

# Access to justice in the European Convention on Human Rights system

**Janneke H. Gerards**

Utrecht University, Utrecht, Netherlands

**Lize R. Glas**

Radboud University, Nijmegen, Netherlands

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## Abstract

The numerous reforms to the Convention system of the past two decades have unquestionably had an effect on applicants' means to access justice in the system. It is, however, open to question how these changes should be evaluated: with reference to the individual right to petition, or with reference to a more substantive and general conception of access to justice. This article explores these two approaches to the notion of access to justice both generally and for the Convention system specifically. The main argument of the article is to show the value of taking a substantive approach to access to justice in the Convention system. Thus, it challenges the centrality of the individual right to petition in discussions on reform of the system. Further, to show how taking a different perspective on access to justice may lead to different analyses, an evaluation in the light of both approaches is made of five sets of central changes to the Court's procedure and its working method. This includes the revised Rule 47, single-judge formations and the priority policy.

## Keywords

European Court of Human Rights, European Convention on Human Rights, access to justice, effectiveness, procedural/substantive justice, general/individual justice

## 1. Introduction

Since the establishment of the current system of the European Convention on Human Rights (Convention, ECHR), numerous reforms have been implemented to the procedure of the European

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### Corresponding authors:

Janneke H. Gerards, is professor of fundamental rights law at Utrecht University, Netherlands.

E-mail: j.h.gerards@uu.nl

Lize R. Glas is assistant professor of European law at Radboud University, Netherlands.

E-mail: l.glas@jur.ru.nl

Court of Human Rights (Court, ECtHR) with an eye to increasing its efficiency and safeguarding its long-term effectiveness.<sup>1</sup> Virtually everyone will agree that these reforms have significantly changed the functioning of the Court, as well as the applicants' means to access justice in the Convention system.<sup>2</sup>

It can be easily agreed that evaluating the effect of these changes on access to justice is important. It is less easy to agree, however, on how such an evaluation should be carried out. Much depends on which parameters are relied upon. One such parameter, which reappears in different evaluations and statements on reform of the Court, is the individual right to petition to the Court. Not sacrificing that right has even been called one 'of the primary considerations that should guide any changes to the Convention system'.<sup>3</sup>

This article challenges the centrality of the individual right to petition and individual justice in discussions on reform of the Court, and submits that it is valuable to supplement these notions by concepts of substantive and general justice as parameters for assessing reforms. To this end, this article first argues (in section 2) what access to justice can be said to encompass, both generally and in the Convention system specifically. The follow-up question (addressed in section 3) is then how past reforms can be analysed in view of the parameters defined in section 2. More specifically, five sets of central changes to the Court's procedure and its working methods are analysed. These changes have been selected because they have arguably had significant impact on individuals' access to justice in the Convention system since 1998. This analysis not only serves to examine the changes in light of the access to justice perspective. It also shows how taking a different access to justice perspective may lead to different outcomes, as well as how and why it can be valuable to take this broader perspective in debates about reform of the Court.

## 2. Access to justice

This section discusses generally how the notion of access to justice can be described in different ways. In light of that description, it also zooms in on what access to justice encompasses in the Convention system, and what it means to have effective access to (substantive) justice in that system. The resulting insights will function as the framework based on which section 3 will analyse reforms with an impact on access to justice at the Court.

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1. Lize Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be Drawn' (2014) 14 HRL Rev 671; Nikos Vogiatzis, 'The Admissibility Criterion under Article 35(3)(b) ECHR: A 'Significant Disadvantage' to Human Rights Protection?' (2016) 65 ICLQ 185. For a review see CDDH Report on the Longer-term Future of the System of the [Convention], CDDH(2015)R84 Addendum I, 11 December 2015.
  2. eg Reflection Group on the Protection of the Reinforcement of the Human Rights Protection Mechanism, 'Activity Report', CDDH-GDR (2001)010, 15 June 2001; Position Paper of the Court on proposals for reform of the [Convention] and other measures as set out in the report of the [CDDH] of 4 April 2003, CDDH(2003)006 final and CDDH-GDR(2003)024, 26 September 2003, para 31; NGO Response to Proposals to Ensure the Future Effectiveness of the [Court], 28 May 2003; Joint NGO statement, 'Protocol 15 to the [Convention] must not result in a weakening of human rights protection', 25 June 2013. See further eg Philip Leach, 'Access to the European Court of Human Rights - From a Legal Entitlement to a Lottery?' (2006) 27 HRLJ 11; Vogiatzis (n 1) 187.
  3. European Law Institute, 'Statement on Case-Overload at the European Court of Human Rights', 6 July 2012, 20-21. See also n 61.

## 2.1 Access to justice generally

The notion of access to justice ‘is not commonly used as legal terminology’.<sup>4</sup> The term does not, for example, feature in the Convention, and could not be found in any of the UN human rights treaties until recently.<sup>5</sup> When it is used in reports or academic writing, the notion is usually not defined, probably because it is difficult to do so.<sup>6</sup> It is, however, often indicated to which other notions the notion of access to justice is connected. Moreover, it is clear that the notion can be approached narrowly – that is, mainly from a procedural perspective – or more broadly, taking a more substantive perspective.

Approached narrowly, access to justice is ‘concerned with the means for securing vested rights, particularly through the use of courts and tribunals’.<sup>7</sup> The notion of ‘procedural access to justice’<sup>8</sup> therefore mainly means being able to use a procedure before a court.<sup>9</sup> Following this approach, one likely focuses on the obstacles people face when trying to bring a case before a court,<sup>10</sup> such as having no access to legal aid.<sup>11</sup>

When taking a broader approach, the notion not only encompasses access to a (legal) procedure,<sup>12</sup> but also the outcome of a procedure or measure. More specifically, the notion concerns the question whether the outcome is ‘just and equitable’<sup>13</sup> or helps realise ‘material justice’.<sup>14</sup> Access to justice thus becomes ‘both a process and a goal’.<sup>15</sup> Clearly, there is not one broad or substantive approach, since a wide variety of substantive elements of justice can be brought under the scope of this notion of justice. However, regardless of which substantive approach is taken, the role of non-judicial bodies, such as national human rights institutions or ombudspersons, is also considered.<sup>16</sup>

4. FRA, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (Imprimerie Centrale 2010) 14.

5. Eilionoir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2015) 21. The 2006 Convention on the Rights of Persons with Disabilities changed the UN situation (see art 13).

6. Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1987) 27(2) *Buff L Rev* 181.

7. Jeremy McBride, ‘Access to Justice for Migrants and Asylum-seekers in Europe’, *CDCJ* (2009) 2, para 6. See also Patricia Hughes, ‘Law Commissions and Access to Justice: What Justice Should We be Talking About?’ (2009) 46 *OHLJ* 773, 778.

8. This term, as well as ‘substantive access to justice’, is used in David A Larson, ‘Access to Justice’ in *Encyclopaedia of Law and Economics* (8 October 2015) 1-2.

9. McBride (n 7) para 6.

10. *ibid.*

11. Francesco Francioni, ‘The Rights of Access to Justice under Customary International Law’ in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007) 1. See also Tom Cornford, ‘The Meaning of Access to Justice’ in Ellie Palmer and others (eds), *Access to Justice. Beyond the Policies and Politics of Austerity* (Hart Publishing 2016), 39; Alan Uzelac and C H (Remco) van Rhee, ‘Introduction’ in Alan Uzelac and C H (Remco) van Rhee (eds), *Access to Justice and the Judiciary. Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (Intersentia 2009) 1-2.

12. Reem Bahdi, ‘Background Paper on Women’s Access to Justice in the MENA Region’ (University of Windsor, 31 October 2007) 3.

13. McBride (n 7) para 9.

14. Antônio A C Trindade, ‘Some Reflections on Access to Justice in Its Wide Dimension’ in Rüdiger Wolfrum, Maja Seršić and Trpimir M Šošić (eds), *Contemporary Developments in International Law; Essays in Honour of Budislav Vukas* (Brill Nijhoff 2015) 464. See also Cappelletti and Garth (n 6) 181; McBride (n 7) para 9.

