

GI-ESCR Comments on the CESCR Rules of Procedure under the OP-ICESCR (Draft Rule 20: Pilot Views Procedure)

The Committee on Economic, Social and Cultural Rights (hereafter ‘the Committee’) has proposed introducing a Pilot Views procedure through draft Rule 20 of its Draft Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Draft Rule 20 has been adapted directly from Rule 61 of the Rules of Court of the European Court of Human Rights (hereafter ‘the Court’), which codifies the Pilot Judgement procedure that it initially developed in the case of *Broniowski v Poland*. The two rules are very similar in nature.¹

Taking this observation as its point of departure, the following submission is divided into three substantive sections. Section II acknowledges that the similarity of draft Rule 20 and Rule 61 reflects an overlap in the objectives that both bodies seek to fulfil through their respective Pilot procedures. These functional similarities grant the Committee an opportunity to consider criticism that Rule 61 has attracted and use it as a means to refine draft Rule 20. Sections III and IV then follow a converse approach, identifying salient differences between the two bodies mandates and functions, as well as the conditions that drove them to introduce a Pilot procedure. These differences are then used to question whether draft Rule 20 should mirror Rule 61 to the extent that it currently does. Section V concludes.

II Similarities between the Pilot procedure of the European Court and the Committee

The Pilot procedures of the Committee and the European Court are designed to serve similar goals and operate in a similar manner. They are both designed to enable the selection of a case that is representative of an underlying structural human rights problem that has generated a number of similar applications.² Although both systems grant an individual right of petition, it is foreseen those similar pending cases will be postponed whilst the Pilot case is determined.³ The remedy granted in the Pilot case will consequently provide a solution for the Pilot applicant and the postponed cases which are similar in nature, resolving the structural human rights problem and reducing the number of applications awaiting consideration, a key concern of both bodies. The extent of the functional similarity between these procedures affords the Committee the opportunity to heed well-founded criticism that the Court has attracted.

The shortcomings of the European Court’s Pilot procedure

Several of the most prominent critiques of the European Court’s Pilot procedure have drawn attention to its prioritisation of judicial efficiency over procedural safeguards that would secure the rights of the individual.⁴ Deployment of the Pilot procedure sits in tension with the interests of individual applicants in several respects, not least in that individuals with similar cases may have their applications postponed and in that Pilot decision may be considered as resolving the underlying violation that drove them to the Court. Whilst the Pilot case is under review, applicants that are similarly situated may be left in an uncertain, possibly lengthy, state of stasis.⁵ The Pilot case that is considered by the Court may simply be the first application it comes across and there is no guarantee that it will raise all of the relevant factual and legal issues that could affect the absent individuals.⁶ Multiple commentators have claimed that the Court often neglects to make clear why it has chosen a certain application, failing to engage

¹ Similarities may be found between Rule 60 (1) and Rule 20 (1); Rule 61 (2), Rule 20 (2); Rule 61 (2), Rule 20 (3); Rule 61 (2), Rule 20 (5); Rule 61 (3), Rule 20 (6); Rule 61 (4), Rule 20 (7); Rule 61 (5), Rule 20 (8); Rule 61 (6), Rule 20 (9); Rule 61 (6), Rule 20 (10); Rule 61 (6), Rule 20 (11); Rule 61 (7), Rule 20 (12); Rule 61 (8), Rule 20 (13); Rule 61 (10), Rule 20 (14).

² For the purposes of this memo, the terms case and communication are used interchangeably, as are the terms adjourned, suspended and postponed.

³ On the right of individual petition, article 2 OP-ICESCR, article 34 ECHR. On postponing communications, Rule 61 (6), Draft Rule 20 (9)

⁴ See, *inter alia*, L. R. Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’, *European Journal of International Law* 19, no. 1 (1 February 2008): 125–59, <https://doi.org/10.1093/ejil/chn004>; Antoine Buyse, ‘The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges’, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 27 November 2009), <https://papers.ssrn.com/abstract=1514441>; Markus Fyrnys, ‘Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights’, in *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance*, ed. Armin von Bogdandy and Ingo Venzke, Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht 236 (Heidelberg: Springer, 2012); Dominik Haider, *The Pilot-Judgement Procedure of the European Court of Human Rights* (Leiden: Martinus Nijhoff Publishers, 2013); Tatiana Sainati, ‘Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights’, *Harvard International Law Journal* 56, no. 1 (2015): 147–206.

