Execution of the judgment of the European Court of Human Rights *Hirsi Jamaa and Others against Italy*’ (2016).

¹¹⁹ Committee of Ministers, ‘DECISION 1355 meeting (DH) September 2019 - H46-28 Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine (Applications No. 40450/04, 56848/00, 46852/13) [CM/Del/Dec(2019)1355/H46-28]’ (2019); ‘DECISION 1348 meeting (DH) June 2019 - H46-35 Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine (Application No. 40450/04, 56848/00, 46852/13) [CM/Del/Dec(2019)1348/H46-35]’ (2019); ‘DECISION 1340 meeting (DH) March 2019 - H46-29 Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine (Application No. 40450/04) [CM/Del/Dec(2019)1340/H46-29]’ (2019).

¹²⁰ *ZELENCHUK AND TSYTSYURA v. Ukraine, ISIKIRIK v. Turkey, N. v. Romania, KEBE AND OTHERS v. Ukraine, ULKE v. Turkey, ONER AND TURK v. Turkey, CESTARO v. Italy, VYERENTSOV v. Ukraine, NEVMERZHITSKY v. Ukraine, SAVITSKY v. Ukraine, LUTSENKO v. Ukraine (no. 2), CHANYEV v. Ukraine, DOBRIYEVA AND OTHERS v. Russia, STATILEO v. Croatia, ATUDOREI v. Romania, CRISTIAN TEODORESCU v. Romania, ISTVAN GABOR KOVACS v. Hungary,*

However, not all cases should be regarded as “systemic”. For example, the case of *S.Z. v. Bulgaria* is classified as systemic in respect of ineffective criminal investigations concerning both private individuals and law enforcement agents. Its structural problem, however, concerns the lack of guarantees for the independence of criminal investigations against the Chief Prosecutor. But this structural problem alone could not be considered as systemic, since it is only a part of another bigger problem concerning a number of other shortcomings affecting investigation system¹²¹.

On the other hand, the case of *Zelenchuk and Tsytsyura* concerns the legislation. A legislative ban in itself extends beyond individual interests, because an exceptionally large number of individuals could be affected by the so-called land-moratorium¹²². In this case, the ECtHR identified structural problem but that have not yet elevated into systemic problem. Lifting that moratorium, would be the sole solution to the problem on the structural level. It however does not imply, as the ECtHR put it, ‘that an unrestricted market in agricultural land has to be introduced in Ukraine immediately’¹²³. Accordingly, the case reveals complex and structural problems and could potentially raise a number of repetitive applications. However, it could be hardly considered as systemic because, the solution to the problem in this case is to lift moratoria making legislative changes ‘to ensure a fair balance between the interests of agricultural land owners and the general interests of the community’¹²⁴. Indeed, the CM did not classify it as systemic problem¹²⁵ but it ‘underlined the need to act without further delay in view of the wide scale of the problem which, if not resolved, has the potential to generate a large number of similar applications to the Court’¹²⁶.

Many other examples could be shown where the CM does not classify a case under the “structural problem” indicator but which remains complex necessitating structural changes. The case of *Savca*, for example, concerns lengthy detention on remand extended beyond the constitutional 12-month time-limits. The extension of detention was based on primary legislation which were contrary to constitutional provisions¹²⁷. The case revealed structural problem in the domestic legislation and led to a number of repetitive applications¹²⁸. However, the case required only amendments of primary legislation and not changes in the whole criminal system. Accordingly, due to the authorities’ prompt response by repealing incompatible legislation, the case was summarily closed¹²⁹ by the CM passing the classification stage and indicators of “complex”, “structural” or “systemic” problems. Nevertheless, the case made part of a bigger

LASZLO MAGYAR v. Hungary, TIMUS AND TARUS v. the Republic of Moldova, GAFGAZ MAMMADOV v. Azerbaijan, S.Z. v. Bulgaria, MCKERR v. the United Kingdom, VASILESCU v. Belgium

¹²¹ ‘Such as delays, lack of thorough and objective investigation, omission to shed light on a particular person’s role in the offence, a refusal of a prosecutor to comply with a judicial decision quashing his decision to terminate the investigation.’ Committee of Ministers, ‘1362nd meeting (December 2019) - H46-6 S.Z. / Kolevi group v. Bulgaria (Applications Nos. 29263/12 and 1108/02) [CM/Notes/1362/H46-6]’ (2019).

¹²² *Zelenchuk and Tsytsyura v. Ukraine* (2018) para. 156.

¹²³ *Zelenchuk and Tsytsyura*, para. 150.

¹²⁴ ECtHR, *Zelenchuk and Tsytsyura*, para. 150; Committee of Ministers, ‘1362 meeting (DH) December 2019 - H46-36 *Zelenchuk and Tsytsyura v. Ukraine* (Application No. 846/16) [CM/Del/Dec(2019)1362/H46-36]’ (2019).

¹²⁵ Committee of Ministers, ‘1362nd meeting (December 2019) - H46-36 *Zelenchuk and Tsytsyura v. Ukraine* (Application No. 846/16) [CM/Notes/1362/H46-36]’ (2019).

¹²⁶ Committee of Ministers, ‘CM/Del/Dec(2019)1362/H46-36’, para. 4.

¹²⁷ *Savca v. the Republic of Moldova* (2016) paras 51 and 52.

¹²⁸ Judgments in the cases of *Goremîchin* and *Miron* plus Decisions in the cases of *Enachi*, *Neicovcen* and *Moscoglo*, *Marîniuc*, *Morozan*, *Godniuc*, *Hodorogea*, *Pînzari* all against Moldova.

¹²⁹ Committee of Ministers, ‘Resolution CM/ResDH(2017)124 closing supervision, the 1284th meeting (DH) April 2017 [Savca case]’ (2017).

group of cases revealing structural problems, i.e. the case of *Şarban*. The analysis of this particular group could exceed the boundaries of the present Methodology. But this group is illustrative to disclose how structural problems are handled by the CM and how they could be distinguished from systemic cases.

The *Şarban* group mainly concerns to overuse of remand detention in criminal proceedings and the number of repetitive cases raised exponentially. Most of the repetitive cases¹³⁰, including the first group of *Muşuc* involving complex problem on detaining applicants without reasonable suspicion, were closed by the Committee of Ministers¹³¹. In the former group, the CM agreed with the legislative improvements but expressed reservations concerning the implementation of law by ‘inadequate reasoning of detention orders’. However, in the absence of new repetitive cases, the CM considered it appropriate to close the supervision. It decided to continue examination of the issues pertaining to the quality of judicial reasoning, as well as to the efficiency of remedies, within the context of the *Şarban* group only¹³². These examples prove that the CM could regard independently some cases as raising complex and structural problems, without such classification given by the ECtHR.

This, however, does not mean that the CM classified cases raising structural and/or complex problems as systemic cases, solely by its own motion and without due consideration to the ECtHR opinion. No such cases were found in the CM practice, i.e. that could be both structural-complex and systemic in the opinion of the CM but not in the classification of the ECtHR. The CM still relies on classification of systemic problems on the ECtHR. It has certain margin of appreciation in classifying the cases under the “structural” or “complex” indicators, but the “systemic” classification remains usually for the ECtHR to decide.

Last but not least, another important element should be mentioned in relation with the CM proceedings on supervision of cases with systemic issues. This is the **context of the case** or its **general background** in which the systemic violations endure. In the pilot-judgments, the ECtHR is careful to explain these aspects since they are relevant to identify the root-causes of the problem¹³³. In some quasi-inter-state cases the overall context of the case is mandatory part of the judgment¹³⁴. However, in cases which raise both complex and structural problems at the executional stage, risking to amount into systemic problems, the context is not evident and less visible. It must be only inferred by the CM on case-by-case basis.

For example, the case of *UMO Ilinden* does not appear to reveal structural or systemic issues. It concerns the domestic courts’ refusals to register an association that aimed to achieve “the recognition of the Macedonian minority in Bulgaria”¹³⁵. However, rerepeated refusals starting from 1998 to 2015, lead to

¹³⁰ Committee of Ministers, ‘Resolution CM/ResDH(2018)296 closing supervision, the 1322nd meeting (DH) September 2018, [Sara case]’ (2018).

¹³¹ Committee of Ministers, ‘Decision CM/Del/Dec(2016)1259/H46-19, the 1259th meeting (DH) June 2016 [Muşuc group, Guţu case and Brega group]’ (2016); ‘Decision CM/Del/Dec(2018)1318/H46-15, the 1318th meeting (DH) June 2018 [Muşuc group, Guţu case, Brega group]’ (2018); ‘Resolution CM/ResDH(2018)227 closing supervision, the 1318th meeting (DH) June 2018, [Muşuc, Stepuleac, Leva, Brega, Brega and Others cases]’ (2018).

¹³² Committee of Ministers, ‘Decision CM/Del/Dec(2019)1348/H46-17, the 1348th meeting (DH) June 2019 [Şarban group]’ (2019); ‘Notes and Status of Execution CM/Notes/1348/H46-17, the 1348th meeting (DH) June 2019 [Şarban group]’ (2019); ‘CM’s Resolution Muşuc et al.’; ‘Resolution CM/ResDH(2019)144 closing supervision, the 1348th meeting (DH) June 2019, [23 cases: Balakin, Buzadji, Castravet, Coteţ, Cucu and others, Feraru, Guţu, Ignatenco, Iurcovschi and others, Levinţa no. 2, Mătăsaru and Saviţchi, Modârca, Ninescu, Paşa, Rimschi, Secrieru, Sirencu, Stici, Straisteanu and others, Tripăduş, Ţurcan and Ţurcan, Veretco, Ursu]’ (2019).

¹³³ *Atanasiu*, paras 7–13; *Ananyev*, para. 184 et seq.; *Kurić*, para. 16 et seq.

¹³⁴ *Chiragov et al.*; *Sargsyan v. Azerbaijan [GC]*; *Ilaşcu*.

¹³⁵ *United Macedonian Organisation Ilinden and Others v. Bulgaria* (2006).

other similar judgments¹³⁶ and other connected cases¹³⁷. At the CM, the proceedings on the supervision of execution are burdensome because these cases involve specific inter-ethnic context elevated into a genuine inter-State dispute. The CM classified the cases under the indicator of “complex problem”, however it did not consider them as raising systemic or structural issues. Indeed, the cases do not require extensive and complex general measures, apart from the will of the authorities to comply with the ECtHR findings. However, the situation in fact elevates into systematic refusal to uphold the ECtHR’s judgments. In this sense, even if formally the cases are not systemic, it could be argued that they risk to become so because of their difficult context.

Two other cases examined in comparison could be an example of such a context-playing role. The systemic cases of *Olaru*¹³⁸ and *Ivanov*¹³⁹ generally concern the same structural ineffectiveness of the enforcement system and lack of remedies. Both pilot-judgments were delivered in the same year being once the respondent States inherited same systemic problems after the collapse of Soviet Union and back then their bailiff systems were similar. However, in the Republic of Moldova after the “April 2009 unrests”¹⁴⁰ a favourable political context was established. It allowed to pursue structural reforms of the enforcement system, to lift the root-causes of continuous non-enforcement and institute remedies. As a result, the CM downgraded its supervision into standard procedure¹⁴¹. In this sense the problem of non-enforcement in Moldova ceased to be systemic. In Ukraine, on the other hand, such a favourable political context appeared only after the so-called “Euromaidan movement” and the “February 2014 revolution”. Palpable evolution in execution of this group of cases was observed long after that in 2018 and 2019, following of the so-called “*Burmych crisis*”¹⁴².

These two cases, roughly compared, attest how a particular context plays, sometimes, a significant role in evaluation of the systemic issues. However, it should not be taken as primary criterion to assess whether the problem resemble systemic issues or not. A particular context is definitely a contributing factor to systemic problems, but it is not the leading criterion.

Other Council of Europe bodies’ views on systemic problems

The below Research was carried out from comparative perspective. The ECtHR and the CM’s concepts of the systemic problems were opposed to the views of other relevant bodies. This comparison brings further clarity in delineation of the systemic problems.

¹³⁶ *United Macedonian Organisation Ilinden and Others v. Bulgaria (no. 2)* (2011); *United Macedonian Organisation Ilinden and Others v. Bulgaria (no. 3)* (2018).

¹³⁷ *United Macedonian Organisation Ilinden and Ivanov v. Bulgaria (2005)*, *United Macedonian Organisation Ilinden and Ivanov v. Bulgaria (No. 2)* (2011), *Singartiyski and Others v. Bulgaria* (2011), *United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (No. 2)*, *Yordan Ivanov and Others v. Bulgaria* (2018) etc.

¹³⁸ Committee of Ministers, *Group OLARU v. Moldova* (2009).

¹³⁹ Committee of Ministers, *Group YURIY NIKOLAYEVICH IVANOV v. Ukraine* (2009).

¹⁴⁰ See for the background ECtHR, *Taraburca v. Moldova* (2011) paras 7–10.

¹⁴¹ Committee of Ministers, ‘1136 (DH) meeting/réunion, 6-8 March/mars 2012 - Decision cases No. 15 / Décision affaires n° 15 - Olaru group against the Republic of Moldova / Groupe Olaru contre République de Moldova 476/07 [CM/Del/Dec(2012)1136/15]’ (2012).

¹⁴² Committee of Ministers, ‘CM/Del/Dec(2019)1355/H46-28’; ‘NOTES 1355th meeting (September 2019) - H46-28 Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine (Applications No. 40450/04, 56848/00, 46852/13)’ (2019).

Venice Commission

The Venice Commission has never defined systemic problems nor it has ever referred to as its own terminology. In a document concerning implementation of international human rights treaties, the systemic problems were mentioned with the reference to the ECtHR pilot-judgments and the CM enhanced supervision¹⁴³. The Commission construed the meaning of the systemic problems in relation with the need of remedies, calling it as “systemic defect” inherent in the state legal system, still without a definition. It however, outlined ‘systemic problems in the legal order of member states’ by listing examples ‘such as large-scale expropriations, tenant law, inhuman detention conditions, and the lack of remedies against lengthy judicial proceedings or detention conditions’¹⁴⁴.

The PACE

The PACE is explicit in its terminology and defines systemic problems. In one of its Reports¹⁴⁵, the PACE takes the definition from the ECtHR case-law, emphasizing that ‘a structural or systemic problem may be considered a “dysfunction” in the national legal system which may lead, in particular, to numerous applications before the Court in Strasbourg’. As noted above, the identification of systemic problem depends on the particular context and circumstances of the case. Accordingly, the PACE rightly underlines that ‘the Court defines such a problem in the context of the specific circumstances of a case before it’. However, the most appropriate understanding of the terminology, the PACE derives from the relevant works of the CDHH and the CM (emphasis added):

“...As stressed by the [CDDH], a structural or systemic problem “may originate in legislation or an absence of legislation or an administrative or judicial practice that may be contrary to the Convention (length of pre-trial detention, length of proceedings, detention conditions, non-execution of final judgments, property rights, etc.)”¹⁴⁶. However, according to the [CM]’ practice, the fact that a group of judgments pending execution before it is small does not prevent the underlying structural problem to be considered as important¹⁴⁷.