15. FRA, *Handbook on European Law Relating to Access to Justice* (Publications Office of the EU 2016) 16.

16. FRA (n 15) 48; Julinda Beqiraj and Lawrence McNamara, ‘International Access to Justice: Barriers and Solutions’ (Bingham Centre for the Rule of Law, February 2014), 5.

Therefore, the need to be able to access a 'classic' court loses the central place it has in the procedural approach. Nevertheless, the means or process by which substantive justice is achieved remains of relevance, because, in the absence of procedural safeguards, it is uncertain that access to substantive justice can be guaranteed.<sup>17</sup> The maxim 'justice delayed is justice denied' is illustrative in this regard, for it points to the importance of procedure as to how outcome is valued. Further, as is explained below, substantive access to justice is often connected to notions of fair trial and due process.

Two routes can be followed to deliver substantive justice to individuals: direct or indirect access to substantive justice. These two routes are related and by no means mutually exclusive, but can be taken at the same time in one and the same legal system.

The direct route is a shortcut from the perspective of individuals. This route gives them immediate access to institutions before which they can bring cases relating to their situation (for example, the length of proceedings). The institutions have the power to decide on the case in order to improve the individuals' situation (for example, by compensating for the delay experienced). Substantive justice thus becomes primarily justice for the individual and can be connected to notions associated with the content and outcome of (judicial) proceedings, such as fair trial, judicial protection, due process, redress and execution of judgments.<sup>18</sup>

The indirect route to substantive justice takes a detour, at least from the perspective of individuals. The route travelled is one of taking general measures, not giving them access to a procedure by which they can seek to improve their own situation. Instead, these measures first lead to general justice (for example, adopting a law setting limits to the length of proceedings). Only in second instance do they lead to an improvement in the situation of the individual (for example, application of the law to limit the length of proceedings in individual cases). Substantive justice thus is primarily concerned with achieving general justice and not in the first place with individual justice. Nevertheless, such general justice presumably leads to access to substantive justice for individuals eventually.

## 2.2 Access to justice in the Convention system

**2.2.1 Procedural and substantive access to justice.** Offering substantive protection of human rights has always been the central aim of the Convention system. The drafters of the Convention regarded the Convention as a means to 'take the first step for the collective enforcement of certain of the rights stated in the Universal Declaration [on Human Rights]'.<sup>19</sup> In the words of the Court, too, the Convention is 'an instrument for the protection of human beings'.<sup>20</sup> This is further apparent from the obligation which the States Parties undertake in Article 1 ECHR, for they 'shall secure to everyone within their jurisdiction the rights and freedoms' defined in the Convention.<sup>21</sup> Thus,

17. Larson (n 8) 2; Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* (Springer 1985), 52; Antônio A C Trindade, *The Access of Individuals to International Justice* (OUP 2011) 75; Francioni (n 11) 12-13.

18. FRA (n 4) 16. See also Lord Woolf, 'Access to Justice – Final Report' (1995), section 1, para 1; UNDP, 'Access to Justice: Practice Note' 9 March 2004, 6; Dinah L Shelton, *Remedies in International Human Rights Law* (OUP 2006), 9; Francioni (n 11) 1, 3-4; XIV Ibero-American Judicial Summit, Brasilia Regulations regarding Access to Justice for Vulnerable People, 4-6 March 2008; Trindade (n 14) 464; FRA (n 15) 16.

19. Preamble ECHR.

20. *Allen v UK* ECHR 2013-IV, para 92.

21. Art 19 ECHR.

the primary objective of the Convention is clearly broader than solely to provide a right of access to court.

When zooming in on the two most important actors in the system, the Court and the States, it also becomes apparent that they should primarily provide substantive access to justice.

Regarding the States, when thinking of access to a court in the Convention system, the *Golder v UK* judgment will spring to the mind of many observers.<sup>22</sup> In that judgment, the Court qualified the right of access to court as ‘an inherent aspect of the safeguards enshrined in Article 6’ ECHR.<sup>23</sup> However, when thinking twice, it becomes clear that this procedural guarantee is of limited consequence to the current context, due to the limited field of application of Article 6. Article 13 ECHR is of more relevance, requiring as it does the availability of an effective remedy at the national level to enforce the substance of the Convention guarantees. The authority providing the remedy need not be a judicial authority<sup>24</sup> and it is possible that, although no single remedy itself entirely satisfies the Article 13 requirements, ‘the aggregate of remedies provided for . . . may do so’.<sup>25</sup> More important than the forum or the means of justice is the question of whether the remedy is effective in the sense that it ‘could have prevented the alleged violation occurring or continuing or could have afforded the applicant appropriate redress for any violation that had already occurred’.<sup>26</sup> Effectiveness must exist both in practice and in law.<sup>27</sup> Altogether this clearly implies a more substantive outlook than a purely procedural one.

Article 13 only requires the availability of an effective remedy at the *national* level; it does not give potential applicants a comparable right at the Court. After all, the Convention merely provides that the Court ‘may receive applications’ of alleged victims of a Convention violation.<sup>28</sup> Indeed, the applicants must first make use of the available domestic remedies before they can access the Court, so there is no direct access to that body.<sup>29</sup> This bar to direct access can be explained by the principle that the primary responsibility for securing the Convention rights does not lie with the Court but with the States.<sup>30</sup> Accordingly, the Court comes into play only as a subsidiary authority, when the States have not fulfilled their responsibility under Article 13.

In conclusion, whether regarded from the perspective of the Convention or when zooming in on the responsibilities of the States and the Court, the Convention system is clearly in the first place concerned with providing access to substantive justice. Key to providing such access is the effective protection of human rights. Such effectiveness, according to the Court, concerns ‘not only the interpretation of substantive provisions of the Convention, but also procedural provisions; it impacts on the obligations imposed on governments, but also has effects on the position of applicants’.<sup>31</sup> The importance of effectiveness brings to mind the importance of procedural safeguards to substantive access to justice, underlined in section 2.1. The next section expands on what such effectiveness encompasses in the Convention system.

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22. (1975) Series A no 18, paras 28-36.

23. *Markovic and Others v Italy* ECHR 2006-XIV, para 92.

24. *Leander v Sweden* (1987) Series A no 116, para 77.

25. *ibid.*

26. *Ramirez Sanchez v France* ECHR 2006-IX, para 160.

27. *Rotaru v Romania* ECHR 2000-V, para 67.

28. Article 34 ECHR; cf Article 33 ECHR ‘Any High Contracting Party may refer’.

29. Article 35(1) ECHR.

30. *M.S.S. v Belgium and Greece* ECHR 2011-I, para 287.

31. *El-Masri v the FYRM* ECHR 2012-VI, para 134.

**2.2.2 Effective access to substantive justice.** The discussion of effectiveness in the Convention system revolves around the ideas underlying the principle of effectiveness, as they can be derived from the Court's case law under Article 13 and from references of the Court to effectiveness when contemplating its own role.

**Independence.** Independence of the authority providing access to justice is needed to ensure 'protection against the [...] abuse of authority'.<sup>32</sup> In its Article 13 case law, the Court has emphasised the importance of independence by indicating that it 'makes a point of verifying [an authority's] independence ... and the procedural guarantees it offers' when the "'authority" concerned is not a judicial authority'.<sup>33</sup>

**Flexibility.** Flexibility has many appearances. One way to be flexible is to not be overly rigid with certain rules. To illustrate, in order to ensure effectiveness, the Court applies 'the rules of admissibility ... without excessive formalism'.<sup>34</sup> Another way to be flexible is to be open and responsive to new developments. With reference to the need for effectiveness, the Court has, for example, regard 'to the changing conditions in the ... Contracting States ...', because if it would not, it would obstruct 'reform or improvement'.<sup>35</sup> From this perspective, flexibility is the antidote to rigidity. A third way to be flexible (for domestic courts) is to take the 'realities of each case ... into account in order to avoid the mechanical application of domestic law to a particular situation',<sup>36</sup> and (for the Court) to 'look behind appearances and investigate the realities of the situation complained of'.<sup>37</sup> Being flexible when providing access to justice therefore means to not engage in excessive formalism or the mechanical application of rules, to not be too rigid and to look beyond appearances.