⁵ Helfer, ‘Redesigning the European Court of Human Rights’, 154; Buyse, ‘The Pilot Judgment Procedure at the European Court of Human Rights’, 13; Fyrnys, ‘Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights’, 362.

⁶ Helfer, ‘Redesigning the European Court of Human Rights’, 154; Fyrnys, ‘Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights’, 362.

in a rigorous analysis of both the structural issue at hand⁷ and the degree to which the Pilot applicant represents the interests of absent applicants in similar situations.⁸ Additionally, the Court does not engage in a thorough analysis of whether the privileged Pilot applicant is well suited to the task of adequately representing the interests of these absent applicants, risking the possibility that they may seek a friendly settlement that favours an individual pay-out over systemic non-monetary remedies.⁹ This undermines the Court's capacity to comprehend and remedy the underlying human rights problem and the different violations suffered by individuals with postponed cases.

These concerns may be understood as emanating from Rule 61, which has been described as ambiguous and lacking in safeguards necessary to protect individual rights.¹⁰ The Rule does not clearly identify the necessary conditions under which the Pilot procedure may be activated, failing, for example, to elucidate standards for determining whether the cases an underlying problem gives rise to are sufficiently 'similar' to warrant recourse to a Pilot Judgement.¹¹ Similarly, no criteria guide the selection of a particular Pilot case and there are no standards for determining whether a given case would sufficiently reflect the factual and legal issues raised in similar cases.¹² It is unclear when the Court should adjourn similar cases and how the Court is to determine whether cases are sufficiently similar to be adjourned, whilst there is also no mechanism for applicants to engage with the decision to suspend their cases.¹³ There are no guidelines for determining whether the Pilot applicant has the ability to act as a fair representative of absent applicants. This indicates that "the overriding focus of Rule 61 is on efficiency concerns-disposing of numerous cases quickly, in order to clear the Court's docket-rather than on procedural safeguards designed to secure individual rights."¹⁴

Suggestions for revising draft Rule 20

Rule 20 (10) of the Committee's Draft Rules of Procedure introduces an important safeguard enabling the authors of postponed communications to make submissions to the Committee explaining why their communications should be examined.¹⁵ Beyond this, however, draft Rule 20 largely mirrors Rule 61, leaving the Committee vulnerable to many of the same critiques that have been articulated in relation to the European Court. This implies that the Committee may benefit from considering proposals that have been advanced with the aim of improving the European Court's Pilot procedure. The present section draws from such proposals and adapts them to as to be applicable to the Committee.¹⁶ Specific language proposals that have been advanced in the context of the European Court's Rule 61 may be found in the footnotes.

Critics of the European Court's Rule 61 have proposed several safeguards that would secure the rights of absent applicants and ensure there is a sufficient degree of shared experience (identity of interest) between the legal and factual matters advanced by a Pilot representative and those advanced by applicants that are similarly situated. Adapted to the Committee, they may be presented as follows:

1. Draft Rule 20 should be modified so as ensure that the Committee selects the Pilot communication with adequate care.¹⁷

This could be achieved through the insertion of a rule that explicitly requires the Committee to consider the depth of its understanding of the underlying violation, how its decision may impact individuals other than the Pilot

⁷ Lize R. Glas, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice', *Netherlands Quarterly of Human Rights* 34, no. 1 (March 2016): 51, <https://doi.org/10.1177/016934411603400104>.

⁸ Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', 169–71.

⁹ Helfer, 'Redesigning the European Court of Human Rights', 154; Fyrynys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights', 362; Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', 165.

¹⁰ Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', 159–63.

¹¹ Rule 61 states that the Pilot procedure may be activated "where the facts of an application reveal... a structural or systemic problem... which has given rise or may give rise to similar applications" but does not clarify what constitutes a "similar application". See Haider, *The Pilot-Judgement Procedure of the European Court of Human Rights*, 36; Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', 159.

¹² Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', 159.

¹³ *Ibid.*, 159 – 160. This criticism cannot be made of the Committee (see footnote 14).

¹⁴ *Ibid.*, 160.

¹⁵ Draft Rule 20 (10) states that "The authors of postponed communications may at any time make representations or submissions to the Committee explaining why the interests of justice require that their communication be examined."

¹⁶ The proposals are drawn primarily from the work of Sainati, who makes the case that the European Court may learn from a rich federal jurisprudence on class actions in the United States. Sainati draws on the procedural safeguards of *identity of interest* and *adequacy of representation*, both of which are enshrined in Rule 23 of the Federal Rules of Civil Procedure. As Sainati makes clear, commentators in European and the United States have noted similarities between U.S.-Style Class Actions and the Pilot-Judgment Procedure, including Boštjan Zupančič, a former judge on the European Court.