The CDDH

The CDDH is the first body that defined a systemic problem with the reference to its causes and then to the consequences it produces. According to the CDDH a structural problem stems from either incompatible or missing legislation and/or practice and results or may result in flow of violations. It noted that ‘a problem may be qualified as structural or systemic when it has given rise or may give rise to similar applications’¹⁴⁸. However, it also underlined that structural problem ‘may also be identified in an isolated judgment’ highlighting ‘a situation that does not comply with the Convention but may concern a large

¹⁴³ CDL-AD(2014)036-e Report on the implementation of international human rights treaties in domestic law and the role of courts, adopted by the Venice Commission at its 100th plenary session (Rome, 10-11 October 2014) (2014) paras 55 and 60

¹⁴⁴ CDL-AD(2014)036-e, para. 55.

¹⁴⁵ Report of the PACE Committee on Legal Affairs and human rights (rapporteur: S. Kivalov), Ensuring the viability of the Strasbourg Court: structural deficiencies in states parties, 7 January 2013 (Doc. 13087). (2013) para. 6.

¹⁴⁶ CDDH report on the advisability and modalities of a “representative application procedure” [CDDH(2013)R77 Addendum IV] (2013) p. Appendix III, para. 6

¹⁴⁷ Committee of Ministers, Annual report 2011, p. 40 Footnote 25.

¹⁴⁸ ‘CM(2017)92-add3final Steering Committee for Human Rights (CDDH) - e. Guide to good practice on the implementation of Recommendation (2008)2 of the Committee of Ministers on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights [1293 meeting]’ (2017) para. 74

number of people'¹⁴⁹ or it 'may arise in repetitive cases'¹⁵⁰. It therefore went to define structural problems as resulting 'from the inability of the defendant State to prevent [further] judgments finding the same situation from increasing'¹⁵¹.

In this later meaning the CDDH discusses the consequences of recurrent problems and lack of appropriate remedies. However, the CDDH does not see systemic patterns exclusively as a problem of quantity and numbers of violations but rather as a substantive issue without appropriate solution. For that reasons it went to define 'repetitive applications' to be "admissible cases raising issues relating to the same underlying problem, frequently structural or systemic and often the subject of previous Court judgments (n.b. usually but not always the pilot-judgments)"¹⁵². The same reason lies behind the difference between the repetitiveness and "well-established case-law' criteria.

The CDDH considers that structural problems can arise not only in cases in which the ECtHR set up its well-established case-law¹⁵³ and thus the criteria used for identification of systemic problems and use of pilot-judgment should not necessarily be linked with repetitive applications as the ECtHR sees it. The repetitiveness criterion, in the opinion of CDDH, implies both qualitative and quantitative elements, i.e. an already identified systemic issue causing large numbers of applications.

In some of its reports the CDDH allowed itself to use the terms of "systemic judgments", distinguishing them from the pilot-judgments, but which still underline structural problems¹⁵⁴.

In its monumental work concerning long-future of the Convention system, the CDDH addressed, *inter alia*, systemic issues, however without giving them a definition but by a reference to "large number of applications resulting' therefrom¹⁵⁵.

Accordingly, the CDDH overall keeps its view on systemic issues as a concept larger than just a structural deficiency giving rise to large number of applications. While it is the most appropriate and the most common meaning of systemic problem, it however should not be confined solely to this narrow sense. It is true that structural problems could potentially lead to repetitive applications before the ECtHR, they however could be regarded systemic even without being accompanied by large number of cases.

¹⁴⁹ *Vasilescu c. Belgique* (2014) paras 124–128

¹⁵⁰ *Lankester c. Belgique* (2014) paras 83, 93 and 94

¹⁵¹ 'The CDDH Guide on rapid execution of the ECtHR judgments', para. 75

¹⁵² CDDH, *CDDH Final Report on measures that result from the Interlaken Declaration that do not require amendment of the European Convention on Human Rights [CDDH(2012)R74 Addendum II]* (2012) para. 8.

¹⁵³ For cases arising from structural problems and for which a well-established case-law does not yet exist (and which are thus not subject to determination by a three-judge committee), the adoption of a pilot judgment may be an adequate solution... CDDH, *CDDH Final Report on measures that result from the Interlaken Declaration that do not require amendment of the European Convention on Human Rights [CDDH(2012)R74 Addendum II]*, sec. iv. Measures implying action by the Court.

¹⁵⁴ '...whilst following the evolution of the Strasbourg case-law, it took particular account of systemic judgments, including those against other States; as an example, it mentioned the case of *S. & Marper v. U.K.*, which concerned retention of DNA material, in relation to drafting of new legislation concerning the police.' *CDDH report on measures taken by the member States to implement relevant parts of the Interlaken and Izmir Declarations [CDDH(2012)R76 Addendum I]* (2012).

¹⁵⁵ *The longer-term future of the system of the European Convention on Human Rights – Report of the Steering Committee for Human Rights (CDDH)* (2016) para. 89

Comparative research

The present Section analyses the semantic meaning of “systemic problems” from comparative perspective. It confronts the Council of Europe views with some seemingly appropriate legal concepts used in the domestic legal systems and/or international organisations.

The EU view on systemic problems

The EU acquis uses the terms of systemic problems or patterns, without however giving them a definition or explanation of meaning. The references made within the context of domestic violence, sexual harassment and “refugee crisis” are illustrative in this sense. The European institutions, however prefer to connect systemic meaning with the **seriousness of the problem** and the **need to fight impunity**. For example, the European Parliament regarded these problems as systemic only because they are serious and should be punished (emphasis added):

*whereas violence against women, including domestic violence, is too often considered as a private issue and too easily tolerated; **whereas in fact it constitutes a systemic violation of fundamental rights and a serious crime that must be punished as such ...***¹⁵⁶

or

*... Strongly condemns all forms of sexual violence and physical or psychological harassment and deplores the fact that these acts are too easily tolerated, **whereas in fact they constitute a systemic violation of fundamental rights and a serious crime that must be punished as such; ...***¹⁵⁷

The same meaning was taken in regulating issues of border control in the context of immigration (emphasis added):

Article 15. Resources for eligible actions in the Member States

*1. ... those Member States faced with **structural deficiencies in the area of accommodation, infrastructure and services** shall not fall below the minimum percentage laid down in this Regulation...*¹⁵⁸

The executive documents implementing primary EU legislation bring no added value in seeking a definition of structural deficiencies (emphasis added):

*..... The EU is facing an unprecedented migratory and refugee crisis following a sharp increase of mixed migratory flows since 2015. This has led to severe difficulties in ensuring efficient external border control in accordance with the Schengen acquis and in the reception and processing of migrants arriving. **Wider structural deficiencies in the way the Union's external borders are protected** have also become evident in this crisis. ...*

¹⁵⁶ ‘European Parliament resolution of 12 September 2017 on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence (COM(2016)0109—2016/0062(NLE))’ (2017).

¹⁵⁷ ‘European Parliament resolution of 26 October 2017 on combating sexual harassment and abuse in the EU (2017/2897(RSP)) OJ C 346, 27.9.2018, p. 192–199’ (2017).

¹⁵⁸ European Council and European Parliament, ‘Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC’ (2014).

(12) In its communication ‘Back to Schengen — A Roadmap’ (7), the Commission referred to the need, if the migratory pressures and the serious deficiencies in external border control were to persist beyond 12 May 2016, to present a proposal under Article 29(2) of the Schengen Borders Code to the Council **recommending a coherent Union approach to internal border controls until the structural deficiencies in external border control are mitigated or remedied...** In particular, structural deficiencies in external border control **related to the overall border management system, border surveillance and situational awareness, have not been remedied yet.**¹⁵⁹

An attempt to define systemic problems was made at the level of EU institutions pending law-making process, but it eventually failed. The term used instead of “systemic problems” was the “generalised deficiencies as regards rule of law”. The following all-inclusive definition was proposed by the European Commission during the drafting process of joint Regulation of European Parliament and Council:

“...2. The following may, in particular, be considered generalised deficiencies as regards the rule of law: [such as]

(a) endangering the independence of judiciary;

(b) failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests;

(c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

However, this draft definition was deleted during the debates at the European Parliament, proving that the consensus has not yet been reached on how to define systemic issues.¹⁶⁰ As it could be seen, the draft definition put accent on proper functioning of judiciary system and necessity to have effective remedies. Comparing this draft definition with the Council of Europe perspective, it appears to be quite limited. The EU underlines the importance of judiciary system and hardly accepts problems associated with this particular branch of state powers. Nevertheless, in the understanding of the Council of Europe, systemic problems are larger than just those associated with the judiciary. Accordingly, the above-proposed definition, while being a commendable initiative, still is on-sided and narrow. It remains within the EU’s policy to rely on the domestic authorities or the Council of Europe institutions in ascertaining the systemic problems.

For example, the European Commission referred once to Constitutional court of one Member-State’s when recognising that that State faces some systemic problems¹⁶¹. The CJUE habitually quotes the ECtHR’s

¹⁵⁹ European Council, ‘Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk’ (2016).

¹⁶⁰ ‘Amendments adopted by the European Parliament on 17 January 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States (COM(2018)0324 – C8-0178/2018 – 2018/0136(COD))’ (2019).

¹⁶¹ ‘...The Constitutional Court identified systemic deficiencies in the organisation of the judiciary and effective exercise of competences at different levels of government, leading to systemic violation of the right to a fair trial within reasonable time. The authorities need to develop and implement a comprehensive set of measures to address systemic violations of the right to a fair trial within a reasonable time and the right to an effective remedy...’ European Commission, ‘COMMISSION STAFF WORKING DOCUMENT Analytical Report Accompanying the document

findings in this sense, without however providing its own understanding of “structural deficiencies”¹⁶². Or, in the alternative the CJUE refers to human rights institutions in evaluation of systemic problems¹⁶³.

Therefore, no definition of structural or systemic problems is given by the EU institutions. This does not mean that there is no understanding of such problems. The EU operates with this terminology quite extensively. However, the meaning of the concept is either used with the reference to the ECtHR and domestic authorities or it is linked to the specific context the EU is the most concerned with (i.e. reforms of judiciary, immigration, fighting sexual crimes and domestic violence, etc.).

The UN view on systemic problems

At the UN level, the language using the present terminology could be quite extensive. It would be far outside of the present Methodology to describe how the UN institutions use the terminology of systemic problems in their documents. Focusing on the language used in the UN human rights universal protection mechanisms, the Research found the same results as above; UN Human Rights Bodies employ at large the terminology and indeed use it in the reasoning of their decisions and documents. They however would not give an express definition to this concept despite of the fact that the systemic thinking is at the core of almost all UN Human Rights Bodies’ mandate.

For example, the Human Rights Council ‘is responsible for addressing situations of human rights violations [around the globe]’ with ‘the ability to discuss all thematic human rights issues and situations that require its attention throughout the year’¹⁶⁴. Its mechanisms are systemic-thinking bodies, such as ‘the Universal Periodic Review - a unique process which involves a review of the human rights records of all UN Member States’¹⁶⁵ or the Advisory Committee functioning as ‘a think-tank for the Council’¹⁶⁶, in contrary to the Complaint Procedure focused on individual complaints¹⁶⁷. Another mechanism called Special Procedures

Communication from the Commission to the European Parliament and the Council Commission Opinion on Bosnia and Herzegovina’s application for membership of the European Union (SWD/2019/222 final) (2019).

¹⁶² ...The European Court of Human Rights has ruled that a court of a Member State party to the ECHR could not refuse to execute a European arrest warrant on the ground that the requested person was exposed to a risk of being subjected, in the issuing State, to detention conditions involving inhuman or degrading treatment if that court had not first carried out an up-to-date and detailed examination of the situation as it stood at the time of its decision and had not sought to identify structural deficiencies in relation to detention conditions and a risk that is both real, and specific to the individual, of infringement of Article 3 of the ECHR in that State (ECtHR, 9 July 2019, *Romeo Castaño v. Belgium*, § 86) CJEU [Grand Chamber], *Dumitru-Tudor Dorobantu. Request for a preliminary ruling. EU:C:2019:857* (2019) para. 57.

¹⁶³ ... The referring court refers, inter alia, to the report of the Swiss Refugee Council, entitled ‘Reception Conditions in Italy’, of August 2016, which contains specific information supporting a conclusion that beneficiaries of international protection in that Member State are exposed to a risk of becoming homeless and reduced to destitution in a life on the margins of society. According to that report, the inadequately developed social system of that Member State is, in respect of the Italian population, offset by support in family structures, which is lacking in respect of the beneficiaries of international protection. That report also states that there are almost no countervailing integration programmes in Italy and that, in particular, access to essential language courses is left more or less to chance. Finally, it is apparent from that report that, in view of the sharply increased refugee numbers in Italy in the past few years, the major structural deficiencies of the State social system cannot be effectively compensated for by non-governmental organisations and churches.” CJEU [Grand Chamber], *Abubacarr Jawo v Bundesrepublik Deutschland. Request for a preliminary ruling. EU:C:2019:218* (2019) para. 47.

¹⁶⁴ ‘OHCHR | HRC Welcome to the Human Rights Council’.

¹⁶⁵ ‘OHCHR | UPR UPR’.

¹⁶⁶ ‘OHCHR | AdvisoryCommittee Human Rights Council Advisory Committee’.

¹⁶⁷ ‘OHCHR | Complaint Procedure Human Rights Council Complaint Procedure’.

also features systemic analysis by ‘independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective’¹⁶⁸.

The Human Rights Treaty Bodies act mostly with two mandates - to monitor human rights situations and examine individual complaints. An illustrative example in this sense are two bodies under the CAT and Optional Protocol thereto. The Committee Against Torture performs mainly the role to overview the reports of the Member-States addressing ‘its concerns and recommendations to the State party in the form of “concluding observations”’¹⁶⁹. The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ‘has a preventive mandate focused on an innovative, sustained and proactive approach to the prevention of torture and ill treatment’¹⁷⁰. Both mandates normally employ systemic approach and assessment of structural problems, despite of the fact that these bodies, as well as other UN Human Rights Treaty-based Bodies¹⁷¹, have complaining procedures allowing individuals and organizations to bring human rights violations to their attention. Their General Comments proves that some of the protected treaty-rights call for a structural approach¹⁷² rather than individual-oriented measures.

Nevertheless, in general, the UN Human Rights documents do not bring clarity in establishing the criteria for definition of systemic problems; nor they help to identify the methods used by the Human Rights Bodies in this sense. Overall, this terminology is not used though the systemic thinking is implied in the activity of these Human Rights Bodies. Many of them, however, are silent and prefer to avoid concrete references to the “systemic problems” and such terminology could be rarely found in their documents. Only some members of the Committees, acting in their individual capacity, could use this term in their opinions but also with reliance on the ECtHR judgments and its methodology of assessment. For example, in 2 cases against Belarus the meaning of systemic problem was applied to the freedom of expression and peaceful protests:

... 14. Recognizing a violation in conjunction with article 2 (2) in contexts of structural and systemic failure by the State to adopt remedial legislation would underscore to the State party, and particularly to relevant lawmakers, the Committee’s concern that the source of the violation lies with the State’s legal framework and the State’s distinct obligation under article 2 (2) to conform its domestic laws to give effect to Covenant rights. Finding such a violation of article 2 (2) in turn would enhance human rights protection for the individual by underscoring the State’s obligation to prevent future recurring violations.

¹⁶⁸ ‘OHCHR | Special Procedures of the Human Rights Council’.

¹⁶⁹ ‘OHCHR | Committee Against Torture | Monitoring the prevention of torture and other cruel, inhuman or degrading treatment or punishment’.

¹⁷⁰ ‘OHCHR | Optional Protocol to the Convention against Torture (OPCAT)’.