**Legal certainty.** Clearly, flexibility should not be boundless, but should be balanced with the need for legal certainty. As the Court has emphasised with reference to Article 13, 'sufficient procedural safeguards against arbitrariness' must be in place.<sup>38</sup> The Court may reach the conclusion that such safeguards are lacking for example when domestic courts have limited competence to review the merits of decisions which have allegedly adversely affected the Convention rights.<sup>39</sup>

**Transparency.** It can be derived from the Court's case law under Article 13 that it also attaches considerable importance to the transparency of the procedure which is meant to contribute to substantive justice. To illustrate, the Court concluded in one judgment that the advisory panel in question did not offer sufficient procedural safeguards *inter alia* because the applicant 'was only

32. *Khan v UK* ECHR 2000-V, para 47.

33. *Souza Ribeiro v France* ECHR 2012-VI, para 79.

34. *İlhan v Turkey* ECHR 2000-VII, para 51.

35. *Scoppola v Italy (no 2)* App no 10249/03 (ECtHR, 17 September 2009) para 104. See also *Sergey Zolotukhin v Russia* ECHR 2009-I, paras 80-81.

36. *Nada v Switzerland* ECHR 2012-V, para 182.

37. *Broniowski v Poland* ECHR 2004-V, para 151. See also *Depalle v France* ECHR 2010-III, para 78. eg *Hermi v Italy* ECHR 2006-XII, para 70.

38. *Maskhadova and Others v Russia* App no 18071/05 (ECtHR, 6 June 2013) para 245.

39. *Zalov and Khakulova v Russia* App no 7988/09 (ECtHR, 16 January 2014) para 103.

given an outline of the grounds for the notice of intention to deport'.<sup>40</sup> In another case, the Court noted that 'throughout the domestic proceedings the applicants were denied a copy' of a relevant decision, a fact contributing to the finding that the relevant legislation did not provide them with the said safeguards.<sup>41</sup> In its Article 13 case law therefore, the Court finds it important that the content of a decision is known and that reasons are given: the decision-making process should be transparent. In other Convention areas,<sup>42</sup> the Court has also emphasised that the reasoning aspect of transparency is of great importance for individuals to understand why certain decisions have been taken.<sup>43</sup> This is for example reflected in its case law under Article 10 (freedom of expression)<sup>44</sup> and in certain judgments on Article 8 (right to respect for private and family life).<sup>45</sup>

**Timeliness.** The timeliness of the delivery of substantive justice has been a relevant factor in the Court's Article 13 case law.<sup>46</sup> To illustrate, the Court has held that 'the timely payment of a final award of compensation for anguish suffered must be considered an essential element of a remedy ... for a bereaved spouse and parent'.<sup>47</sup>

**2.2.3 Direct and indirect substantive access to justice.** As explained above, one can deliver substantive justice to individuals in a direct or indirect manner. This distinction can also be applied to the Convention system. The Court can be regarded as an institution that is meant to deliver justice in individual cases. It can also be seen as its main task to help raise the level of protection in the Member States and to thus contribute to substantive access to justice indirectly. When going down the latter route, it is not necessary to adjudicate each individual application because not every application contributes to general justice.<sup>48</sup> The question is now which route the system and the Court travel.

The drafters envisaged the Convention as an instrument that would be 'an early warning system to sound the alarm in case Europe's fledgling democracies began to backslide toward totalitarianism'<sup>49</sup> and one that would strengthen 'the resistance [...] against insidious attempts to undermine our democratic way of life from within or without', that is, protecting States from communism.<sup>50</sup> The drafters therefore seemed to see the Convention system as a safeguard of general justice; the protection of individual human rights was not at the forefront of their concerns. This is not

40. *Chahal v UK* ECHR 1996-V, para 154.

41. *Sabanchiyeva and Others v Russia* ECHR 2013-III, para 154.

42. eg the right to property. See *Rysovsky v Ukraine* App no 29979/04 (ECtHR, 20 October 2011) para 70.

43. *Garcia Ruiz v Spain* ECHR1999-I, para 26; *Suominen v Finland* App no 37801/97 (ECtHR, 1 July 2003) para 34.

44. eg *Cumhuriyet Vakfi and Others v Turkey* App no 28255/07 (ECtHR, 8 October 2013) para 68.

45. eg *X v Latvia* ECHR 2013-VI, para 107.

46. David Harris and others, *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 771.

47. *Öneryıldız v Turkey* ECHR 2004-XII, para 152. See also *Çelik and İmret v Turkey* App no 44093/98 (ECtHR, 26 October 2004) para 55.

48. Paul Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' (2002) 21 Penn State Intl L Rev 101, 104.

49. Laurence R Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 EJIL 125, 129.

50. Arthur H Robertson, *Collected Edition of the "Travaux Préparatoires"* (vol 1, Martinus Nijhoff 1975) 30 (citation Lord Layton); Mikael R Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2007) 32 L & Soc Inquiry 137, 140; Ed Bates, *The Evolution of the European Convention on Human Rights – From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 5, 7.



surprising as the individual right to petition was regarded as ‘a dream unlikely to ever be realized’ in the early 1950s.<sup>51</sup> Furthermore, up to the 1990s, individuals had an ‘inferior’<sup>52</sup> status in the system because the right remained optional and individuals did to not have standing before the Court.<sup>53</sup> By the 1990s, however, all States had accepted the right.<sup>54</sup> Furthermore, Protocol 11 (1998) made acceptance of the right mandatory and thereby ‘fully institutionalized’<sup>55</sup> it ‘as the motor of the enforcement machinery under the Convention’.<sup>56</sup> Providing individuals justice thus gained importance. Nevertheless, several scholars still maintained that it is *not* the Convention’s primary aim to provide individual justice but to provide ‘constitutional justice’.<sup>57</sup>

The ‘general justice’ vision was not central to Protocol 14 (2004), however.<sup>58</sup> Increasingly, ‘general’ and ‘individual’ justice were proposed as equally important aspects of the system.<sup>59</sup> The High Level Conferences on the future of the Court also reaffirmed the States’ commitment to the right of individual petition ‘as a cornerstone of the Convention mechanism’.<sup>60</sup> Comparably, the Court admits that the right to individual application ‘has... become of high importance and is now a key component’ of the protection mechanism.<sup>61</sup> However, its mission is ‘also to determine issues on public-policy grounds in the common interest thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States’.<sup>62</sup> The Court’s increasing attachment to general justice becomes clear when looking at some recent developments. In the pilot-judgment procedure, for example, the Court’s focus is on solving the underlying structural problem rather than on deciding individual cases.<sup>63</sup> In this respect, it is telling that the Court has stated, in the context of the pilot-judgment procedure, that it ‘cannot be converted into providing individualised financial relief in repetitive cases arising from the same systemic situation’.<sup>64</sup> In short, the consensus seems to be that the Court’s primary task is to provide direct access to substantive justice and that this is a goal in itself. In addition, it (increasingly) plays a role in providing indirect access to justice, for it also contributes to general justice.

51. Bates (n 51) 9.

52. *ibid* 404.

53. In 1955, the right to individual petition became effective after it had been accepted by six (small) states. The major states waited longer, see Astrid Kjeldgaard-Pedersen, ‘The Evolution of the Right of Individuals to Seize the European Court of Human Rights’ (2010) 12 *Journal of the History of International Law* 267, 282.

54. Bates (n 50) 19.

55. Wildhaber, ‘Rethinking the European Court of Human Rights’ in Jonas Christoffersen and Mikael R Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2011) 208.

56. Bates (n 50) 149.

57. eg Mahoney (n 48) 101; Luzius Wildhaber, ‘A Constitutional Future for the European Court on Human Rights?’ (2002) 23 *HRLJ* 161.

58. Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016) 57.

59. CDDH (n 1) paras 11, 15 and proposal B.4.

60. Izmir Declaration (27 April 2011), Follow-up Plan para A(1). See also Interlaken Declaration (19 February 2010), para 1; Brighton Declaration (21 April 2012), para 13; Brussels Declaration (27 March 2015), para 1.