¹⁷ In the context of the European Court's Rule 61, Sainati suggests incorporating the following: *When selecting or approving an application for a pilot judgment, the Court shall first determine whether the application raises questions of law and fact common to the class of similarly affected applicants, and whether the claim asserted by the pilot applicant is typical of the claims of absent or potential future applicants.* Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', 197.

representative, and whether the Pilot communication raises the legal and factual issues implicated by the structural matter at hand.

2. Rule 20 should provide for the Committee to join different applications and create subclasses where applicants affected by the same systemic issue do not belong to one homogenous group.¹⁸

This would encourage the Committee to consider multiple Pilot communications that each represent different subclasses within the broader group of similarly situated individuals affected by an underlying violation. This may in turn allow it to view and remedy more aspects of an underlying systemic issue.¹⁹

3. Rule 20 should carve out greater scope for civil society organizations (CSOs) and national human rights institutions (NHRIs) to participate in various stages of the Pilot Views procedure.²⁰

Draft Rule 20 should recognise the heightened importance of third-party engagement with the Pilot Views procedure and include a specific article that provides for an enhanced process of third-party intervention which is public, flexible, open and similar in nature to shadow reporting in State reviews.²¹ It could also provide for CSO and NHRI involvement in designing effective remedial measures,²² reaching friendly agreements,²³ and supervising compliance with the Pilot View. *Inter alia*, this could provide the Committee with a richer picture of the factual and legal questions raised by the underlying violation in question, expose conflicts or differences between absent applicants, ensure that the interests of absent complainants are represented, and assist the Committee in designing an appropriate systemic remedy.²⁴

4. Rule 20 should be modified to provide greater protection for the rights of absent applicants

The Committee should develop criteria to ensure that the Pilot complainant is an adequate representative of similarly situated complainants, explaining, for example, that a Pilot author is to have particular concern towards the underlying systematic issue in question.²⁵ Draft Rule 20 should also provide for CSOs to be consulted on whether a Pilot claimant is a suitable representative, empower similarly situated complainants to feedback on whether they consider the Pilot complainant to adequately represent their interests, and enable them to register objections to a proposed systematic remedy. The Rule may also introduce a time limit on suspended cases, which would limit uncertainty faced by those with postponed communications.

III Different conditions leading to the introduction of a Pilot procedure

Differences in the nature of the issues that the Committee and European Court's Pilot procedures are designed to solve give us reason to question the extent to which Rule 20 is a near mirror image of Rule 61.

Variations in the number, source and nature of the cases faced

¹⁸ In relation to Rule 61, Sainati suggests incorporating the following language: *Where persons in the same situation as the pilot applicant do not belong to one identifiable class, the Court shall select such applications raising distinct claims or issues of law and fact as necessary to create homogenous subclasses.*

¹⁹ Draft Rule 10 (3) already envisages that the Committee may deal with communications jointly, as does Rule 42 of the European Court. The European Court is known to have made poor use of this possibility in the context of Pilot Judgements. A specific reference in the Draft Rule 20 may guide the Committee towards a better course of action. See further Glas, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice', 68; Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', 199.

²⁰ Sainati suggests that the European Court's Rule 61 should be modified so as to include the following: *The Court may also seek the views of National Human Rights Institutions (NHRIs) or domestic associations provided that the stated purpose of such Institutions or associations is to protect the rights and freedoms contravened by the systemic violation identified.*

²¹ Whilst the Committee is empowered to receive third-party interventions only two different parties have ever intervened (ESCR-Net and the Special Rapporteur on adequate housing), and interventions have only been received in relation to four decisions (I.D.G; Ben Djazia; Alarcón Flores; Trujillo Calero).

²² Sainati suggests that the European Court's Rule 61 should be modified so as to include the following: *In determining the type of remedial measures necessary, the Court may consider the submissions of NHRIs and other domestic associations, provided that the stated purpose of such NHRIs or associations is to protect the rights and freedoms contravened by the systemic violation identified.*

²³ Sainati suggests that the European Court's Rule 61 should be modified so as to include the following: *The Court shall allow NHRIs and other domestic associations to comment on the efficacy of these general measures in determining whether the friendly-settlement agreement respects the human rights defined in the Convention and the Protocols thereto, provided that the stated purpose of such NHRIs or associations is to protect the rights and freedoms contravened by the systemic violation identified.* See also D. J. Harris et al., *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, Third edition.