¹⁷¹ Committee on the Elimination of Racial Discrimination (CERD), Committee on Economic, Social and Cultural Rights (CESCR), Human Rights Committee (CCPR), Committee on the Elimination of Discrimination against Women (CEDAW), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED) ‘OHCHR | Human Rights Bodies’.

¹⁷² See for example The Committee on the Elimination of Racial Discrimination, ‘General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system Sixty-fifth session (2005)’ reading that: ‘...To implement national strategies or plans of action aimed at the elimination of structural racial discrimination. These long term strategies should include specific objectives and actions as well as indicators against which progress can be measured. ...’

15. This approach would also accord with that of other human rights bodies. Pursuant to article 46 of the Convention for the Protection Human Rights and Fundamental Freedoms, the European Court of Human Rights has adopted a similar approach in its pilot judgement procedure, in **which the court identifies in its judgement systemic or structural problems with the State party's legal framework that gave rise to the violation and the remedial measures that the State must adopt, including revision of legislation.** The court has applied this approach to address persistent failures of the State to introduce remedial legislation. The Inter-American Court of Human Rights also has long identified situations that require revision of the domestic legal framework and, particularly in circumstances of failure of the State to take such action, has found a violation or failure to comply with article 2 of the American Convention on Human Rights in relation to the relevant substantive articles.¹⁷³

It is remarkable that the author uses the systemic reasoning of the ECtHR to a human right situation in the country which is not a member to the Council of Europe. In other words, the author might suggest that the Human Right Committee could and should get inspired by the ECtHR reasoning and its mechanisms in dealing with some structural problems such as lack or incompatibility of the domestic legislation with the standards of the Covenant. As it could be seen from this example, the author rightly identifies the connection of systemic problems with the issues of legislation and lack of remedies.

Still, these are isolated examples and they do not amount into the systemic use of this terminology notwithstanding the fact the UN Human Rights bodies employ systemic analysis at large. The examples do not reveal a consistent practice of the Committee and other UN Human Rights Bodies in using the terminology of systemic or structural problems. Even with the fact that the term of systemic problem, might be used all together in the parlance of diplomats and/or during the debates¹⁷⁴, yet it did not become the legal terminology of the UN.

Collective State responsibility versus individual responsibility as separate criterion to assess systemic problems

Systemic character of violations could be ascertained in view of general principles of state international responsibility for a wrongful act. Any violation of the European Convention on Human Rights is also a responsibility of a Member-State under international law for such a wrongful act. Not all wrongful acts are systemic and could be either isolated or recurrent. Some guidance how to distinguish these types of wrongful acts could be found in the 'ARSIWA'¹⁷⁵ and the Commentaries thereto¹⁷⁶. These sources will be briefly explained, only in part that is relevant for the purposes of the present Methodology.

¹⁷³ Human Rights Committee, *Anatoly Poplavny v. Belarus* (2015); *Leonid Sudalenko v. Belarus* (2015) Individual opinion of Committee member Sarah Cleveland (concurring).

¹⁷⁴ See for example Human Rights Council, 'Report of the Working Group on the Universal Periodic Review. Georgia' (2011)'... 32. The Russian Federation emphasized that human rights violations committed by Georgia against the population of Abkhazia and South Ossetia during and before 2008 conflict were yet to be investigated. Focusing on systemic human rights problems in Georgia, it pointed at the unwillingness of Georgia to objectively evaluate them. ... 104. While responding to the issues regarding allegations of ill-treatment, torture and excessive use of force, the delegation noted that every single case of power abuse needed to be investigated effectively. The delegation noted the inconsistency in some of the statements, probably due to the lack of information. It was emphasized that torture as a systemic problem had disappeared as cited by national and international human rights institutions. ...'

¹⁷⁵ International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' (2001) *Yearbook of the International Law Commission, 2001, vol. II (Part Two)*.

¹⁷⁶ International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) *Yearbook of the International Law Commission, 2001, vol. II, Part Two*.

According to the ASRIWA, breaches of international obligation could be distinguished in **isolated** or non-recurrent and serious or **systemic**. The first type should not be confused with the distinction between instantaneous and continuing acts separated by the time factor. Yet they both remain in principle isolated and single-out occurrences. For example, Article 14 of the ASRIWA distinguishes between non-continuous (alin.1) and continuous acts (alin.2) but either the first or the second could be single in character. However, if they recur, the instantaneous and continuous violations become serious and systemic. For example, the Commentaries illustrated this distinction that by quoting the *Loizidou* case¹⁷⁷. It was underlined that the case reveals a continuous breach, but which could be hardly seen as isolated¹⁷⁸ because it gave rise to a number of cases and one inter-state case¹⁷⁹.

Nonetheless, single breaches are usually isolated and their systemic character must be assessed on case-by-case basis and only when they tend to become repetitive. The most relevant example of such a systemic approach is observed from definition given by the ASRIWA to the “composite breaches”. This category is more complex, since it implies violations of at least two and more international obligations. It is defined as:

*The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.*¹⁸⁰

The Commentaries underline the systemic character of such breaches reading that:

*Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct. ... (2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is “a series of acts or omissions defined in aggregate as wrongful”. ... Some of the most serious wrongful acts in international law are defined in terms of their composite character. ... It implies that the responsible entity (including a State) will have adopted a systematic policy or practice.*¹⁸¹

But the most relevant reference to the systemic character of composite acts is made by the Commentaries to the *Ireland v. United Kingdom* case, where the ECtHR defined the incompatible practice as (emphasis added):

*A practice incompatible with the Convention consists of an **accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches.***¹⁸²

In what follows the Commentaries describe a number of situations when the breach implies State responsibility in systemic manner, mostly drawing distinction between individual acts attributable to the State as a whole. For example, crimes against humanity, even if composite by isolated human rights

¹⁷⁷ ECtHR, *Loizidou*.

¹⁷⁸ ‘ARSIWA Commentaries’, 61 par. 10.

¹⁷⁹ ECtHR, *Cyprus v. Turkey*.

¹⁸⁰ ‘ARSIWA’, Article 15

¹⁸¹ ‘ARSIWA Commentaries’, 64 paras (1), (2) and (3).

¹⁸² *Ireland v. the United Kingdom*, para. 159

violations, are to be regarded separately, i.e. in the aggregate¹⁸³. Therefore, it could be argued that the ASRIWA sees composite breaches of international law as systemic and opposite to isolated acts. This systemic understanding helps to establish both the nature of violations and the time when it ends. As the Commentaries pointed out, the effects of composite acts must be taken as a whole, holistically, 'not merely as a succession of isolated acts'¹⁸⁴.

In addition, the ASRIWA connects the systemic meaning with the seriousness of breaches. Article 40 of the ASRIWA¹⁸⁵ reads that 'A breach of [peremptory] obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.' The Commentaries explain the meaning of systematic as follows:

*(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.*¹⁸⁶

The domestic authorities view on systemic violations

A brief comparative Research roughly found that the domestic legal systems rarely or almost never embrace the original meaning of systemic violations. Usually, mostly in the Member-States of the Council of Europe, the understanding of systemic problems is taken over from the ECtHR case-law and the CM's practice, where it has arisen from (as the above research confirmed). This does not mean that the Member-States do not have understanding of systemic problems at all their respective legal terminology. The research studied only the terminology pertaining to human rights adjudication and the domestic mechanisms of the implementation of the Convention. Only in these limited branches of legal systems was found that the Member-States got inspired by the Council of Europe views and introduced the concept of systemic problems into their domestic law and practice. In particular this is true for the Member-States that implemented pilot- and quasi-pilot judgments. Outside this particular framework, the terminology of systemic problems is not being used in its legal sense given by the Convention law.

Roughly speaking, systemic violations could be confronted only with the legal concept of "class-actions" and/or other procedural tools for administration of large number of cases. Class-action appears as a judicial tool to deal with large number of complaints disclosing the same legal problem. In the US they are defined as 'a procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or "class", allowing 'courts to manage lawsuits that would otherwise be unmanageable

¹⁸³ '...In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed...' International Law Commission, 'ARSIWA Commentaries', 64.

¹⁸⁴ "(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful. " 'ARSIWA Commentaries', 63.

¹⁸⁵ International Law Commission, 'ARSIWA'.

¹⁸⁶ 'ARSIWA Commentaries', 133 para 8.

if each class member were required to be joined in the lawsuit as a named plaintiff¹⁸⁷. They may examine a legal problem with systemic thinking and identify it as a major disfunction requiring one solution. However, their principal feature is the difficulty to assemble all members of the given group where the legal question could be determined in one case, so the other will follow. In this sense, this “class-actions” tool resembles the pilot-judgment procedure at the ECtHR and thus need no further explanations. As the CDDH rightly pointed, this procedural tool is inadvisable to introduce¹⁸⁸, as well as collective complaints and default judgments¹⁸⁹.

All these domestic procedural tools operate with the same perception of systemic problem as the pilot-procedure at the ECtHR. Accordingly, in the present Methodology these tools will not be given much attention. They are good examples of domestic tools for handling numbers of cases and large-scale problems. In this sense, they could serve as inspiration in overtaking a methodology for assessment of systemic violations. However, they should be applied with care since some of these tools are strictly confined to the particularities of the domestic legal and judicial systems. For example, even if class actions originate from “representative actions” in English system they were lately abandoned in the UK system¹⁹⁰. The US system of law continues to embrace them. Yet, class actions seem to be hardly compatible with the formal systems of law in the European countries. Some European states allow for collective applications in civil litigations, which resemble civil actions. In the end, the feasibility of class actions and/or collective applications to evaluate systemic problems depends on the particularities of each legal system. Still they could be a good tool for judiciary to handle both big number of cases and identification of the systemic problems with their root-causes.

Methodological recommendations to identify systemic patterns

The present Section summarises some suggestions how to make substantive assessment of “systemic problems” and how to distinguish these problems from other “complex”, “structural” or other similar situations. It describes two methods that could be used for these purposes. These methods were, indeed, used during the present Research seeking to unveil both legal and semantic meaning of systemic problems in the ECtHR’s case-law and the CM’s practice on supervision of the execution. **One method** is to regard the systemic problems in their autonomous meaning and to draw up criteria rather than an all-inclusive definition. The **second method** is about finding patterns of systemic violations following two types of legal reasoning based either or both on consequences and the nature of violations.

It could be observed that determination of systemic issues could be quite a troublesome task. Systemic and/or structural problems are identified primarily by the ECtHR in its pilot- or quasi-pilot judgments. Obviously, once identified by this type of judgments, the systemic character of violation is undoubtful. Inter-State cases and, generally, quasi-inter-State judgments by definition disclose systemic violations. These systemic violations should be distinguished from those found in the pilot- and quasi-pilot proceedings, as they have different context and root-causes. They involve an international inter-State dispute and usually such systemic violations unfold certain degree of bad faith on part of States, i.e. the violations are based on “official state tolerance” or even “state coordinated policies”.

However, these are not the only cases disclosing systemic problems. The difficulty in identification of systemic problems arises in other, non-pilot and non-quasi-pilot or non-inter-State and non-quasi-inter-

¹⁸⁷ *Hansberry v. Lee*, 311 U.S. 32, 41, 61 S.Ct. 115, 118 (1940).

¹⁸⁸ CDDH, *CDDH Report on longer-term future of the ECHR*, para. 95.

¹⁸⁹ CDDH, *CDDH(2013)R77 Addendum IV*, paras 30, 31.

¹⁹⁰ *Wex Legal Dictionary*, ‘Class Action’.

State cases. The present Methodology develop the tools for identification of systemic problems outside of the framework of these later types of cases. In other words, the Methodology shows how to understand systemic problems without a link to these particular cases. Moreover, it is already agreed among the Council of Europe bodies, mainly in the CM, that systemic issues could be observed from other judgments and cases, other than those traditionally associated with systemic problems.

The difficulty in identification of systemic issues stems from the fact that neither the ECtHR nor the CM provide for an all-inclusive definition. Furthermore, each of these Convention bodies institutes its own criteria for determination of systemic violations. In the essence they seem to be similar but still the meaning reflects different perspectives and purposes of each Convention organs. The ECtHR mostly is concerned about its backlog and effective administration of justice; thus, it grasps systemic problems as something raising big number of unmeritorious applications that need to be remedied first by the responded State. The CM, on the other hand, while sharing this view, extends its understanding of systemic issues to both structural and complex problems that require implementation of wide-ranging general measures mainly in view of preventing new violations in the future. It seems that other Council of Europe' bodies, such as the CDDH and the PACE, adhered to this later view. However, these bodies inevitably include their own perspective into the meaning of systemic problem, without saying that the Member-States to the Convention observe systemic issues wholly in another dimension. All these different opinions and views break the meaning of systemic problem and makes it even more difficult to ascertain.

In summary, all involved parties by and large, the ECtHR, the CM, the Member-States, other bodies, have not asked what legal connotations, if any, the expression of "systemic problem" might have. Moreover, States, the ECtHR and the CM have not yet agreed to a legal definition for that expression. Taking aside the pilot- and quasi-pilot judgments, inter- and quasi-inter-state disputes, the situations that could be described as systemic violations are diverse, so much so that **it is difficult to formulate a definition that is both concise and all-inclusive**. If, instead of creating a definition that encompasses every situation, one only considers the main features characteristic to many of cases disclosing systemic problems, then one can perhaps arrive at a useful definition.

The starting point is to identify the common characteristics that distinguish these violations from other non-systemic situations. The next step is to assess the essence of the problem holistically, from the perspective of its root-causes and consequences. The below techniques describe these steps to follow.

The 1st technique: Determine criteria not a definition

Indeed, this method and the way of reasoning is employed by the ECtHR¹⁹¹. It is called **autonomous interpretation** of the Convention, which briefly can be construed as a technique to draw some shared-criteria pertaining to legal concept rather than to attempt defining it all-inclusively¹⁹². Although none of the Convention bodies gives an abstract definition of systemic problems, this concept could be deduced by extracting criteria from the ECtHR case-law and the relevant CM's practice on supervision of execution

¹⁹¹ The ECtHR defined "autonomous meaning of legal terms" with many occasions, for example by the "Engel criteria" for determination of criminal accusations or the "Pretto criteria" for assessing the "reasonableness of the length of proceedings", or the "*Bentham* criteria for assessing the meaning of "dispute", etc.

¹⁹² e.g G. Letsas, 'The Truth in Autonomous Concepts: How To Interpret the ECHR' (2004) 15 *European Journal of International Law* 279–305; S. Greer, *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights* (Council of Europe Publishing, 2000) chap. IV. Commonality, autonomous and evolutive interpretation.