61. *Mamatkulov and Askarov v Turkey* ECHR 2005-I, para 122.

62. *Djokaba Lambi Longa v the Netherlands* ECHR 2012-IV, para 58.

63. Glas, ‘The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice’ (2016) 1 *NQHR* 41, 42.

64. *Wolkenberg and Others v Poland* App no 50003/99 (ECtHR, 4 December 2007) para 76.



**2.2.4 Conclusion.** This section has shown that the notion of access to justice has a specific meaning for the Convention system. In line with the Convention's objectives and the Court's and States' tasks, the system aims to provide substantive access to justice in an effective way. Effectiveness thereby implies independence, flexibility, legal certainty, transparency and timeliness. It can further be concluded that the Court provides both indirect and direct access to justice and therefore both individual and general justice, albeit only to supplement domestic remedies.

### 3. Limitations to access to justice at the ECtHR

#### 3.1 Introduction

As was mentioned in the introduction, in recent times many reforms have been made to the Court's procedure with an eye to increasing its efficiency and safeguarding its long-term effectiveness.<sup>65</sup> These changes have been met with criticism and concern, in particular because they are considered to make serious inroads upon the individual complaint mechanism and thereby negatively impact on individuals' access to (international) justice.<sup>66</sup>

The discussion in section 2 has shown, however, that although the individual right of complaint is important for the Convention system, the system is in the first place concerned with providing access to substantive justice.<sup>67</sup> It may be questioned, therefore, whether procedural and individual access to justice really is the most appropriate parameter for assessing the reforms. This is the more important because using particular parameters, such as procedural or substantive access to justice, may lead to a different evaluation of procedural changes. This section aims to explain these effects by analysing five sets of central changes to the Court's procedure and its working methods from the different perspectives to access to justice.

#### 3.2 Significant disadvantage

The significant disadvantage criterion was introduced in Protocol 14.<sup>68</sup> The gist of the new Article 35(3)(b) ECHR is that the Court can declare complaints inadmissible when they clearly concern Convention rights but do not result in any significant disadvantage for the applicant.<sup>69</sup> This *de minimis* rule aims to help the Court to filter out cases that are so technical or insignificant that they do not merit legal protection at the European level.<sup>70</sup>

65. See n 1.

66. See sources mentioned in n 2. See further eg Leach (n 2); Vogiatzis (n 1) 187.

67. Section 2.2.1.

68. See eg Leach (n 2) 11ff; Antoine Buyse, 'Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35(3)(b) ECHR' in Brianne McGonigle Leyh and others (eds), *Liber Amicorum for Leo Zwaak* (Antwerp, Intersentia 2013) 107-124; Alexander Morawa, 'The European Court of Human Rights' Rejection of Petitions Where the Applicant Has Not Suffered a Significant Disadvantage: A Discussion of Desirable and Undesirable Efforts to Safeguard the Operability of the Court' (2013) 1 *Journal of Transnational Legal Issues* 1ff.

69. On the criterion's specificities, see eg Simona Granata, 'Manifest Ill-Foundedness and Absence of a Significant Disadvantage as Criteria of Inadmissibility for the Individual Application to the Court' (2010) 20 *The Italian Yearbook of International Law Online* 111, 111.

70. cf Explanatory Report to Protocol 14, CETS no 194, paras 39, 77-9. The Court has embraced this rationale in its case-law. See eg *Korolev v Russia*, ECHR 2010-V (dec); *Shefer v Russia* App no 45175/04 (ECtHR, 13 March 2012) para 18. See further Fiona de Londras and Kanstantin Dzehtsariou, 'Managing Judicial Innovation in the European Court of Human Rights' (2015) 15 *HRLR* 523, 532; Morawa (n 69) 8.

It has been argued that Article 35(3)(b) ‘sits uncomfortably with the principle of access of individuals to international justice’.<sup>71, 72</sup> If a procedural perspective of access to justice is adhered to, the criterion is indeed problematic, since it blocks individual applicants from accessing a judicial institution.<sup>73</sup> The criterion may be assessed differently, however, if a broader, more substantive perspective is taken. As the Court has mentioned, the criterion can even be advantageous to general justice, as it ‘allows [it] to concentrate on its central mission of providing legal protection of human rights at the European level’.<sup>74</sup>

However, in order to assess the effect of Article 35(3)(b) on access to justice, it is also important to note the Court’s application of the two safeguard clauses of Article 35(3)(b).<sup>75</sup>

First, Article 35(3)(b) states that the Court should not declare a complaint inadmissible if respect for human rights requires an examination on the merits. The Court has reverted to this clause when the protection of human rights in a particular area deserves special attention,<sup>76</sup> the case deals with important matters of principle,<sup>77</sup> it contains new human rights issues that are also at stake in other cases,<sup>78</sup> or it concerns core aspects of human rights<sup>79</sup>. In addition, the Court uses this clause when it considers it desirable to assess the case from the broader perspective of Convention law.<sup>80</sup> Thus, the clause may help the Court respect both individual and general, substantive justice.<sup>81</sup> It also allows the Court to be flexible in the sense that it does not mechanically apply an (admissibility) rule. This is an important aspect of substantive access to justice as explained previously.

The second safeguard clause states that no case may be rejected if it has not been duly considered by a national court. The Convention constitutes a compound system, where the States and the Court interact to offer effective human rights protection. From that perspective, it may be

71. Vogiatzis (n 1) 187. The proposal was also criticised for other reasons, see eg Leach (n 2) 32-3.

72. Helen Keller, Andreas Fischer and Daniela Kühne, ‘Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals’ (2010) 21 EJIL 1025, 1038; Vogiatzis (n 1) 187, 190 -1; Dinah Shelton, ‘Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights’ (2016) 16 HRLR 303, 309. For an analysis of this perspective, see also Xavier-Baptiste Ruedin, ‘De Minimis non Curat the European Court of Human Rights: The Introduction of a New Admissibility Criterion (Article 12 of Protocol No.14)’ [2008] EHRLR 80, 97-8.

73. cf Tazeen Said and John Wadham, ‘What Price the Right of Individual Petition: Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights’ [2002] EHRLR 169, 173; Marie-Aude Beernaert, ‘Protocol 14 and New Strasbourg Procedures: Towards Greater Efficiency? And at what Price?’ [2004] EHRLR 544-57; Vogiatzis (n 1) 191; Ruedin (n 72) 92.

74. eg *Sylka v Poland* App no 19219/07 (ECtHR, 3 June 2014) para 26, echoing the Explanatory Report to Protocol 14, CETS no 194, paras 39, 77-9.

75. Explanatory Report to Protocol 14, CETS no 194, paras 81-82. See also Buyse (n 68) 111. Additionally, the Court sometimes mixes the presence of a significant disadvantage and the first safeguard clause, eg *El Kaada v Germany* App no 2130/10 (ECtHR, 12 November 2015) para 42.

76. *Turturica and Casian v Moldova and Russia* App nos 28648/06 and 18832/07 (ECtHR, 30 August 2016) para 43.

77. *Berladir and Others v Russia* App no 34202/06 (ECtHR, 10 July 2012) para 34; *Karelin v Russia* App no 926/08 (ECtHR 20 September 2016) para 41.

78. eg *Mikhaylova v Russia* App no 46998/08 (ECtHR, 19 November 2015) para 49.

79. eg *Roşianu v Romania* App no 27329/06 (ECtHR, 24 June 2014) para 56; *Hebat Aslan and Firas Aslan v Turkey*, no 15048/09 (ECtHR, 28 October 2014) paras 74-82. See further Buyse (n 68); Morawa (n 68) 14ff; Shelton (n 72).

80. Explanatory Report to Protocol 14 (CETS no 194, 13 May 2004), para 77, as also accepted by the Court. See eg *Korolev v Russia* (n 70); *Finger v Bulgaria* App no 37346/05 (ECtHR, 10 May 2011) para 72; *Avotins v Latvia* App no 17502/07 (ECtHR, 25 February 2014) para 37.