²⁴ On these arguments in relation to the European Court, see Helfer, 'Redesigning the European Court of Human Rights', 156; Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', 198. Gerrards also suggests that the European Court make more visible use of NGO assistance to select appropriate Pilot cases where there is real possibility of an effective solution Janneke Gerards. 'The Pilot Judgment Procedure before the European Court of Human Rights as an Instrument for Dialogue', in *Constitutional Conversations*, ed. Claes and Popelier, 2011, 24.

²⁵ For this argument in the context of the European Court, see Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', 200.

Whilst both pilot procedures are designed to resolve structural human rights issues and temper the growth of backlogged cases, the conditions that the Committee and the European Court face are distinct in several notable respects. Firstly, there is a significant distinction in the scale and source of the backlog faced by each body. In the year in which it codified its Pilot procedure a total of 151,600 cases were pending before the European Court, many of which emerged from distinct underlying human rights problems affecting persons in numerous different member States.²⁶ In contrast, the Committee currently has a total backlog of 140 communications, 131 of which emerge from a sole underlying systemic issue: housing conditions in Spain.²⁷ Acknowledging that it has different level of resources, the Committee has a less immediate need for the judicial efficiency represented by the Pilot procedure. Given the resource constraints of UN Treaty Bodies, there is a risk that the individual communication process may be eroded in the pursuit of budgetary goals.

Secondly, there are salient differences in the type of cases that have motivated each body to turn to a Pilot procedure. The Court introduced their Pilot procedure as a response to being overwhelmed by ‘repetitive’ or ‘clone’ cases that arise from the same structural issue, are well founded, “usually do not raise any new substantial questions as for the interpretation of the Convention” and in which it “merely has to apply its established case-law repeatedly.”²⁸ The Spanish housing jurisprudence of the Committee paints a different picture. Of the 13 Spanish housing decisions thus far published by the Committee, 6 have been declared inadmissible²⁹ and 1 has been found to disclose no violation of the Covenant.³⁰ Moreover, of the 6 cases in which a violation of the Covenant has been established,³¹ several raised different questions of law and fact and resulted in different recommendations. In *I.D.G.*, for example, the Committee made recommendations concerning the public posting of notice in mortgage enforcement procedures that were not repeated in any other Spanish housing cases. In *El Goumari and Tidli* the Committee made recommendations concerning temporary accommodation that are not repeated in other Spanish housing cases. Moreover, it was only in the two cases of *El Ayoubi and El Azouan Azouz* and *López Albán et al.* that the Committee recommended Spain end its practice of automatically excluding those who are illegally occupying a property from housing lists. It is difficult to conclude that the Committee’s prior engagement with its systemic issue of concern has involved the straightforward application of previously developed jurisprudence to well-founded clone cases.

Assuming that the Committee’s published decisions may be considered broadly indicative of those pending before it, this raises two key concerns. Firstly, there is a risk that the Committee may activate the Pilot procedure and suspend communications that it would have declared inadmissible had they come before it, with communications halted in anticipation of a Pilot remedy that the complainants would not be able to benefit from. Secondly, it is much more likely that pending cases raise issues of law and fact that are novel to the Committee and not encompassed by the Pilot case that they select.³² This may hinder the Committee’s efforts to develop its jurisprudence, to prescribe recommendations which will address the complaints of absent applicants, and to comprehend and remedy the full scope of the systemic issues that it faces.

Suggestions for revising draft Rule 20

Rule 20 would better protect individual rights and enable the Committee to develop a richer jurisprudence that addresses the range of issues raised by the communications pending before it if it were to enshrine the individual safeguards outlined in Section II, namely compel careful selection of Pilot communications; provide for the joining of cases and the creation of subclasses; and facilitate CSO involvement in identifying pertinent questions of law and fact. Two additional modifications would further alleviate concerns:

5. Rule 20 should contain a specific reference to the Pilot procedure as an ‘exceptional’ measure and include clear criteria for the circumstances under which it will be used.

This would ensure consistency and protect against the risk of excessive recourse to the Pilot procedure.

²⁶ ECHR, ‘The European Court of Human Rights in Facts and Figures 2011’, 2011, https://www.echr.coe.int/documents/facts_figures_2011_eng.pdf.

²⁷ OHCHR, ‘Committee on Economic, Social and Cultural Rights | Table of Pending Cases’, accessed 22 July 2021.