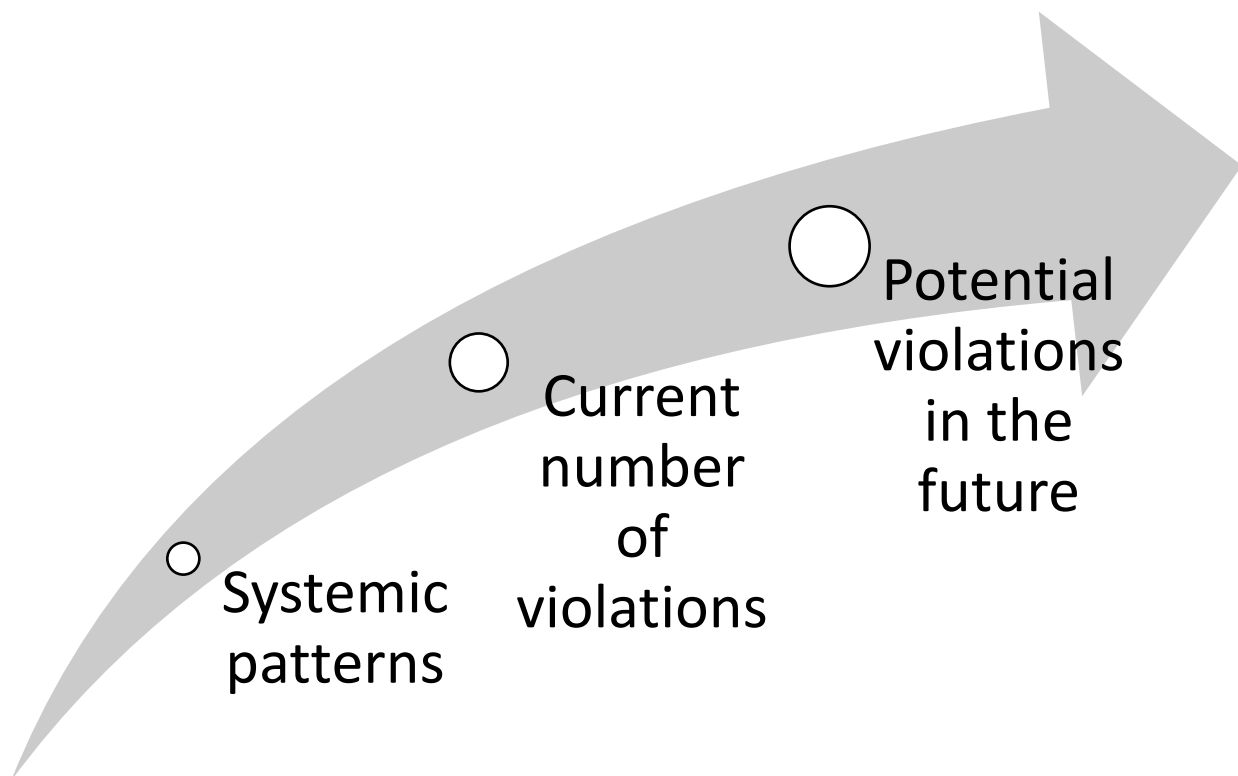
of judgments. Many of these criteria could be observed in the explanatory texts of other Council of Europe's bodies mentioned above. Even other international human rights protection mechanisms employ systemic analysis of the human rights violations basing on the similar criteria.

These criteria of will be illustrated below. They were extracted from the ECtHR jurisprudence and the CM's practice by pin-pointing some recurrent characteristics in many descriptions of systemic phenomena rather than delineating a universally agreed definition. However, these criteria are not all-inclusive in themselves, in the sense that they remain flexible. It means that a person using the present technique can find new patterns or extract other shared-criteria, depending on the context and perspective. As it was mentioned above, the context in which systemic problems occur could significantly change its meaning. The same could be said about the different perceptions of the same problem, also changing the understanding of systemic problems.

Criteria for definition of systemic patterns

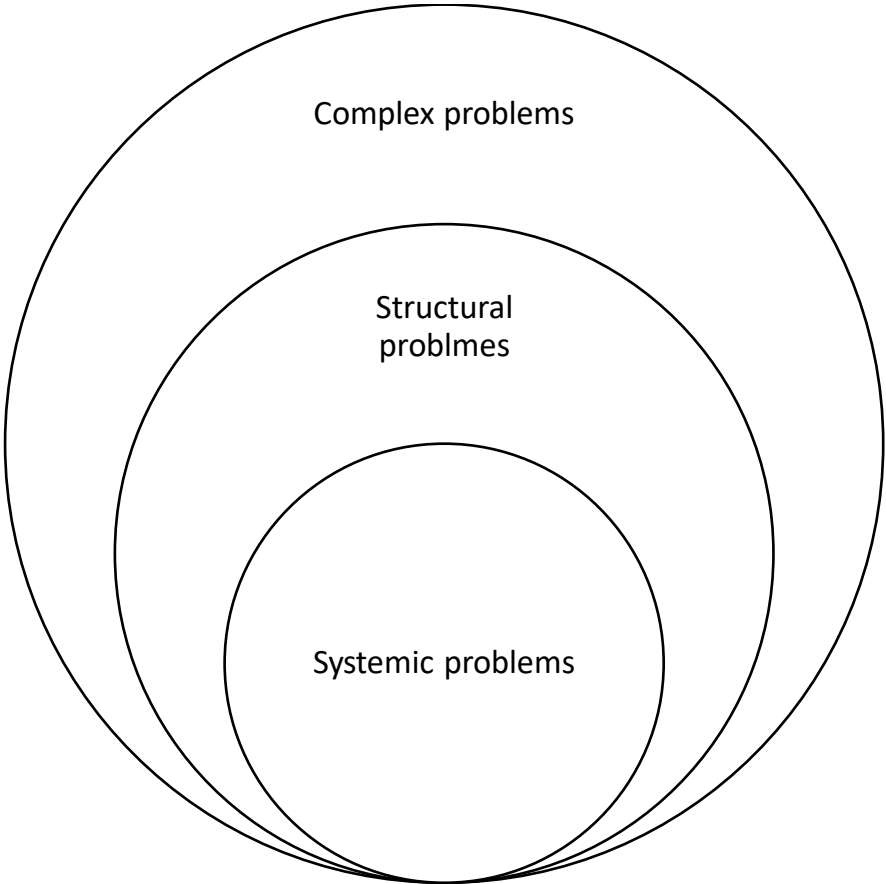
Firstly, systemic cases **should not be treated exclusively from the perspective of repetitiveness**. A large number of human rights violations rings a bell about systemic character but it is not the sole indicator. Large number of similar violations usually allow to conclude about the presence of systemic problems. However, a small number of cases may also disclose systemic patterns and clues about the root-causes potentially leading to large number of violations. Accordingly, the evaluation of systemic problems should be made from both perspectives, (i) the current situation and (ii) the range of violations in which the problem can hypothetically elevate. The below Figure 1 illustrates this rationale.

Figure 1. Systemic consequences



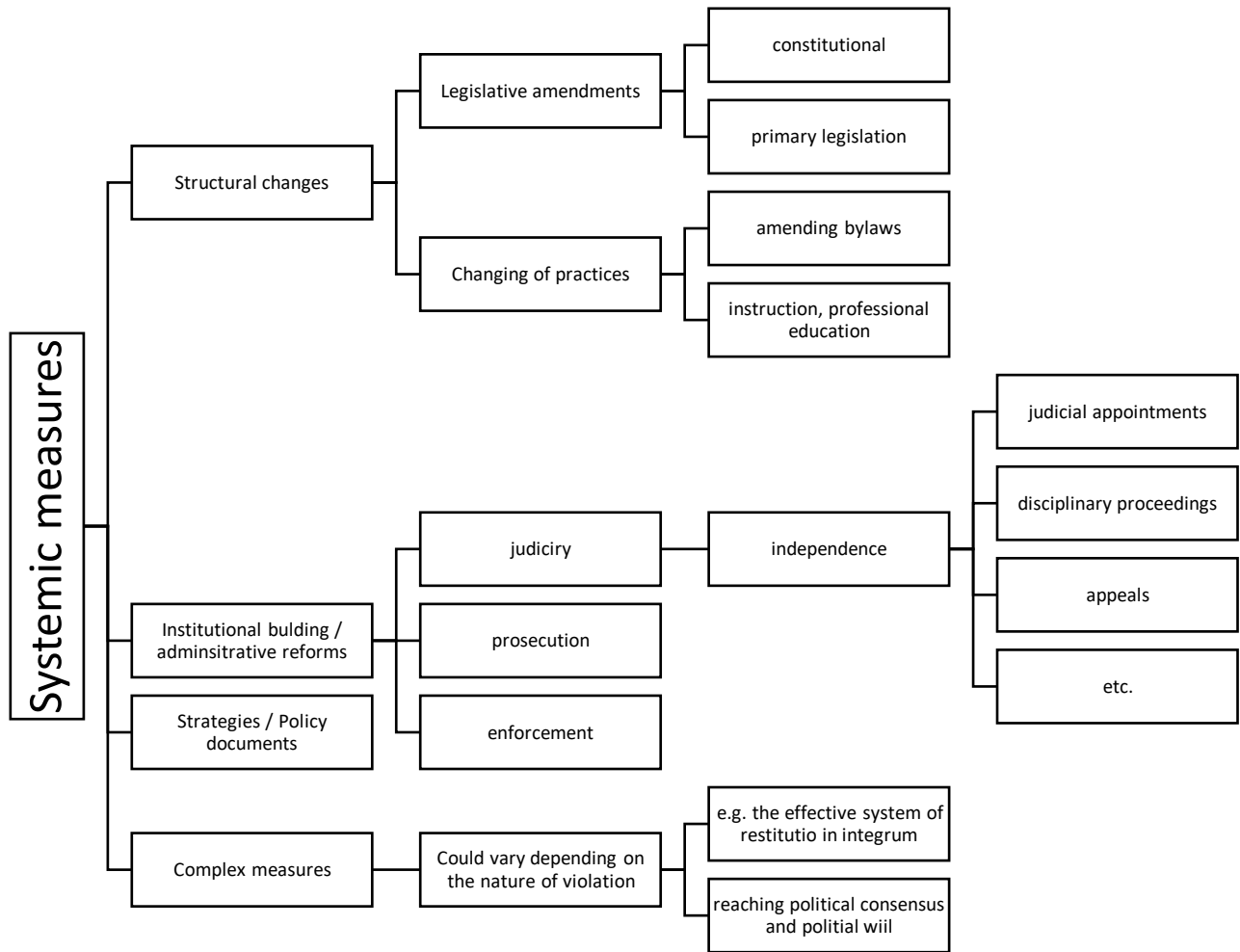
Secondly, all three above-mentioned indicators - “complex”, “systemic” and “structural”- should not be separated blindly. They are interconnected and interchangeable. If the case is systemic it is indeed both complex and raising structural problems. However, the structural problems should not be always regarded as systemic, still all structural cases are complex. And in the end, the last indicator of “complex cases” is the most inclusive one, since it incorporates all above categories of complex and systemic. Yet not all complex cases should be regarded by default as complex and systemic. The below Figure 2 visualises these hierarchic-relationships.

Figure 2. Systemic problems



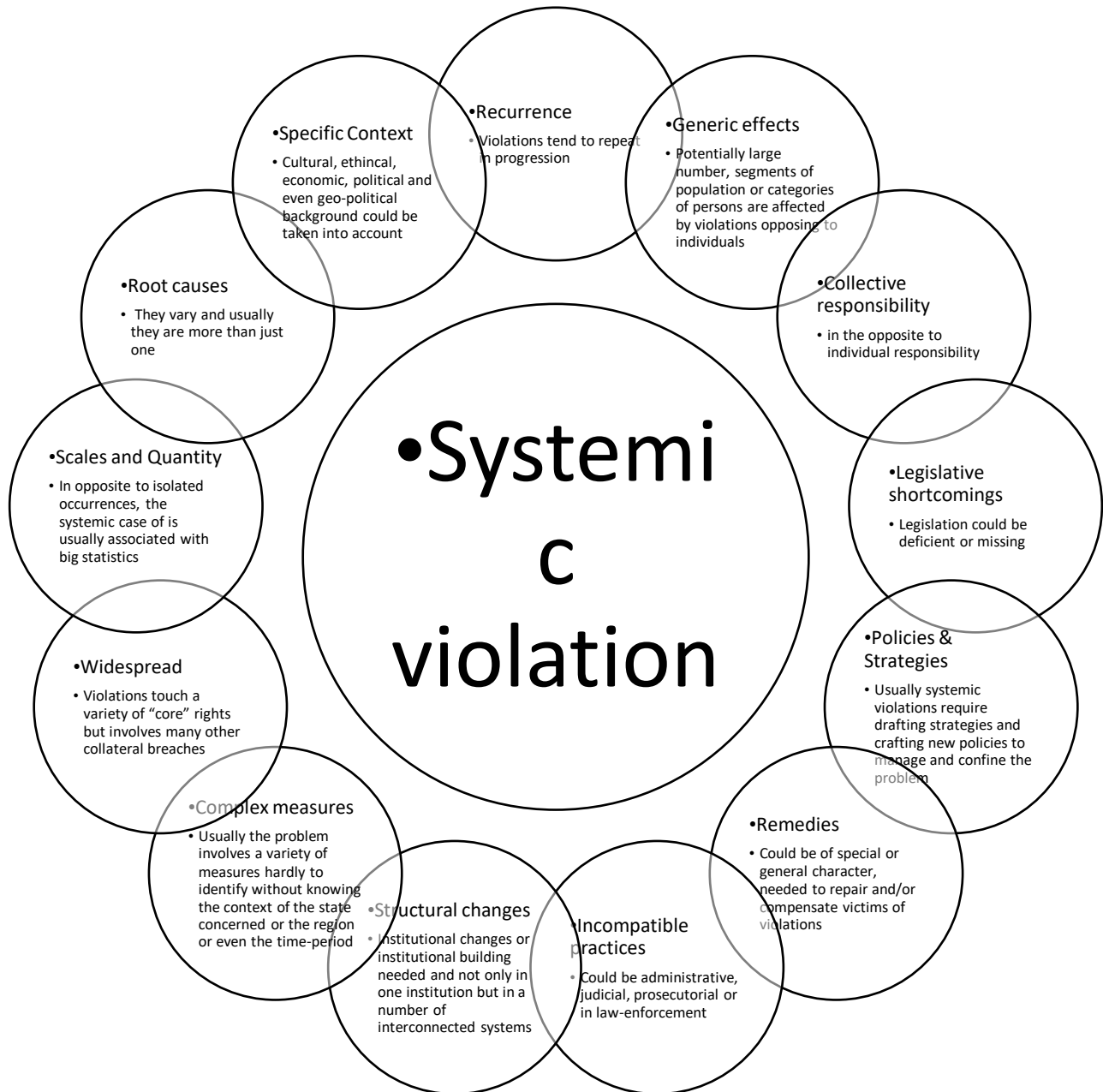
Thirdly, the principal indicator of systemic problems is the need of both complex reforms and changes at the structural level. In other words, the systemic problems require systemic and composite general measures going far beyond one or two simple actions, regardless of how complex, sensible or structural these actions might be. Systemic problems require holistic all-inclusive approach that reshapes systems or builds new ones from the scratch. These are measures of rather exceptional character and of greater scales. They are long-terms reforms requiring strategies and policies. These could be exemplified by the below Figure 3, which should not be regarded as an all-inclusive illustration. It narrows the systemic reforms needed, for example, in the case of *Olexandr Volkov*. It should be emphasised that all systemic measures are by default general measures, within the meaning of the CM’s practice, i.e. opposing to the individual measures.

Figure 3. Systemic measures



In summary, all criteria identified from the research could be assembled and illustrated in the below Figure 4:

Figure 4. Recommended criteria for identification of systemic violations



The 2nd technique: Use two-fold reasoning to assess systemic problems

The method of seeking common features and extract shared-characteristics to define a systemic problem should go hand in hand with another technique. It is to employ both the **consequentialist** and **categorical reasoning** when assessing the systemic character of a problem. Using one instead of another reasoning could significantly change the results of the analysis. In brief, these two types of reasoning build their conclusions basing on different premises. The first type of reasoning relies on the worse outcomes of systemic problem, while the second looks into its premises, assessing the problem as categorically wrong in itself, regardless of its good or bad results.