81. cf Morawa (n 68) 8.

enough that sound judicial remedies are offered domestically.<sup>82</sup> If such remedies are in place, there is little need for the Court to intervene and review the national decision. The gain in effective access to justice then would be very small.<sup>83</sup> By contrast, when the national protection is seriously flawed, it is important that the Court has a second look at a case. Hence, this safeguard clause is to be favourably assessed when providing substantive access to justice is concerned. Nevertheless, in practice, the application of the clause has caused some problems.<sup>84</sup> Many cases that the Court could declare inadmissible under Article 35(3)(b) concern national procedural flaws, which normally would have to be investigated on their merits under Article 6.<sup>85</sup> Due to the second safeguard clause, such cases cannot be rejected based on the significant disadvantage requirement. The Court has found a way around this by holding that minor imperfections do not yet imply that the case has not been ‘duly’ considered by a national court,<sup>86</sup> while Protocol 15 more radically solves the matter by fully abandoning the clause.<sup>87</sup> In all readings of access to justice, both choices might seem hard to defend, since either solution accepts flawed procedural domestic protection, without there being a possibility of correction by the Court.<sup>88</sup> All the same, taking a more substantive perspective, it can be argued that the Court then still can decide to admit a complaint if effective protection of human rights so requires.<sup>89</sup> Thus, from that substantive perspective, the removal of the second safeguard clause may be accepted, on the condition that the first one is carefully applied. Seen from a purely procedural perspective, by contrast, the blocking of access to the Court continues to be problematic.

### 3.3 Revision of Rule 47 of the Rules of Court

To streamline the application process, the Court has set several requirements in its Rules of Court as to how an application must be submitted and what information applicants should provide.<sup>90</sup> Applicants must, for example, provide personal information (name, address, occupation, etcetera) and information about the facts, the national remedies they have used, and so on.

In cases submitted before 1 January 2014, the Court and its Registry were rather lenient in dealing with (incomplete) information provided by applicants. A Registry officer who found information lacking notified the applicant and, if need be, gave him an extension of the six-month time limit for filing an application to supply the missing information, usually of six to eight weeks,<sup>91</sup> or even longer.<sup>92</sup> In addition, if a respondent Government argued that the

82. cf *Korolev v Russia* (n 70).

83. cf *Ruedin* (n 72) 98.

84. cf *Buyse* (n 68) 116.

85. cf *Fomin v Moldova* App no 36755/06 (ECtHR, 11 October 2011) para 20. See further *Morawa* (n 68) 16.

86. eg *Vincent Cecchetti v San Marino* App no 40174/08 (ECtHR, 9 April 2013); *Van der Putten v the Netherlands* App no 15909/13 (ECtHR, 27 August 2013). In other cases, the Court simply does not apply the clause, eg *Shtefan and Others v Ukraine* App no 36762/06 and others (ECtHR, 31 July 2014) paras 30-2. See also *Buyse* (n 68) 116; *Shelton* (n 72) 318.

87. Article 5 of Protocol 15 (CETS no 213) (not yet entered into force at time of writing).

88. cf CDDH, ‘Final Report on Measures Requiring Amendment of the European Convention of Human Rights’, Strasbourg, 15 February 2012, CDDH(2012)R74 Addendum I, para 26 and Appendix III.4, para 4d.

89. *ibid.*

90. Rule 47 of the Rules of Court. For the application form, see [www.echr.coe.int](http://www.echr.coe.int) > applicants > how to make a valid application.

91. Even then, the deadline was not always strictly applied. See eg *Smertin v Russia* App no 19027/07 (ECtHR, 2 October 2014); *Manerov v Russia* App no 49848/10 (ECtHR, 5 January 2016) para 30.

92. eg *Izmidin Isayev v Russia* App no 54427/08 (ECtHR, 29 October 2015); *Bilen and Çoruk v Turkey* App no 14895/05 (ECtHR, 8 March 2016). See further Andrew Tickell, ‘Dismantling the Iron-Cage: the Discursive Persistence and

application form had not fully been completed, the Court carefully looked into the nature of the omissions. If the omission would be directly relevant to answering admissibility questions the Court could declare the case inadmissible. However, it would not do so if the omission was unrelated to the admissibility criteria, for example when the applicant submitted a succinct<sup>93</sup> or too long<sup>94</sup> complaint, or when he failed to indicate, for example, his profession<sup>95</sup> or gender<sup>96, 97</sup>. Moreover, applicants were excused for not submitting all relevant copies when it would be difficult to do so, for example because of detention.<sup>98</sup>

On 1 January 2014, the application policy changed drastically because Rule 47 of the Rules of Court was amended. Each applicant must now download an application form from the Court's website requiring specific information.<sup>99</sup> Consequently, applicants have to be much more aware of how they submit their complaints. Moreover, since 1 January 2014, the Registry can no longer grant an extension of the six-month term if a form is incomplete. In its first Chamber decision on the revised policy, the Court emphasised that it should be very strict in this respect.<sup>100</sup> A failure to provide relevant information will generally result in the application not being allocated to any of the Court's judicial formations.<sup>101</sup> As yet, it is unclear what this means for omissions and mistakes in the application form which do not directly pertain to admissibility criteria.<sup>102</sup> The overwhelming effect of the revision is evident, however: 23% of the applications that arrived in Strasbourg in 2014 did not comply with the revised Rule.<sup>103</sup>

From a procedural access to justice perspective, all such formal requirements and time limits are problematic, as they may easily block individuals' access to the Court. If a more substantive perspective is taken, the most important question is whether the remedy provided in Strasbourg is sufficiently available so as to enable effective protection of the Convention rights (see section 2.2.2).

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Legal Failure of a "Bureaucratic Rational" Construction of the Admissibility Decision-Making of the European Court of Human Rights' (2011) 12 German LJ 1786, 1803 ff.

93. eg *Yüksel v Turkey* App no 49756/09 (ECtHR, 1 October 2013) para 42; *Brândușe v Romania* (no 2) App no 39951/08 (ECtHR, 27 October 2015) para 19.

94. eg *Kasap and Others v Turkey* App no 8656/10 (ECtHR, 14 January 2014) para 52; *Gözüm v Turkey* App no 4789/10 (ECtHR, 20 January 2015) para 31; *Vedat Doğru v Turkey* App no 2469/10 (ECtHR, 5 April 2016) para 21.

95. *Reisner v Turkey* App no 46815/09 (ECtHR, 21 July 2015) para 36; *Knick v Turkey* App no 53138/09 (ECtHR, 7 June 2016) para 36.

96. *Özen and Others v Turkey* App no 29272/08 (ECtHR, 23 February 2016) para 45.

97. For acceptance of several boxes left empty, see *Aydoğdu v Turkey* App no 40448/06 (ECtHR 30 August 2016) paras 50-3.

98. *Djundiks v Latvia* App no 14920/05 (ECtHR 15 April 2014).

99. Paul Harvey and Pamela McCormick, 'More on Admissibility, the View from the Court' (*UK Human Rights Blog*, 19 September 2012) <<https://ukhumanrightsblog.com/2012/09/19/more-on-admissibility-the-view-from-the-court-paul-harvey-and-pamela-mccormick/>> accessed 11 October 2016. See also ECtHR, *Report on the Implementation of the Revised Rule 47* (2015) 3.

100. *Malysh and Ivanin v Ukraine* App nos 40139/14 and 41418/14 (ECtHR, 9 September 2014). See also ECtHR, 'Common Mistakes in Filling in the Application Form and How to Avoid Them' (1 January 2016) <[www.echr.coe.int/Documents/Applicant\\_common\\_mistakes\\_ENG.pdf](http://www.echr.coe.int/Documents/Applicant_common_mistakes_ENG.pdf)> accessed 11 October 2016.

101. *ibid.*

102. The revised Rule 47 only applies to cases submitted after 1 January 2014 (*Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015) para 68), while only few such cases have been examined by a Committee/Chamber.