²⁸ Costas Paraskeva, “Human Rights Protection Begins and Ends at Home: The ‘Pilot Judgment Procedure’ Developed by the European Court of Human Rights”, *Human Rights Law Commentary* 3 (2007): 1; Haider, *The Pilot-Judgement Procedure of the European Court of Human Rights*, 5. Haider adds that repetitive cases accounted for some 60% of the European Court’s judgements in the year before its first Pilot judgement. See also Harris et al., *Harris, O’Boyle & Warbrick*, 149.

²⁹ Martínez Fernández; Makinen Pankka and Fernández Pérez; S. S. R.; A.M.O and J.M.U; M. B. B.; Asmae Taghzouti Ezquihel.

³⁰ Soraya Moreno Romero.

³¹ I.D.G; Mohamed Ben Djazia and Naouel Bellili; López Albán et al; Rosario Gómez-Limón Pardo; El Goumari and Tidli ; El Ayoubi and El Azouan Azouz.

³² A worry especially acute given that the Optional Protocol only entered into force in 2013. At present, the Committee has rendered 10 merits decisions.

6. Rule 20 should make clear that the Committee may only suspend cases that are *prima facie* admissible

This would reduce the risk that individuals with inadmissible communications will be left in a state of stasis awaiting a Pilot decision that they will not benefit from.

IV Distinct institutional mandates of the European Court and the Committee

Differences in the mandate of the Committee and Court also serve as grounds for interrogating the degree of similarity between Rule 20 and Rule 61.

Bifurcation of adjudication and supervision

In the Council of Europe system, it is the Committee of Ministers that supervises the execution of the judgements of the European Court.³³ This bifurcation of adjudication and supervision perhaps explains the absence in Rule 61 of any specific article that addresses how Pilot Judgements are to be supervised.³⁴ Given that the Committee engages in both adjudication and follow-up, draft Rule 20's parallel omission of any article addressing supervision is harder to justify. This absence results in uncertainty as to how the follow-up to Pilot Views will function. It is unclear, for example, whether follow-up to Pilot Views will take priority over follow-up to standard Views, as it does in the Council of Europe system.³⁵ Similarly, it is not clear whether the Pilot follow-up will be identical in nature to the regular follow-up process, or if, following the approach of the Committee of Ministers, the CESCR will place Pilot Views under a model of enhanced supervision.³⁶ If an enhanced model of supervision is indeed envisaged, it is not clear what this would entail.

Suggestions for revising draft Rule 20

7. A specific provision in Draft Rule 20 should address follow-up to Pilot Views

This would provide greater certainty by clarifying how this key stage of Pilot process will function.

8. Draft Rule 20 should provide for an enhanced form of follow-up supervision

A stricter, enhanced form of supervision would reflect the heightened significance of Pilot Views and their potential to remedy a structural human rights issue affecting numerous complainants. Follow-up to Pilot Views could be distinguished by public oral hearings in which members could question the extent of implementation; closer scrutiny of the State party's written responses; and a stricter evaluation of changes to legislative/administrative rules and evidence they are effective in practice. Rule 20 may also establish a more flexible and public mechanism for ensuring third-party engagement with follow-up to Pilot Views.³⁷

V Conclusion

The introduction of a Pilot procedure may play a valuable role in enabling the Committee to reduce its backlog and remedy systemic human rights issues. Adoption of the aforementioned eight recommendations would help ensure that this promise is realised and does not come at the cost of individual access to justice.

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³³ Article 46 (1–2) of the European Convention of Human Rights. This division of roles has been blurred by the introduction of the Pilot procedure.

³⁴ Rule 61 (4) comes the closest to addressing supervision, stating that the Court may require that “remedial measures... be adopted within a specified time”. Draft Rule 20 (7) of the Committee reproduces this language, stating that it may request that “recommendations... be implemented within a specified time frame”.

³⁵ This is perhaps implied by draft Rule 20 (5), which states that Pilot communications “shall be processed as a matter of priority.” The Committee of Ministers decided in 2006 to prioritise supervision of judgements in which the European Court had identified a systematic problem. See Committee of Ministers, *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*, adopted 10 May 2006, CM (2006) 90.

³⁶ ‘The Supervision Process’, Department for the Execution of Judgments of the European Court of Human Rights, accessed 27 July 2021, <https://www.coe.int/en/web/execution/the-supervision-process>.

³⁷ See Section II of the present submission. In the Council of Europe system, it is envisaged that CSOs may be engaged through roundtables and seminars that discuss appropriate reforms. See Gerards, ‘The Pilot Judgment Procedure before the European Court of Human Rights as an Instrument for Dialogue’, 15.