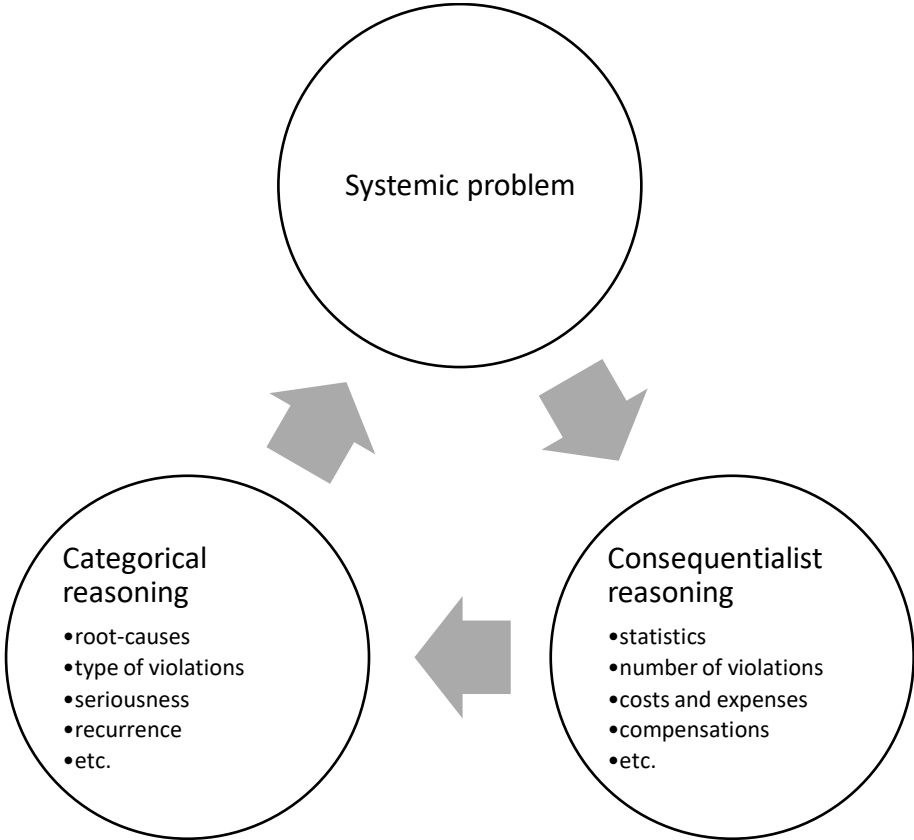
In the **consequentialist reasoning**, the conclusion about a systemic issue is based mostly on the statistical data about a number of violations, i.e. the greater the number of repetitive applications the more chances that the problem would be classified as systemic. Otherwise, if the statistics are not numerous, the problem is not regarded as serious enough to merit a systemic classification. In the end, the problem could be disregarded because it does not produce repetitive cases, despite of the fact that it remains recurrent. In other words, due to minor repetitive applications the problem is classified as a sequence of isolated cases not amounting into a pattern.

In the **categorical reasoning**, the conclusion is built upon the substance of the problem, its compatibility with the Convention and its ability to become widespread in the future. In this sense, the categorical analysis is harder because it looks into the quality of legislation and/or practices; it evaluates their agreement with certain Convention standards. In the second situation, the large number of repetitive applications, do not matter. Still, the categorical reasoning should foresee the likelihood of recurrence and make conclusions on systemic features of the problem basing on the hypothesis that it might raise numbers of new repetitive cases. In this sense, both types of reasoning are connected.

These reasonings distinguish different views on systemic problems. The ECtHR, for example, prefers to justify existence of systemic problems with the reference to the numbers of already pending repetitive applications and need for domestic remedies to stop this flow. It is rather a quantitative, - consequentialist – approach. The CM observes the complexity of the problem itself, what solutions it needed and what are the prospects of future repetitive violations – which is rather a qualitative - categorical – analysis. The CDDH, understands systemic problems broadly, with the reference to both incompatible legislation and practices spreading in time and numbers of violations, i.e. the consequences and roots of the problem. The Venice Commission, on the other hand, sees the problem more in the substance, on the structural level; it is the incompatibility or the problem that matters not its consequences.

In assessing systemic problems, thus, two types of reasoning better be used in conjunction. Neither the substance of the problem nor its consequences should be ignored. Otherwise, if the reasoning will be based on one or another, the problems might be misinterpreted and result in the failure to evaluate systemic characteristics. The Figure 5 demonstrates this two-folded assessment.

Figure 5. Two-fold reasoning



PART 2. PROCEDURAL ASPECTS

This part of the Methodology answers to the questions “*How, When and Where to identify the systemic problems?*”. It elaborates mostly on the tools and steps needed to identify these problems, as well as their origins. Knowing substantive meaning of systemic problems and being able to distinguish them from other problems is not enough. A researcher needs certain operational procedures, steps to follow in order to reach the conclusion that a problem is systemic according to that knowledge. He or she needs to know the sources where to get answers and how to make a research. Accordingly, in what follows the Methodology suggests some of the techniques that could be employed or inspired from for that purpose.

Problem-solving or systemic thinking techniques

These techniques consist mainly of generic and ad hoc methods destined to resolve problems. There is a big variety of these methods depending on the fields they are to be applied (in philosophy, computer science, engineering, mathematics, or psychology, etc.). They mainly are cognitive methods requiring both pragmatic and abstract thinking. Systemic and complex problems call for systemic thinking techniques and complex multifaceted solutions.

Problem-solving techniques include, *inter alia*, the strategies such as “7 steps of problem-solving”; “Eight Disciplines Problem Solving”, “GROW”, “OODA loop”, “PDCA”, “Root cause analysis”, etc. Each has its own recommended steps to follow in the way of getting to the solution. Some refer to these steps as the “problem-solving cycle”. Despite of various methods and recommendations many of these strategies share similar steps and have common goals. For example, the most generic - “7 steps of problem-solving” strategy by definition include the same number of steps to follow: definition of the problem, then analysis of its causes, investigation of data, gathering information, brainstorming to generate solution, followed by evaluation of alternatives, optional or even hypothetical solutions and, at last, implementation and monitoring in practice. First two steps – definition and analysis of causes - are characteristic to any problem-solving technique; thus, they were taken as basis for elaboration of the present Methodology and its structure. It needs no detailed description of every of these techniques. It is sufficient to indicate their shared characteristics and to choose one technique, better suited to examine the systemic problems and their roots.

The first technique is to develop and employ **systemic thinking**. This type of thinking is needed for identification of systemic problems. It is not designed to identify the problems as such, which is an ordinary task. Indeed, the scope of the present Methodology goes beyond simple identification of the problems; it is the systemic character of the problems which is difficult to ascertain. And this task requires systemic thinking.

Defining systemic thinking is in itself a demanding exercise. Such type of thinking requires experience and training. Systemic thinking is a technique for making sense of challenging situations and finding patterns, for which reasons it is sometime was called as “Pattern Thinking”. There are many systemic analysis tools and every institution or governmental authority uses its own tools and methods to elaborate this type of thinking. Mainly, this technique stems from working methods and institutional memory. The present Methodology illustrates only one technique but not at the expense of others. It remains at the discretion of the GA office to choose its own systemic thinking process. The below example is recommendary. It was chosen to show the meaning of systemic thinking and how to elaborate it in the organisation.

This technique is employed in the so-called “**needs assessment**” exercise, which includes some tools to analyse systemically large and variable data. It is the process that illustrates systemic approach, which has

been identified as helping to ‘distinguish between [the] wants and [the] needs’¹⁹³. It has been acknowledged that it is a systematic process ‘to guide decision making’ that can ‘provide a systemic perspective for decision makers’ and ‘allow for interdisciplinary solutions to complex problems’¹⁹⁴.

The same systemic approach by using criteria could be observed in other fields of human activity. Managers with **systemic thinking** are capable to identify the problems in the rules of conduct rather than in the consequences of their transgression. This systemic thinking works regardless of the context and the activity. It always refers to the rules of a system or the system of rules. For example, in an interview, a manager described systemic problem as ‘...not just isolated events...’ but the problem in ‘a complete set of rules that had been adopted over the years’ having been transformed into ‘a culture’¹⁹⁵.

It could be clearly observed that the systemic thinking requires to distinguish the “recurrent events” from “isolated occurrences”. An isolated event could be seen as something exceptional, sometimes outside of the rules and/or culture, mentality and habits. In the contrary, the recurrence lies in a “set of rules” imbedded in the “culture” of people applying them. That being so, it becomes largely acceptable and thus systemic and repetitive. It becomes a pattern unveiling that there is somewhere a rule, either written or unwritten, a habit or wrongful interpretation of the rule of conduct. A bias could be also apparent that the systemic problem in fact is not a problem at all because the majority lives by these rules. This is called “systemic biases” or “institutional biases”, being defined in sociology as inherent tendencies to support particular outcomes. In other words, these are experiences, loyalties, and relationships of people in their daily lives or well-settled organisational behaviour according to written or unwritten rules.

Accordingly, a systemic problem is due to some issues inherent in the system rather than owing to a specific, isolated factor. And being so, it cannot be fully attributable to individual error or user mistakes. A user mistake, or else a “human error”, is defined as an error of individual in complex systems that is the principal cause of the failure of that system. It could be compared with the so-called “pilot error” where an accident is caused, *inter alia*, by wrong decision-making or failure to follow the prescribed rules of conduct. However, if such “pilot errors” reappear with certain frequency, then the problem could become systemic. Here the system is viewed as a set of rules not only regulating the conduct but also capable to prevent their wrong application.

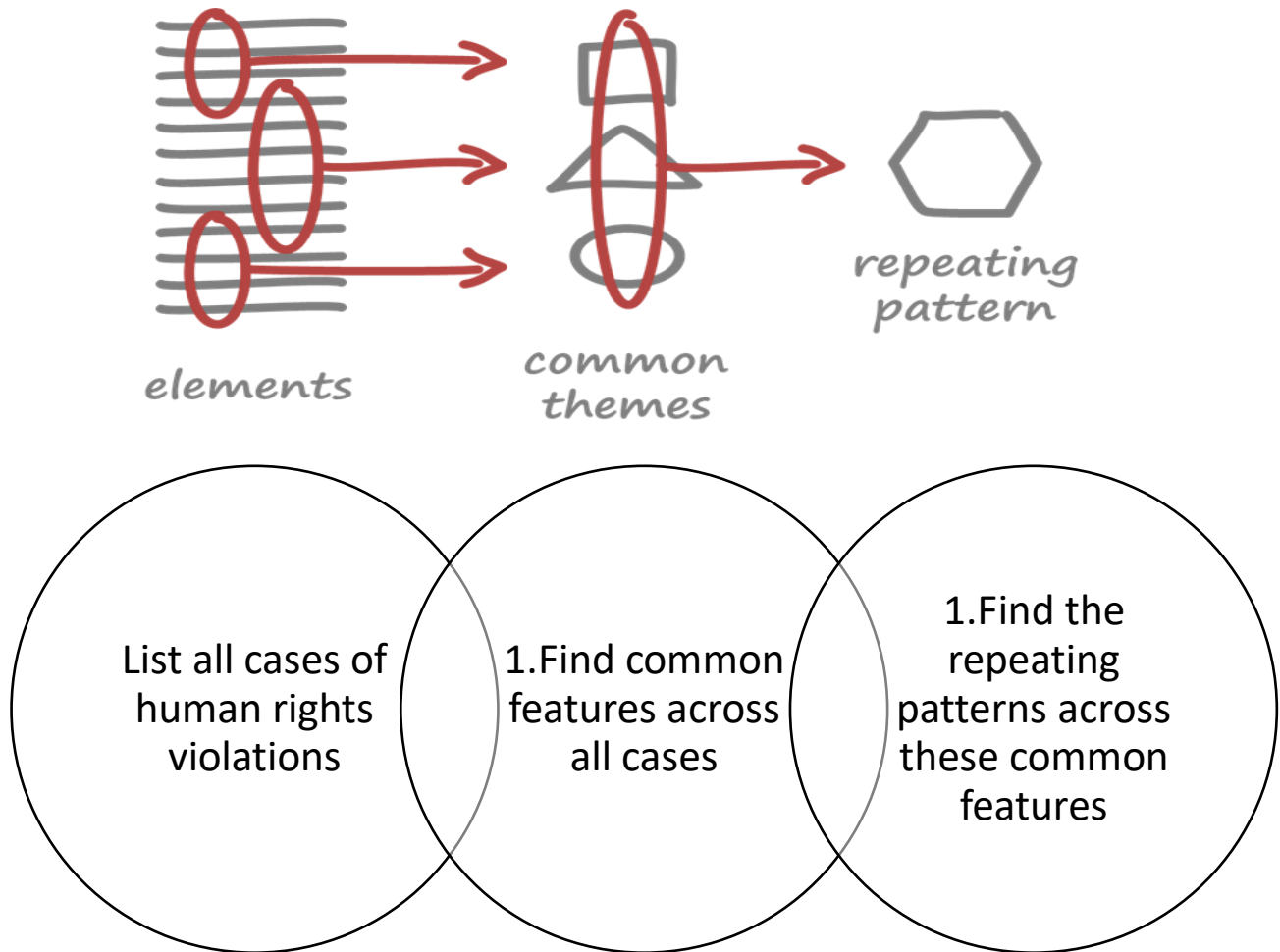
The systemic thinking is difficult to educate because it compels a person to grasp difficult and complex systemic events, to analyse big data and to make deductions ignoring outside of unilateral, on-sided events. The below Figure 6 illustrates in very simplified manner how to evaluate complex systemic problems and to find patterns of systemic violations.

¹⁹³ R. Watkins, M. West Meiers, and Y. Visser, *A Guide to Assessing Needs: Essential Tools for Collecting Information, Making Decisions, and Achieving Development Results* (The World Bank, 2012) p. 11.

¹⁹⁴ Watkins, West Meiers, and Visser, *A Guide to Assessing Needs*, pp. 25–26.

¹⁹⁵ D. Willman, ‘NIH Chief Calls for Ethics Summit’ (2005).

Figure 6. Systemic thinking



Together with the systemic thinking, the second tool recommended by present Methodology is one of many problem-solving techniques – the root-cause analysis.