103. ECtHR (n 99) 1.

Rule 47 itself provides for a certain flexibility to avoid unwarranted blocking of access to justice.<sup>104</sup> Equally relevant, the Court is prepared to make exceptions to its new policy in such cases where it seems necessary from the perspective of procedural fairness. This can occur either due to the circumstances of the applicant,<sup>105</sup> or, exceptionally, when an application raises important issues of interpretation ‘which are of a significance for the effective functioning of the Convention mechanism beyond the individual circumstances of the case’.<sup>106</sup> All the same, it is difficult to assess the effects of the revised rule, since neither the Registry’s proposals nor the decisions of single judges (the formation taking most inadmissibility decisions by far)<sup>107</sup> are made public. It is therefore almost impossible to know if the Court’s information as to the exceptions made is correct, if it shows consistency in making exceptions, if it applies the rules in a fair and non-arbitrary manner, and if it is sufficiently aware of the need for flexibility. The very lack of information about the application of the Rule also makes clear that the Court’s practice falls short of the requirement of transparency.

In addition to this, it is difficult to estimate the consequences of the revisions for the access to justice of potential applicants. Persons who find themselves in a vulnerable position (for example those being unlettered or those without (easy) access to internet), or those being unable to gain assistance by a lawyer,<sup>108</sup> may find it especially difficult to submit an application in conformity with Rule 47.<sup>109</sup> This might imply that especially these groups are discouraged from even trying to access this Court,<sup>110</sup> if at all they can be successful<sup>111</sup>. If this turns out to be the case, and the system is not applied in a sufficiently flexible manner,<sup>112</sup> this would show a serious potential infringement of both procedural and substantive access to justice. Hence, for evaluating this procedural change, it does not make much of a difference which parameter is used.

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104. Rule 47(5.1)(c) Rules of Court.

105. ECtHR (n 99) 2.

106. *ibid.*

107. They declared inadmissible or struck out 36,300 cases in 2015, see ECtHR, *Annual Report 2015* (Strasbourg, 2016), 65 < [www.echr.coe.int/Documents/Annual\\_report\\_2015\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2015_ENG.pdf) > accessed 11 October 2016.

108. As can be the case in Russia. See Grigory Dikov, ‘The Ones that Lost: Russian Cases Rejected at the European Court’ (*Open Democracy*, 7 December 2009) 5 <[www.opendemocracy.net/od-russia/grigory-dikov/ones-that-lost-russian-cases-rejected-at-european-court](http://www.opendemocracy.net/od-russia/grigory-dikov/ones-that-lost-russian-cases-rejected-at-european-court)> accessed 11 October 2016.

109. cf Stefan Kirchner, ‘Recent and Forthcoming Changes to the Procedure before the European Court of Human Rights: An Attorney’s View from the Perspective of the Right to Access to Justice’ [2016] ECLJ 37, 41-2; Lubomír Majerčík, ‘The Invisible Majority: The Unsuccessful Applications against the Czech Republic before the European Court Of Human Rights’ [2010] CYIL 217, 221; Dikov (n 108).

110. See, however, Granata (n 69) 119.

111. Trying to lodge an application without assistance by a (qualified) lawyer may reduce the chances of success (see eg Dikov (n 108) 2, 5; Granata (n 69) 115), although this may vary between the states, see Françoise Tulkens, ‘The Link between Manifest Ill-Foundedness and Absence of a Significant Disadvantage as Inadmissibility Criteria for Individual Applications’ (2010) 20 *Italian Yearbook of International Law Online* 169, 172.

112. eg providing detailed admissibility guidelines (Ian Cameron, ‘The Court and the Member States: Procedural Aspects’ in Andreas Follesdal and others (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 29), training of lawyers or provision of information through NGOs (Tulkens (n 112) 172).

### 3.4 Single judges, role of the Registry and the priority policy

Another set of changes made over the past two decades to improve the efficiency of case disposal in Strasbourg concerns the Court's organisation and working methods.<sup>113</sup> Most importantly, in 2010, the Court started working with single judges who are competent to decide on the admissibility of simple and straightforward cases.<sup>114</sup> Another development was the introduction of a 'priority policy' by the Court in 2009, which allowed it to deal with urgent and important human rights issues first and postpone deliberations on less urgent or relatively unimportant cases.<sup>115</sup>

The work of single judges has hugely increased the efficiency of deciding on admissibility matters, and has contributed to a fast reduction of the Court's backlog.<sup>116</sup> This may be regarded as a great gain from a perspective of procedural access to justice, since in all these cases the Court is actually looking into the individual complaints. However, there is a downside from the perspective of substantive access to justice. It has been well documented that non-judicial rapporteurs (Registry officers) sift through, assess and categorise the many incoming applications.<sup>117</sup> When they allocate cases to the single judges, these are presented with lists containing single-sentence descriptions of each case.<sup>118</sup> Relying on the quality of these preparatory documents, the judges usually simply rubber-stamp them, without looking into the file.<sup>119</sup> Given that the single-judge decisions currently make up nearly 80% of all the applications disposed of,<sup>120</sup> this means that in all these cases, the decisions are taken in substance by Registry staff. This may be problematic from a perspective of independence, since it means an important responsibility for non-judicial rapporteurs who do not need to meet the strict requirements that are set for judges.<sup>121</sup> As such, perhaps, this does not need to be too large a cause for concern from a substantive perspective, provided that the judge can decide to take on a case when there is reason for doubt and there are otherwise sufficient safeguards for the effectiveness of the substantive rights protection offered. It is questionable, however, if these safeguards are sufficiently provided. At no point in the preparations is the applicant or the respondent government heard or asked for additional information and the single-judge decisions are hardly reasoned, nor are they published.<sup>122</sup> This leaves many applicants

113. See eg Marie-Bénédicte Dembour, "'Finishing off" Cases: The Radical Solution to the Problem of the Expanding ECHR Caseload' [2002] EHRLR 604, 606 ff.

114. Measures introduced by Protocol 14.

115. <[www.echr.coe.int/Documents/Priority\\_policy\\_ENG.pdf](http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf)> accessed 11 October 2016. See also Glas (n 1) 678; Shelton (n 72).

116. eg ECtHR, *The Interlaken Process and the Court (2015 Report)* (Strasbourg, 12 October 2015) 3 <[www.echr.coe.int/Documents/2015\\_Interlaken\\_Process\\_ENG.pdf](http://www.echr.coe.int/Documents/2015_Interlaken_Process_ENG.pdf)> accessed 11 October 2016.

117. Cameron (n 112) 33; Shelton (n 72) 307-8.

118. Shelton (n 72) 308.

119. Ben Jones, 'European Court of Human Rights: Is the Admission System Transparent Enough?' (*UK Human Rights Blog*, 27 January 2012) <<http://ukhumanrightsblog.com/2012/01/27/european-court-of-human-rights-is-the-admissions-system-transparent-enough-ben-jones/2012>> accessed 11 October 2016; Cameron (n 112) 33-4; Shelton (n 72) 308.

120. In 2015, 45,576 applications were disposed of judicially and the single-judge formation decided 36,314 cases, see <[http://echr.coe.int/Documents/Stats\\_analysis\\_2015\\_ENG.pdf](http://echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf)> 4, accessed 11 October 2016.

121. cf Cameron (n 112) 33-4; Jones (n 119).

122. Granata (n 69) 114; Cameron (n 112) 55; Gerards, 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning' (2014) 14 HRLR 148. This was a problem already for the Committee decisions taken of before Protocol 14. See critically Dembour (n 113) 612.



in the dark as to why their cases have been dismissed,<sup>123</sup> and as to whether their cases have been disposed of in a fair and equitable manner.<sup>124</sup> This lack of transparency is all the more problematic now that the Court's application of admissibility requirements is far from consistent.<sup>125</sup> Moreover, there is a risk that admissibility clauses such as that of significant disadvantage are applied too automatically. This may have the result that underlying structural human rights problems are insufficiently detected, or that seemingly trivial cases are not recognised as disclosing important human rights issues.<sup>126</sup> Clearly, this makes it more difficult to bring general and, indirectly, individual justice, even if procedural justice is sufficiently served.