The **Root Cause Analysis** appears to be the most relevant technique in the current framework and for the purposes of the present Methodology. This technique is widely used in variety of fields from narrow and technical (such as “IT operations, accidents analysis, telecommunications etc.) to more systemic assessments in aviation¹⁹⁶ or health safety¹⁹⁷, management and business administration¹⁹⁸. In all these fields, its common and principal steps are **identification, chronology, differentiation** and **causation**. Some techniques may include question-oriented approach distinguishing the phases of analysis by answering specific questions such as “What, Why, Who and When?”. However, the most common steps are those 4

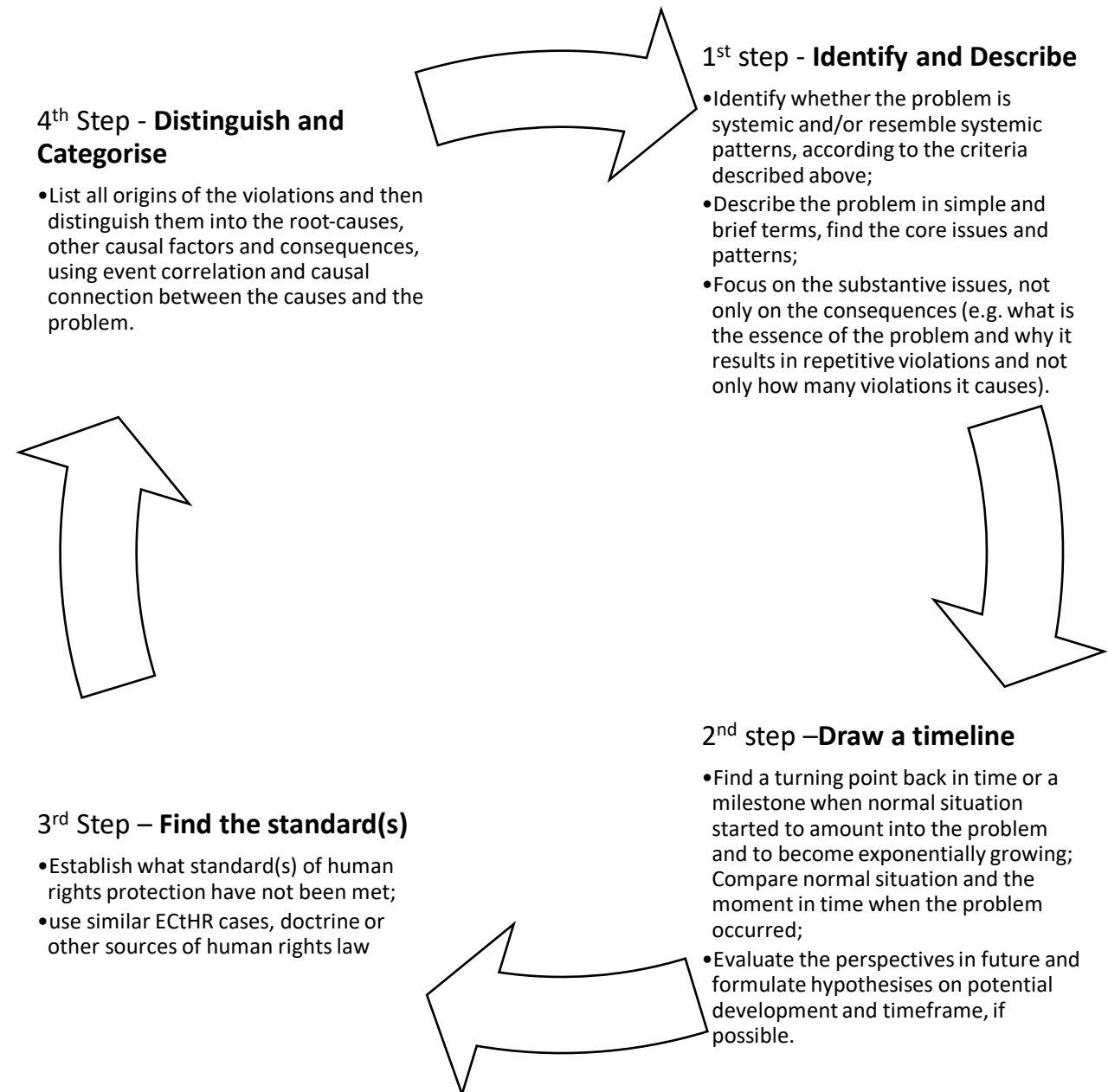
¹⁹⁶ Sofema Aviation Services and AETS-Sofema, ‘Root Cause Analysis for Safety Management Practitioners’.

¹⁹⁷ Occupational Safety and Health Administration (OSHA) and Environmental Protection Agency (EPA), ‘FactSheet: The Importance of Root Cause Analysis During Incident Investigation’ (2019).

¹⁹⁸ P. F. Wilson, L. D. Dell, and G. F. Anderson, *Root cause analysis: a tool for total quality management* (ASQC Quality Press, 1993).

stages mentioned above. Adjusting this technique to the present Methodology, the following principal methodological recommendations could be derived (see Figure 7).

Figure 7. Root Cause Analysis



The last step is the most difficult where the root causes should be distinguished from contributing factors. This step employs isolation of the principal causes of the problems from the secondary elements. Distinguishing the root-cause from other collateral factors could be done by the so-called inversion argument, that is to say, to ask oneself hypothetically whether the violations would have been different, had the particular cause been erased. If so, when the cause is crucial for the survival of the violation then it is the root-cause; whereas if it is not important for its existence or the violation might have occurred without this cause it than this is a secondary contributing factor. For example, a systemic non-enforcement of judicial decisions is a violation that would have not existed if the State would have lifted social privileges that not being covered by funds, it would put a full stop to recurrence of non-enforceable writs for execution. This is the root-cause. On the other hand, the financial funds afforded to pay non-enforced writs do not solve the problem, since other non-enforceable continue to come because of the socially-oriented legislation. Thus, the lack of financial funds is a contributing factor and not the principal cause.

In the end, **other legal and para-legal tools** of systemic-thinking could be used for determination of the systemic patterns. For example, the methods used in **drafting legislation** and **law-making process** usually involve assessment of systemic problems needed to be regulated. In each country these processes are specific and follow their own prescribed law-making rules and legal traditions. In any case, all of them are preceded by a process called *travaux préparatoires*, during which the problems needed regulation are discussed. Valuable information could be found in these preparatory works to legislation. The methods used for codification, identification or patterns of regulated behaviour, etc. could be taken as example in systemic evaluation.

Various cognitive methods of assessment

The present Section describes some of the cognitive techniques that help to identify systemic patterns. They will be described briefly because their detailed study outsteps the limitations of the present Methodology. They are relevant for the Methodology, since these are cognitive processes needed to be taken into account when using the methodological recommendations in practice. As noted above, in the section concerning methodological recommendations on identification of the systemic problems, some of the cognitive methods could be crucial for assessment. For example, the consequentialist and categorial reasoning is basically a cognitive method. It is a mental exercise seeking answers to the question whether a problem features systemic characters, either or both because of its consequences or substantive issues. The below cognitive methods play significant role in the process of finding causes of the problem. These are mainly legal tools and cognitive methods usually used in judicial examinations of cases and legal reasoning.

The first cognitive tool is *ex ante* and *ex post* examination, meaning respectively “from before” and “from after” with regard to some event that might occur or has occurred already. This examination, in the context of the present Methodology, is useful to examine the cases in the past and/or to build up hypotheses about future possible events. For example, the violations in torture cases usually require *ex ante* examination, i.e. what happened and why after the event. The violations involving threats, domestic violence or the effects of incompatible legislation ask for *ex-post* analysis, i.e. what might have happened after certain event. Of course, both types of analysis intermingle and could be used together, but the conclusions could differ. That is why, before reaching some conclusions about a particular problem, it needs to be ascertained which method - either *ex-ante* or *ex-post* analysis – has been used.

The same is true for **the second cognitive method**, i.e. *de lege ferenda* and *de lex lata* arguments. The first are “positive-type” claims referring to the law as it stands now and the second are the “normative-type” reasons that is how the law ought or should have been. These refers to all type of regulations, rules, standards and principles and it is a usual legal dichotomy, which sometimes is called “Is-talk *versus* Ought-talk”. In the present framework, these arguments are useful to distinguish the systemic problems based on violations of standards and/or principles of human rights law. Quite often, the discussions about systemic violations could turn to disputes about the rightness or wrongfulness of domestic legislation and practices against the Convention standards. The domestic law may be seen compatible or not because of how it stands now (positive-type) or because how it ought to have been (normative-type). In this situation it is necessary to separate the arguments since only positive-type arguments can be right or wrong, while “normative-type” cannot; they are hypothetical. Only the positive law, as it stands now, could be compatible or not with the Convention, how it should have been do not solve the problem.

The last cognitive tool for assessment is the ability to draw certain legal distinctions, i.e. between substantive and procedural violations, between the “standards” and “rules”; “peremptory” and “qualified” or “derogative” rights, etc. Basically, the tool require experience to distinguish these legal categories and to qualify the character of violations. In some instances, this could be important for evaluation of systemic problems. For example, the distinction between substantive and procedural violations is important to determine not only the root-causes but also the remedies. A violation of the right to a reasonable length of judicial proceedings is procedural and require only compensation for moral inconveniences; it cannot serve as basis for compensation of the lost substantive civil claims, such as revenues or material damages.

Distinction between the “rules” and “standards”, that is to say between “peremptory” and “qualified” or “derogative” rights, is also important to determine the seriousness of the problem and its causes. Rules establish clear and objectively measurable requirements, either prohibitive or positive obligations which are knowable in advance (for example “torture is prohibited in any circumstances”). Standards, on the other hand are not easier to determine and hardly foreseeable; using the words such as “reasonable”, “necessary” or “promptly”, they allow for a larger margin of appreciation and discretion. As it could be inferred, this distinction reshapes the analysis of the problems, because the nature systemic violations changes if a peremptory norm or a standard is breached.

Methods used by the ECtHR and the CM in their assessment of systemic problems

The ECtHR and the CM use slightly different methods to assess systemic patterns of human rights violations. The ECtHR focuses on dropping its backlog of repetitive cases, thus preferring to put emphasis on the short-term results. It underlines the need to introduce or improve special remedies for systemic problems. The CM, in the contrary, understands the problems more broadly, on structural level, highlighting the need for multilevel reforms and prevention of new violations. It may require to change systems in the respondent States. The authorities of that state pursue other scopes and see the problems from their own, domestic perspective. Opinions may vary and, accordingly, the methods of identification of systemic patterns and tools dealing with the problems differ. They depend on the perspective and the scopes pursued.

It is thus acceptable for any domestic authority to develop its own methodology according to the goals and perspectives of that institution. For instance, the perception of systemic problems in the judiciary is different from the GA Office’s views. The methods will be also different. Nevertheless, for the GA Office the methods used by both the ECtHR and the CM are the most appropriate to the spirit and functions of

the that institution. Accordingly, these methods merit special description, so the GA Office could draw inspiration therefrom.

The method used by the ECtHR to identify systemic problems could be observed in all its pilot-judgments. It includes mainly three steps. **First step** is the statistical data analysis for determination of repetitiveness. After that, the **second step** carries on substantive evaluation of patterns of violations checking compatibility with the Convention. This step is principal because it allows to find the causes of violations in practices or legislation. Then, the last **third step** is the reasoning about possible solutions to the problem, mostly made through the assessment of feasibility to introduce new remedies or to strength the existing ones. Here, the ECtHR may or may not make suggestions on the need remedies. This method was applied, for example, in the *Atanasiu* case, where the ECtHR first decided on the applicability of pilot procedure in view of the recurrence and numbers of repetitive applications after previous judgments¹⁹⁹. Then, the ECtHR evaluated anew the compatibility of the existed practices finding that the cause of repetitive violations lies in deficient implementation of legislation, i.e. in the practices rather than in the legislation itself²⁰⁰. At last the ECtHR reflected on appropriate solutions but left large discretion to the respondent State²⁰¹.

Depending on the type and character of violations, including the context of the systemic problem, the methods employed by the ECtHR could vary. But still they remain the same in the essence. For instance, in the *Ananyev* case the ECtHR was more focused on the finding the roots of the problem of overcrowding and the possible ways of solution (the 2nd step and the 3rd were merged) than on the evaluation of the seriousness (the 1st step) of the problem²⁰².

The Figure 8 illustrates this ECtHR generic method of assessment.

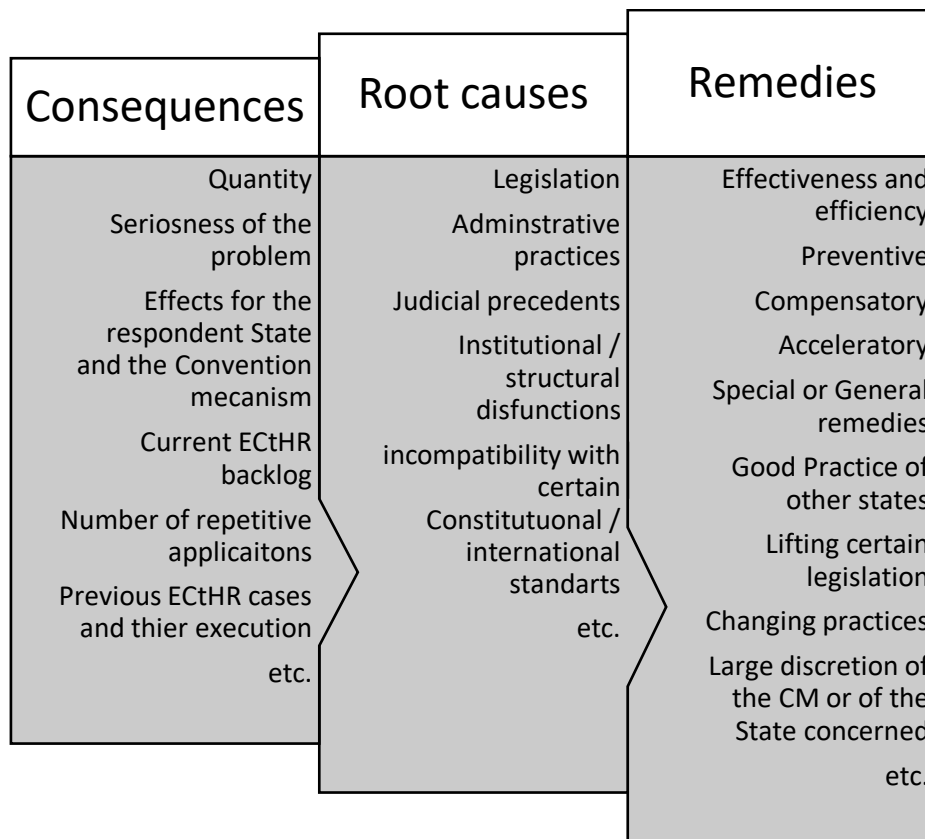
¹⁹⁹ "...The Court observes that it is clear from the present case that the ineffectiveness of the compensation and restitution mechanism continues to pose a recurrent and large-scale problem in Romania. This situation persists in spite of the adoption of the *Viașu*, *Faimblat* and *Katz* judgments, ..., in which the Court indicated to the Government that general measures were needed in order to guarantee the right to restitution in an effective and rapid manner. ... Since those judgments the number of findings of a violation of the Convention has been constantly on the increase, and several hundred more similar applications are pending before the Court, which are liable to give rise to further judgments finding a breach of the Convention. ECtHR, *Atanasiu*, paras 216, 217.

²⁰⁰ "...The main cause appears to be the gradual extension of the scope of the reparation laws to include virtually all nationalised immovable property, compounded by the absence of a cap on compensation. The complexity of the legislative provisions and the changes made to them have resulted in inconsistent judicial practice and in a general lack of legal certainty as to the interpretation of the core concepts in relation to the rights of former owners, the State and third parties who acquired nationalised properties..." *Atanasiu*, paras 220 and 221.

²⁰¹ "...These aims could be achieved, for instance, by amending the current restitution mechanism, in which the Court has identified certain weaknesses, and establishing simplified and effective procedures as a matter of urgency on the basis of legislation and of coherent judicial and administrative practice, with a view to striking a fair balance between the various interests at stake...the national authorities retain full discretion in choosing, subject to supervision by the Committee of Ministers, the general measures to be laid down in the domestic legal system in order to put an end to the violations found by the Court. *Atanasiu*, paras 232 and 236.

²⁰² The evaluation of problem occupied 6 paragraphs, while the identification of the causes and solutions was written in 44 paras ECtHR, *Ananyev*, sec. B and C.

Figure 8. The ECtHR method for evaluation of systemic problems



The CM's method is slightly different, since it has its own perception of systemic problems. The CM is mostly focused on the prevention and deterrence of systemic violations. That is why its approach is broader, but it however depends on the ECtHR findings. For such a broader view of systemic problems the CM could be sometimes criticised by the Member-States for exceeding its mandate of supervision²⁰³. This raises a to what extent these critics are justified. However, this question is outside of the scope of the present Methodology. It however illustrates the point that usually the perception of systemic problems is not uniform among the Convention organs. The CM employs slightly other criteria for classification of cases and its method comprises the following steps.

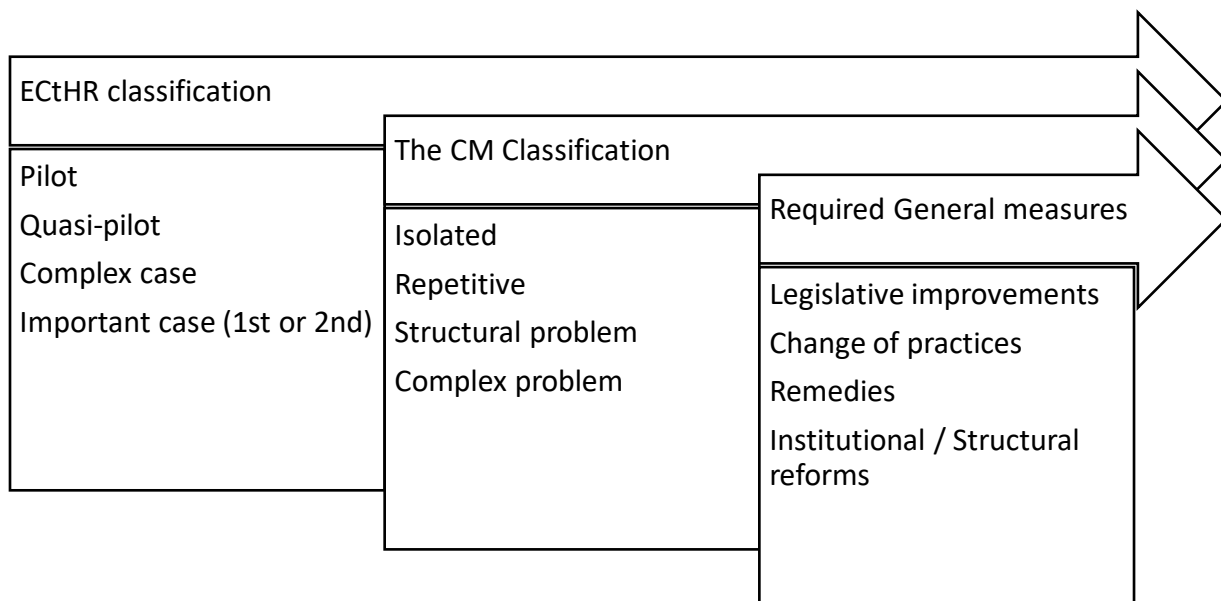
The first step is to distinguish the character of violation in a given judgment; either it is isolated or repetitive. Then, in the **second step**, the CM carefully examines the substance of the violation to determine how to classify its supervision of execution. If the case is isolated it could be classified as complex but never as systemic or structural. The more substantive examination concerns the determination of the nature of the violation and its classification under one or more of the determinants, i.e. is it a solitary case but important from the perspective of future violations or it is a repetitive case that follows previous leading case(s). The CM assesses the character of the problem, whether it is structural, complex or both. The **third step** of systemic evaluation is the character of general measures needed for preventing the recurrence of violations. This is the most important step because depending on it the CM could reach its own conclusion concerning the systemic character of the problem. In this step the classification of the CM could be different from that originally expressed in the ECtHR judgment.

²⁰³ See for example CDDH, *CDDH Report on longer-term future of the ECHR*, para. 169.

Of course, the explained above CM assessment applies only the non-pilot and non-quasi-pilot cases, in the cases where the systemic character of the problem is disputable. The determination of systemic character in the pilot- and quasi-pilot cases has been already made by the ECtHR and needs no special CM assessment. The above steps are employed by the CM on regular basis for all other cases when it distinguishes some meritorious cases disclosing systemic problems.

As with the ECtHR, the CM opinion vary depending on the context of the case, as well as other, non-legal factors. The CM remains essentially a politically involved forum. For example, judgments disclosing structural problems could be classified and then reclassified, groups of cases can be assembled and reassembled, partially or fully closed, etc. Accordingly, the above-mentioned steps for evaluation in a given case could merge or substitute one another. It is usually the 3rd step, which is the most important for classification of the problem in a given judgment as systemic or otherwise; what general measures are required and whether they are so complex and structural that the case merits systemic approach. Nevertheless, the ordinary steps in the CM methodology of assessment could be illustrated as follows, in the Figure 9.

Figure 9. The CM method of evaluation of systemic problems



Both methods of the ECtHR and the CM are inspirational but they observe systemic problems only partially in comparison with the respondent State perspective. This means that both organs of the Convention see systemic problems according to their roles in the Convention machinery and goals. Of course, the Member-States are not excluded from this equation, but they have their own views on the systemic problems in their domestic legal systems. The States could agree with the ECtHR and/or the CM's positions and could not. Some pilot-judgments prove that Member-states could agree or disagree. The CM supervision practice also have sufficient examples where the States cooperated or otherwise, resisted

classification. It is not the purpose of the present Methodology, to illustrate these examples; it suffices to say that they exist.

Accordingly, any methodology for systemic assessment should be drafted primarily from the State perspective with due consideration of the ECtHR and the CM methods. This perspective appears to be even broader. It includes both remedial and preventive scopes of systemic evaluation but also certain discretion and subsidiarity principle. In plain words, this means that the Member-States prefer to evaluate systemic problems by their own-chosen means depending on the context of the problem and many other collateral factors. The ECtHR and the CM methods appears to be leading in this sense, but they should not be blindly taken at the expense of good practices in the Member-State. They should be properly adapted to the domestic context, needs and scopes of the authority in the Member-State that applies them.

Methodological Recommendations

The present Methodological Recommendations were developed in view of the GA Office's specific mandate and role. The recommendations answer the principal methodological questions, i.e. when and where to find systemic patterns and how to do this in an organised manner. Respectively, the below sections were dedicated each to these questions making suggestions concerning the stages of procedures, sources for systemic evaluation and the recommended institutional organisation of the GA Office. On this basis, the GA office could draft its own SOPs²⁰⁴ for the purposes of identification of systemic problems.

Needless to say, the below Recommendations are neither mandatory nor universally applicable. Other state institutions need to adapt these recommendations to their own working methods, should they foresee drafting their procedures to identify and resolve systemic problems.

Moreover, the recommendations were drafted following a preliminary research confined to the methods applicable by the ECtHR and the CM. The research did not compare similar working methods in other offices of the Governmental Agents. Nor it has been inquired whether these offices have developed their methodology or SOPs for the same purpose. It is suggested that such a comparative research to be carried out by the GA Office itself.

1st Recommendation: Set up a Registration and Data Collection system; Build up a Database
Systemic problems will never be identified without appropriate mechanism of data-gathering and data-recording. Its scope is to register and classify the flow of cases providing basis for the research and assessment of situation. For example, getting "basic statistical data" on enforcement of judgments against the State was one of the principal factors of successful administration of systemic problem in the case of *Colic et al.* concerning enforcement of judicial decisions ordering war compensation damages²⁰⁵.

The manner and methods of the case-recording system remain at the exclusive discretion of the GA Office. It must include some key-criteria for identification of systemic problems apart from the elements recorded by the GA Office for its own purposes. The space of the present Methodology does not allow to describe in details such a database and the full list of criteria. Some generic recommendations, however, could be proposed as follows:

²⁰⁴ A standard operating procedure (SOP) is a set of step-by-step instructions compiled by an organization to help workers carry out complex routine operations.

²⁰⁵ ECtHR, *Čolić and Others v. Bosnia and Herzegovina* (2009); ECtHR, *Đurić and Others v. Bosnia and Herzegovina* (2015).

- Distinguish and record data separately for communicated cases, decided cases by judgments and by decisions, as well as the cases pending execution;
- Record general data of a case to use them as connectors between the lists of “communicated” cases, “decided” and “pending execution” cases (such as Name, Date of application, date of communication, Registration number, name and number of applicants, etc.)
- Register separately the complaints under Article(s) of the Convention and legal issues; use the classification and ECtHR keywords or develop your own classification;
- Describe in brief the problem *in casu*; separate the description of legal and factual issues
- Classify cases as isolated, repetitive or leading;
- Include other criteria allowing to group the cases and to observe repetitive or recurrent patterns;
- Register the time of violations; whether it is an instantaneous or continuous violation; record *dies a quo* and *dies ad quem* and periods of violations, etc.

Essentially, this database is an enhanced table of cases with as many as possible information attached thereto. The screenshot below illustrates an example of such a table (see Figure 10).

Figure 10. Table of cases (example)