The Court's priority policy implies that it does not deal with cases in chronological order, but turns to the urgent and important cases first and leaves the less important and pressing ones to be decided later.<sup>127</sup> This policy is understandable from a perspective of sound docket management and it guarantees that at least those applicants on top of the priority list are quickly given access to court. Moreover, it can be accepted from a procedural justice perspective, since in none of these cases is the applicant actually refused access to court. By contrast, clear flaws can be noted when substantive justice is considered. For example, the Court's policy is transparent only to the degree that it is based on a published list of seven categories of priority. No public information is provided as to the category in which a certain case has been placed, or about the reasons for this categorisation.<sup>128</sup> In addition, if a case is placed in one of the lowest priority categories, it can take many years for it to be decided on its merits.<sup>129</sup> In the meantime, the applicant may know he has an admissible case and that, potentially, the Court will find a violation and offer him redress, but he has no means to speed up the process.<sup>130</sup> Such obvious lack of transparency and timeliness clearly hampers substantive access to justice.<sup>131</sup>

### 3.5 Unilateral declarations

For reasons of efficiency, the Court has adopted a practice of admitting so-called unilateral declarations.<sup>132</sup> In a unilateral declaration,<sup>133</sup> the government acknowledges that it has violated

123. Dembour (n 113) 613; Keller, Fischer and Kühne (n 72) 1046; Gerards (n 121).

124. Keller, Fischer and Kühne (n 72) 1046; Andrew Tickell, 'Is the European Court of Human Rights Obsessively Interventionist?' (*UK Human Rights Blog*, 22 January 2012) <<https://ukhumanrightsblog.com/2012/01/22/is-the-european-court-of-human-rights-obsessively-interventionist-andrew-tickell/>> accessed 11 October 2016; Paul Harvey, 'Is Strasbourg obsessively interventionist? A view from the Court' (*UK Human Rights Blog*, 24 January 2012) <<https://ukhumanrightsblog.com/2012/01/24/is-strasbourg-obsessively-interventionist-a-view-from-the-court-paul-harvey/>> accessed 11 October 2016.

125. This is the case already for simple and relatively technical requirements (eg six-month and anonymity rule) (Tickell (n 92) 1799ff), but also for the 'manifestly ill-founded' criterion (Tickell (n 124)). Shelton's analysis shows similar inconsistencies in the application of the significant disadvantage requirement (Shelton (n 72) 319). On inconsistencies in the application of the victim requirement, see Tamar Feldman, 'Indirect Victims, Direct Injury: Recognising Relatives as Victims under the European Human Rights System' [2009] EHRLR 50, 61.

126. Morawa (n 68) 8; Buyse (n 68) 113.

127. See <[www.echr.coe.int/Documents/Priority\\_policy\\_ENG.pdf](http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf)> 2, accessed 26 September 2016.

128. cf De Londras and Dzehtsariou (n 70) 529.

129. Antoine Buyse, 'The Court's New Priority Policy' (*ECHR Blog*, 17 November 2010) <<http://echrblog.blogspot.com/2010/11/courts-new-priority-policy.html>> accessed 11 October 2016; Glas (n 1) 678.

130. cf Cameron (n 112) 43.

131. cf Glas (n 1) 695.

132. Helen Keller, Magdalena Forowicz and Lorenz Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice* (OUP 2010) 67; Glas (n 1) 677.

133. Rule 62A Rules of Court.



the Convention and offers a certain amount of compensation to the applicant or another form of redress.<sup>134</sup> A unilateral declaration does not need to be accepted by the applicant, but must only be approved by the Court to justify a strike-out decision.<sup>135</sup>

This practice can be criticised from the perspective of procedural access to justice. As a result of the striking out of cases in which a unilateral declaration is made, individual applicants are kept away from an assessment of the case by the Court. This may be considered the more problematic because these cases are clearly admissible and it is very likely that the Court would have found a violation of the Convention, had it considered the case on the merits.<sup>136</sup>

Such criticism is less easy to give if a substantive perspective is taken. The main objective of the Convention system is to provide for effective protection of human rights. When such protection has been lacking, redress should be offered to the individual. In dealing with unilateral declarations, the Court aims to do just that: it obliges the State to recognise that it has wronged the individual and to provide for compensation. The result thus achieved is not very different, substantially, from that which would follow from a judgment by the Court.<sup>137</sup> Moreover, in deciding to accept unilateral declarations, the Court shows considerable due care.<sup>138</sup> It assesses whether a unilateral declaration is indeed meeting the requirements it has set in its case law,<sup>139</sup> and it rejects a declaration if it finds that respect for human rights requires an examination of the case.<sup>140 141</sup>

Nonetheless, important caveats have been expressed concerning the Court's acceptance of unilateral declarations.<sup>142</sup> In particular, the Court should very carefully check whether the violations really have been adequately addressed<sup>143</sup> and it should not too easily accept a government's assurances.<sup>144</sup> Moreover, if the unilateral declarations seem to stem from a desire to escape the responsibility to improve the general situation in the future by simply providing compensation for individual cases, the Court should be wary to accept them and deal with the substance of the complaint instead.<sup>145</sup> If the Court would fall short of such diligence in investigating the unilateral declarations too often, access to (general) justice might still be unduly hampered.

134. Rule 62A(1)(b) Rules of Court. See further *Glas* (n 58) 179.

135. *Keller, Forowicz and Engi* (n 132) 67; *Glas* (n 58) 287-8.

136. cf eg *Dembour* (n 113) 618; P. Sardaro, 'Jus non dicere for allegations of serious violations of human rights: questionable trends in the recent case-law of the Strasbourg Court' [2003] EHRLR 601-630, 623.

137. See, however, *Glas* (n 1) 695; Sardaro (n 136) 623.

138. *Leach* (n 2) 28; *Glas* (n 58) 289.

139. In particular in *Tahsin Acar v Turkey* ECHR 2004-III.

140. *ibid* para 13. See further *Glas* (n 58) 289-95.

141. See eg *Zherebin v Russia* App no 51445/09 (ECtHR, 24 March 2016); *Jeronovics v Latvia* App no 44898/10 (ECtHR, 5 July 2016).

142. eg Sardaro (n 136) 623 ff.

143. In *Jeronovics v Latvia* (n 141), an earlier oversight in indicating to the State that certain violations still needed to be repaired resulted in the Court's having to reassess the case after the individual applicant had tried a national remedy in vain.

144. See further, with references, *Glas* (n 1) 695.

145. Cf Sardaro (n 136) 623-4.

### 3.6 Pilot-judgments and joining repetitive cases

Finally, the Court tends to turn increasingly away from individual applications and focus on the underlying structural problems instead.<sup>146</sup> This tendency is apparent from a number of developments, in particular the pilot-judgment procedure.<sup>147</sup> In a pilot-judgment, the Court provides the State with general recommendations as to the measures it should take in order to solve a structural human rights problem; usually it then adjourns the examination of comparable cases awaiting the national measures.<sup>148</sup> Another growing practice is that the Court joins a large number of repetitive applications with a similar legal and factual background in order to dispose of them in a single judgment.<sup>149</sup> In those cases it sometimes even gives a standardised amount of just satisfaction to all applicants.<sup>150</sup>

The Court's objective in taking these approaches is twofold. On the one hand, they enable it to deal quickly and effectively with large amounts of repetitive cases and help it to reduce its backlog and caseload.<sup>151</sup> On the other hand, the pilot-judgment procedure especially (but also, to a lesser extent, joining repetitive cases) may help to solve structural violations of Convention rights and change the practice in the respondent State.<sup>152</sup> After all, in response to a pilot-judgment, the States have to introduce new legislation or new remedies to bring the domestic situation in line with the Convention requirements.<sup>153</sup>

Pilot-judgments clearly hamper the right to individual complaint and individual access to justice. The Court often adjourns the examination of pending applications of a similar nature for as much as eighteen months in order to allow the State to make the necessary changes.<sup>154</sup> After the domestic authorities have implemented these changes, the Court disposes of the adjourned cases in a variety of ways.<sup>155</sup> It may, for example, hold that all individual applicants must resort to a newly introduced remedy at the national level, and it will declare their complaints inadmissible for non-exhaustion of domestic remedies.<sup>156</sup> No matter the method of disposal, no individual access is given to the Court.

146. Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9 HRLR 397, 412ff; Buyse (n 129); Glas (n 1).

147. Glas (n 1) 676. See also Dilek Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations' (2016) 4 HRLR 731.

148. See Rule 61 of the Rules of Court. In more detail, see eg Lech Garlicki, 'Broniowski and After: On the Dual Nature of "Pilot Judgments"' in Lucius Caflish and others (eds), *Human Rights – Strasbourg Views. Liber Amicorum Luzius Wildhaber* (N.P. Engel 2007) 177-192; Philip Leach, Helen Hardman and Svetlana Stephenson, 'Can the European Court's Pilot Judgment Help Resolve Systematic Human Rights Violations? *Burdov* and the Failure to Implement Domestic Court Decisions in Russia' (2010) 10 HRLR 346; Janneke Gerards, 'The Pilot Judgment Procedure before the European Court of Human Rights as an Instrument for Dialogue' in Monica Claes and others (eds), *Constitutional Conversations in Europe* (Intersentia 2012) 371; Glas (n 58) 475ff; Glas (n 63).

149. Glas (n 1) 675 and 679, referring to ECtHR Registrar, 'Press Release: European Court Registrar Calls for Special Measures to Deal With Influx of Hungarian Pension Cases' (11 January 2012) ECHR 009 (2011).

150. Glas (n 1) 675 and 680, referring to *Şenyürek and Others v Turkey* App no 34986/05 and others (ECtHR, 21 September 2010) para 31 and *Kharuk and Others v Ukraine* App no 703/05 and others (ECtHR, 26 July 2012) paras 23-5.

151. cf *Broniowski v Poland* (n 37) para 193. See further eg Sadurski (n 146) 422; Keller, Fischer and Kühne (n 72) 1042; Glas (n 1) 684.

152. eg Gerards (n 148).

153. Glas (n 63).

154. Glas (n 58) 490 -1.

155. For the different variations in the Court's case-law, see Glas (n 58) 493 ff.

156. eg *Stella and Others v Italy* App no 49169/09 and others (ECtHR, 16 September 2014). See further Glas (n 58) 495 ff.

All the same, the pilot-judgment procedure generally is in line with the Convention system's objective to offer general justice.<sup>157</sup> Although no procedural access to justice is offered, the procedure may help guarantee effective protection of human rights – or at least effective compensation – at the national level.<sup>158</sup> If new national remedies have been introduced and they have been found by the Court to be effective, from a perspective of substantive access to justice an applicant can reasonably be asked to try such a remedy. After all, albeit indirectly and in the long run, the individual can then still obtain individual justice.<sup>159</sup>

Nevertheless, a cause for concern is that the Court tends to show great lenience towards the States in reviewing the newly introduced measures.<sup>160</sup> In its follow-up judgments, the Court usually allows the States a wide margin of appreciation and the standards for Convention compliance appear to be lower than those in 'regular' cases.<sup>161</sup> The Court may already approve a remedy 'based on promises, commitments and undertakings of the respondent State',<sup>162</sup> 'even when no or little practice has been established yet or when the results of the remedy will only be seen in the long-term'.<sup>163</sup> Consequently, the Court could impose an obligation on individuals to resort to national remedies rather than have their cases dealt with by the Court, even if the new remedies have not yet fully and reliably shown to meet the mark of the Convention.<sup>164</sup> This significantly limits substantive access to justice.<sup>165</sup> In addition, the delays caused by adjourning the pending cases and the need to use new national remedies once they have become available are difficult to reconcile with the need for timely delivery of justice.<sup>166</sup>

In contrast to pilot-judgments, joining large amounts of repetitive cases and disposing of them in one single judgment does not significantly seem to affect procedural access to justice. All applicants have access to the Court, their cases are dealt with on their merits, and reparation is offered if a violation is found. Nonetheless, this approach does not allow for a concrete assessment of the facts of each individual case and the compensation offered does not always take the applicant's personal circumstances into account.<sup>167</sup> Even if joining repetitive cases can be regarded as an acceptable solution from the perspective of protecting the individual right of complaint, it therefore can be seen to offer a rather low degree of substantive individual justice.

157. Glas (n 1) 686; Glas (n 63) 44.

158. The aim is to avoid overburdening the Convention mechanism. cf the Court's own formulation of the rationale for the procedure in *Broniowski v Poland* (n 38) para 193. See critically eg Sadurski (n 146) 422.

159. Glas (n 1) 690.

160. Garlicki (148) 182; Gerards (n 148) 393; Glas (n 63) 64. Moreover, the Court may have insufficient knowledge and expertise to assess national remedies (Sadurski (n 146) 423) and the case taken as pilot case may not best reflect relevant factual and legal issues (Keller, Fischer and Kühne (n 72) 1042).

161. *ibid.*

162. Glas (n 63) 63.

163. *ibid.* 63.

164. *ibid.*

165. This is somewhat mitigated by the Court's willingness to continue monitoring the situation after the pilot-judgment procedure has been closed; if needed, an issue can be restored to the list. cf Gerards (n 148) 393-4.

166. cf Leach and others (n 148) 178.

167. Glas (n 1) 680, 683 and 694.

### 3.7 Conclusion

The analysis of some of the changes in the Court's procedure and its working methods shows that it may make a real difference whether a procedural or a more substantive reading is taken of the notion of 'access to justice'. Some elements of the Court's procedure appear to fit in rather well with the narrow idea of offering access to the Court, yet are less easy to reconcile with the notion of substantive access to justice. The other way around, while some changes would seem to be problematic from a procedural perspective or the individual right to complaint, they may be quite acceptable when considered from the viewpoint of effective protection of human rights, delivered directly or indirectly. Nevertheless, it was found that even the last category of changes might be problematic if core elements of effectiveness are not complied with. In particular, substantive access to justice may be hampered if procedural requirements are applied overly rigidly, or when requirements of independence, timeliness, legal certainty and transparency are not respected. Clearly, thus, the substantive perspective to access to justice allows for a rather more refined and nuanced analysis than the purely procedural perspective does.

Hence, in further studying the reality of shortcomings in (projected) procedural reform, these findings suggest that it is valuable to not only look at the individual right of complaint, but to use the wider notion of substantive and effective access to both individual and general justice. This broader perspective provides for a more comprehensive analytical framework that is well suited to the Convention system's aims. Moreover, by relying on the broader perspective when examining the Convention system, the concept of effectiveness comes into play, which can be broken down into useful analytical tools such as timeliness and legal certainty. Thus, it becomes possible to carry out a comparably precise examination.

## 4. Conclusion

This article set out to challenge the centrality of the individual right to petition and individual justice in discussions on reform of the Court. Its main argument was to show the value of supplementing these classic notions with concepts of substantive and general justice as parameters for assessing changes and developments. To this end, it has been shown what access to justice encompasses in the Convention system. In regard to any legal system, access to justice can be constructed either in a narrow sense, meaning access to a judge, or in a broader sense, meaning access to substantive justice. Such access to substantive justice can be given by way of individual justice (providing access directly) or by way of general justice (providing indirect access).

It further has been demonstrated that, considering the Convention system's objectives, access to justice in the Convention system should mainly be regarded as access to substantive justice, that is, effective protection of the Convention rights. Based on the Court's own requirements as to effectiveness of national remedies in protecting these rights, it was found that substantive access to justice requires that such justice is delivered timely, transparently, independently, flexibly (that is, without excessive formalism), and with sufficient legal certainty.

The analysis of five sets of central changes to the Court's procedure in light of both the procedural and substantive access to justice perspective demonstrates that taking one or the other perspective as a parameter for evaluation really matters. While some changes are valued negatively from the perspective of individual justice and the right to individual complaint, these may not be as problematic when substantive or general justice are used as parameters. In the

continuing debate on the long-term future of the Court, this means that it is particularly valuable to use the substantive perspective as an important parameter in evaluating suggested reforms of the Convention system. Certainly the ‘individual right to complaint’ parameter remains of relevance, but it should not be absolutized.

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