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	Y	Z
1	TITLE	NO	APPLICANT	LOGGED	COMMUNICATED IN CASU	ART	dies a quo	dies ad quem	NOTES	TYPE	REPERIURE	LAST DATE	DATE	SOLUTION	GOV	STAGE	SET	communic	SET	resoluc	EXECUTIO	REGISTRY			
1020	DUB	3037409	Vilaine DUB	06/07/2009	25/01/2013	imprisony	-	-	-	COMMON	R Zardo DEC	-	05/02/2015	-	FN	-	-	-	-	-	-	-	-	-	-
1021	TOICH AND OTHERS	863310	Iurie Toichi	29/01/2010	25/01/2013	Transnistria issue	1, 2	-	-	COMMON	S Popo PEN	-	-	-	AM	-	-	-	-	-	-	-	-	-	-
1023	VELESCO	5391811	Tatiana VELESCO	15/08/2011	25/01/2013	Investigation of suicide	2	-	-	COMMON	V Kovs PEN	-	-	-	AM	-	-	-	-	-	-	-	-	-	-
1023	EFROS	5238011	Vasilie EFROS	05/10/2011	25/01/2013	Unlawful arrest on lack of reasons	5.1, 5.3, 8	-	-	COMMON	V Zamo DEC	-	06/06/2019	UD	FN	-	-	-	-	-	-	-	-	-	-
1023	NAVROTI	6595311	Alexandru NAVROTI	08/10/2011	25/01/2013	Unreasonable arrest	5.1, 5.4	-	-	COMMON	M Belin PEN	-	-	-	AM	-	-	-	-	-	-	-	-	-	-
1033	STOMATI	6952810	Svetlana STOMATI	13/11/2010	05/02/2013	Transnistria issue	1, 2	22/05/2010	28/12/2010	COMMON	A Posth JUD	-	18/09/2018	CONT	FN	-	-	-	-	-	-	-	-	-	-
1033	REZANOV	3369412	Andrei REZANOV	16/05/2013	05/02/2013	Transnistria issue	1, 3, 5.1, 13	-	-	COMMON	A Posth PEN	-	-	-	AM	-	-	-	-	-	-	-	-	-	-
1033	TOCARENICO	769113	Iulia TOCARENICO	12/12/2012	14/02/2013	Child custody	8.1, 13	30/06/2012	-	COMMON	A Posth JUD	-	28/03/2013	04/11/2014	CONT	FN	-	-	-	-	-	-	-	-	-
1033	TUDORACHI	2857307	Grigore TUDORACHI	24/04/2007	28/02/2013	Compensation for unlawful detentions	5.1, 5.5	-	-	COMMON	-	-	30/05/2014	-	AM	-	-	-	-	-	-	-	-	-	-
1033	BELCENCOV	4457709	Etim BELCENCOV	06/11/2009	01/03/2013	Unsuccessful reasons for judgments	6.1	01/04/2008	28/04/2008	COMMON	-	-	17/04/2014	18/06/2019	CONT	FN	-	-	-	-	-	-	-	-	-
1033	LAZU	4618208	Anastolie LAZU	10/09/2008	01/03/2013	Non-hearing, non-examining of evs	1	17/10/2006	24/05/2008	COMMON	-	-	11/03/2014	-	AM	-	-	-	-	-	-	-	-	-	-
1033	URECHEAN	4162408	Serafim URECHEAN	01/07/2008	04/03/2013	Access to court	5.1	-	-	COMMON	D Grau DEC	-	01/07/2014	CONT	FN	-	-	-	-	-	-	-	-	-	-
1033	URECHEAN	6142808	Serafim URECHEAN	12/11/2008	04/03/2013	Access to court	5.1	-	-	COMMON	D Grau DEC	-	01/07/2014	CONT	FN	-	-	-	-	-	-	-	-	-	-
1043	AGHENIE AND OTHERS	1166613	Tatiana Aghenie	11/09/2013	21/03/2013	Legal certainty Civil	6.1, P.1.1	-	-	COMMON	I Dodon PEN	-	-	-	AM	-	-	-	-	-	-	-	-	-	-
1043	VERETCO	679113	Fiodor Veretco	10/12/2012	25/03/2013	Medical assistance while in detents	3, 5.1, 5.3, 5.28/11/2012	24/01/2013	-	COMMON	R Zado JUD	-	07/04/2015	CONT	FN	-	-	-	-	-	-	-	-	-	-
1043	CORNEI	1173609	Claudia CORNEI	12/02/2009	12/04/2013	Fairness and absence of arbitrariness	1	-	-	COMMON	V Prute DEC	-	13/03/2014	14/12/2017	CONT	FN	-	-	-	-	-	-	-	-	-
1043	NEDELCU	3514910	Ion NEDELCU	14/06/2010	17/05/2013	Ill-treatment in police custody	inek3, 5.1, 5.5	-	-	COMMON	P Posth DEC	-	18/02/2014	FS	FN	-	-	-	-	-	-	-	-	-	-
1043	NIHOLAT	1870510	Ghenadie NIHOLAT	24/03/2010	21/05/2013	Unlawful arrest on unclear informal	5.1, 5.3, 5.4	-	-	COMMON	-	-	16/05/2014	21/10/2014	CONT	FN	-	-	-	-	-	-	-	-	-
1043	RAILO	3174703	Igor RAILO	02/07/2010	21/05/2013	Transnistria issue	3, 14, 9	18/08/2001	02/06/2004	COMMON	-	-	08/04/2014	06/11/2014	CONT	FN	-	-	-	-	-	-	-	-	-
1043	CAZANBEV	3251009	Iurie CAZANBEV	12/06/2009	22/05/2013	Ill-treatment in police custody	inek3, 13	18/08/2005	15/01/2009	COMMON	Andrei E JUD	-	27/03/2014	19/01/2016	CONT	FN	-	-	-	-	-	-	-	-	-
1043	MESCEREACOV	6105011	Alexandru MESCEREACOV	19/09/2011	22/05/2013	Conditions of detention	3	29/12/2010	14/06/2011	COMMON	V Turcu JUD	-	13/03/2014	16/02/2016	CONT	FN	-	-	-	-	-	-	-	-	-
1043	COBANU	6257809	Veronica COBANU	14/11/2009	23/05/2013	Death as a result of a car accident	2	06/04/2008	14/05/2009	COMMON	T Osoi JUD	-	24/02/2015	CONT	FN	-	-	-	-	-	-	-	-	-	-
1053	OKULISAN	3320011	Pavel OKULISAN	15/04/2011	23/05/2013	Conditions of detention	3	22/01/2011	23/08/2011	COMMON	V Presc JUD	-	15/04/2014	29/03/2016	CONT	FN	-	-	-	-	-	-	-	-	-
1053	CRISTIOGLO	21416311	Vasilie CRISTIOGLO	01/04/2011	23/05/2013	Conditions of detention	3	-	-	COMMON	V Turcu JUD	-	26/04/2016	CONT	FN	-	-	-	-	-	-	-	-	-	-
1053	APCOV	1346307	Sergiu APCOV	26/03/2007	23/05/2013	Transnistria issue	1, 5.1, 6.1	21/01/2005	24/12/2012	COMMON	P Posth JUD	-	20/05/2014	30/05/2017	CONT	FN	-	-	-	-	-	-	-	-	-
1053	BANARI	7445011	Radu BANARI	25/11/2011	24/05/2013	Ill-treatment in police custody	inek3	-	-	COMMON	M Banu DEC	-	17/09/2013	FS	FN	-	-	-	-	-	-	-	-	-	-
1053	LUPACESCU	629113	Roxion LUPACESCU	10/12/2012	24/05/2013	Detention on remand	5.1, 5.4	07/11/2012	21/02/2014	COMMON	A Doni DEC	-	24/01/2014	01/07/2014	FS	FN	-	-	-	-	-	-	-	-	-
1053	IOVANOVSKI	8006908	Iovan IOVANOVSKI	23/01/2008	24/05/2013	Ill-treatment in police custody	inek3	-	-	COMMON	B Mani DEC	-	06/03/2014	05/01/2016	CONT	FN	-	-	-	-	-	-	-	-	-
1053	SOYMA	1203305	Sergiy Volodymyr SOYMA	28/12/2004	28/05/2013	Transnistria issue	1, 2, 5.1, 6.1	28/06/2002	24/05/2006	COMMON	V M. Sh JUD	-	30/05/2017	CONT	FN	-	-	-	-	-	-	-	-	-	-
1053	PASA	5047311	Iurie PASA	01/08/2011	31/05/2013	Detention on remand	5.1, 5.4, 5+13-	-	-	COMMON	A Procl JUD	-	06/03/2011	16/11/2011	CONT	FN	-	-	-	-	-	-	-	-	-
1053	BERBER	3252810	Vilaine BERBER	05/05/2010	31/05/2013	Detention on remand	5.1, 5.4	-	-	COMMON	T Osoi DEC	-	21/01/2014	-	FN	-	-	-	-	-	-	-	-	-	-
1053	MTU AND OTHERS	5360310	Ecaterna MTU	03/09/2010	31/05/2013	Positive obligation on protection of 3+8, 13	-	-	-	COMMON	S Demi DEC	-	11/04/2014	21/10/2014	CONT	FN	-	-	-	-	-	-	-	-	-
1053	IP	3370812	IP	21/05/2012	31/05/2013	Positive obligation on protection of 3+8	-	10/05/2010	23/11/2011	COMMON	I Dodor JUD	-	14/04/2014	28/04/2015	CONT	FN	-	-	-	-	-	-	-	-	-
1053	DOROSOVA	3955312	Ecaterna DOROSOVA	12/06/2012	31/05/2013	Ill-treatment in police custody	inek3	11/11/2009	01/11/2011	COMMON	R Zado JUD	-	11/03/2014	28/04/2015	CONT	FN	-	-	-	-	-	-	-	-	-
1053	COBANU	6982911	Veronica COBANU	25/10/2011	31/05/2013	Positive obligation on protection of 2, 2+13	-	-	-	COMMON	-	-	11/03/2014	-	AM	-	-	-	-	-	-	-	-	-	-
1053	MORARI	4771109	Victor MORARI	12/11/2008	10/06/2013	Non-enforcement	6.1, P.1.1	27/02/2008	pending	COMMON	POST-OLAF T Cojoc JUD	-	20/03/2014	07/07/2015	UD	JS	-	-	-	-	-	-	-	-	-
1053	SPRIDONOV	717909	Oleg SPRIDONOV	10/01/2009	10/06/2013	Non-enforcement	6.1, P.1.1	06/05/2008	pending	COMMON	POST-OLAF A Bzogu JUD	-	11/03/2014	07/07/2015	UD	JS	-	-	-	-	-	-	-	-	-
1053	STADUTICH	4775409	Vladimir STADUTICH	18/06/2009	21/06/2013	Double fiscal sanctions	7, 14	-	-	COMMON	-	-	04/07/2014	27/09/2016	CONT	FN	-	-	-	-	-	-	-	-	
1053	CEBOTAR	4636710	Anatol CEBOTAR	02/06/2010	21/06/2013	Transnistria issue	1, 5.1, 6.1	-	-	COMMON	A Zubc PEN	-	-	-	AM	-	-	-	-	-	-	-	-	-	
1053	FIDOROV & CO S R	7634511	FIDOROV & CO	24/11/2011	21/06/2013	Legal certainty Civil	6.1, P.1.1	18/05/2010	18/05/2010	COMMON	T Gurta PEN	-	-	-	FS	-	-	-	-	-	-	-	-	-	-
1053	POPOVICI (GILCA)	485312	Petru POPOVICI	11/01/2012	21/06/2013	Conditions of detention	Request 13, 6.1	12/03/2010	07/11/2011	COMMON	R Zado PEN	-	22/04/2014	-	CONT	JS	-	-	-	-	-	-	-	-	-
1053	COBREANU	2292709	Marc COBREANU	28/04/2009	26/06/2013	Conditions of detention	3	08/12/2008	29/08/2011	COMMON	V Turcu PEN	-	10/05/2014	-	CONT	JS	-	-	-	-	-	-	-	-	-
1073	LISNIC	1701507	Petru LISNIC	04/04/2007	02/07/2013	Non-enforcement	6.1, P.1.1	-	-	COMMON	POST-OLAF F. Naga PEN	-	-	-	CONT	ADJ	-	-	-	-	-	-	-	-	-
1073	COROI	2693109	Ecaterna COROI	11/05/2009	18/07/2013	Failure to address in judgments	the 1, P.1.1	-	-	COMMON	D Pago DEC	-	17/12/2015	-	FN	-	-	-	-	-	-	-	-	-	-
1073	REZANOV & CO	1870510	Andrei REZANOV & CO	11/05/2009	18/07/2013	Denial of justice	1, P.1.1	-	-	COMMON	A Posth DEC	-	11/03/2014	14/12/2017	CONT	FN	-	-	-	-	-	-	-	-	-

2nd recommendation: Identify stages where the systemic violations are visible

Systemic patterns could be observed immediately after the ECtHR has given notice of the application to the responded Government or pending its proceedings. No need to wait for a judgment or pilot-procedure. It is the “stage pending proceedings” or “judicial stage” and it starts by communication of an application to the Government. The ECtHR. If it is not the simplified communication procedure, the Registry of the ECtHR would describe relevant facts and would formulate of legal questions under the Convention. Some of the violations able to become systemic to important in view of their mass effects could be discernible already at this stage; for instance, questions concerning quality of law or violations because of institutional incompatibility, lack of independence or well-settled erroneous practices.

The second, “Execution stage” begins when final judgement or decision is sent for supervision of the CM. At this stage, the systemic violations could be observed from the ECtHR non-pilot or non-quasi-pilot

judgments. Its decisions on friendly settlement and/or unilateral declarations should be linked to a leading judgment and have no self-standing in identification of systemic problems. At this stage the most important step is the classification of the given judgment by the CM and preparatory work in cooperation with the Department for the Execution. The systemic problems could be identified following the re-reading of that judgment and during the drafting of plans for its execution, mostly when the GA Office contemplates on general measures needed for implementation of the judgment. In a given context, the judgment may become important because it unveils systemic problems only after its delivery. For example, a final ordinary judgment of the ECtHR is sent to the CM for supervision but, at the same time, it is being followed by numbers of repetitive communicated cases disclosing the same problem. Formally that judgment is neither a pilot nor a quasi-pilot and no other similar cases are pending before the CM. Formally speaking, for the CM it appears as one isolated case. Other communications of new cases after the judgment cannot be taken into account and thus the CM is not able to classify the problem as systemic. It cannot speculate on the potential up-coming violations either or make inferences about the scales of the problem on the domestic level. In this situation, the GA Office remains the only one to classify the problem as systemic on the basis of one judgment pending its execution. Only the GA Office knows the full context of the problem and its consequences expressed in large number of communicated cases and potential violations in the future.

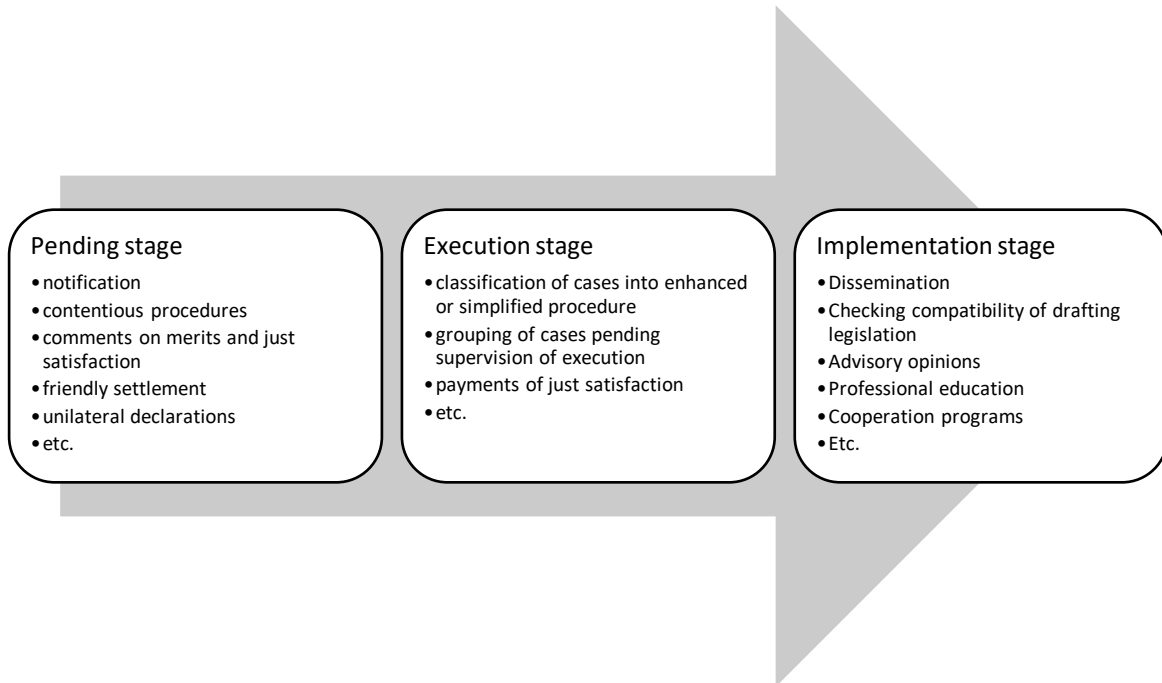
General implementation of the Convention at the domestic level is another important stage when the systemic problems can be identified. Though connected with the above-mentioned execution stage this phase is autonomous because it goes beyond concrete general measures of execution. The ECtHR judgments, even when the CM closed its supervision of execution, continue to have effects on legal practices, law-making and examination of other cases. Do not forget about the alleged *erga omnes* effect of the ECtHR judgments, which remains disputed yet noticeable in the domestic legal systems. Some of the judgments remain deeply imbedded into the legal mentality and practices after their formal closure. In this post-executional stage, the GA office and the authorities may rely on the authority of already decided cases in order to pursue their policies or to make reforms. Hypothetically speaking, systemic problems could be also identified at this stage. The references to the past judgments shall be made if new legal reforms tend to forget the ECtHR and the CM previously decided and closed cases. For example, the reforms of the judiciary pursued following one judgment made necessary adjustments in the system of selection and career of judges. The supervision of judgment was successively closed, but later the new governmental or political agenda again envisages fresh judicial reforms. It may roll back the changes and thus the problems could become systemic. Indeed, this is seemingly the precedent with recent reforms of judiciary in Ukraine as of 2019 that were questioned by the Venice Commission²⁰⁶.

In brief, the stages include the following 3 principal stages of “Pending”, “Execution” and “Implementation” proceedings. Each may incorporate some sub-stages such as “notification”, “statement of facts”, “contentious procedures”, “friendly settlement”, “classification of cases into enhanced or simplified procedure”, “grouping of cases pending supervision of execution”, etc. The classification of

²⁰⁶ ‘Ukraine has undergone profound judicial reforms in recent years, and the implementation of some of them is still unfinished. The reform of the process of the selection of judges and the new composition of the Supreme Court of Ukraine, which began its work in January 2018 (n.b. after the Olexandr Volkov judgment) , has been a marked improvement over the system that existed before. In this situation, convincing justifications have to be presented for yet another reform.’ CDL-AD(2019)027-e Ukraine—Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies, adopted by the Venice Commission at its 121st Plenary Session, Venice, 6-7 December 2019 (2019) para. 15.

stages and sub-stages depends on the working methods of the GA Office. But some specific instructions could be written in the internal SOPs aiming at identification of systemic problems at these stages. The Figure 11 below illustrates these stages visually.

Figure 11. Case-flow and Stages when systemic patterns could be identified



3rd recommendation: Identify and draw the list of legal and para-legal sources necessary for identification of systemic patterns

Sources provide for basic research material from where valuable interferences on systemic patterns of problems could be drawn. For instance, the ECtHR judgments and the CM cases have been regarded as the main sources during the drafting of the present Methodology. However, they were not the only sources for the Research as it took into consideration other legal and non-legal sources. The same should be done when systemic problems are being identified in the GA Office.

Data and sources should not be exclusively legal. Investigation of systemic problems could rely on direct observation of the actual situation in the field, on mass-media, opinions of international organisations and/or high officials, official letters and/or communications between state authorities, the judicial practice and the case-law of the Constitutional court, etc.

The present Methodology does not intent to draw a full list of such sources. It only proves that identification of systemic problems starts by classification, structuring and organising legal and non-legal sources and research material. If all is organised than all sources will be used to find patterns and to verify the veracity of the conclusions drawn therefrom. In this sense, this process is similar to academic technique when firstly the sources and data are collected, investigated and only then conclusions are drawn, not in advance.

The below list of sources is solely suggestive and vary from the context of the problem (see Figure 12).

Figure 12. Example of organising the sources to investigate systemic violations



4th Recommendation: Review working methods and institutional organisation if needed; set up cooperation mechanisms between the Office divisions to collect and exchange information with analytical section.

The best answer to the challenge in identification of systemic problems is to set up an analytical division within the GA Office. However, it is not the panacea for all and it would not be functional without appropriate organisation of all other sections responsible for collecting of data and providing information. The data should be interchangeable and preferably collected in such a way so as to allow the analytical section to draw reasoned conclusions. Cooperation with other governmental bodies and judicial institutions should not be forgotten. In principle, the Office has exclusive discretion to set up its own working methods and internal organisation. The below Chart examples an organisational structure of Office that could be efficient in dealing with the task to identify systemic problems:

Figure 13. The Sample of an organisational chart

