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Friendly Settlement before the European Court of Human Rights

Veronika Fikfak[1]

Abstract

Even though they represent almost 50% of all reported cases before the European Court of Human Rights, settlements of human rights violations escape scholars' attention. Whilst victims are increasingly expected to resolve their disputes amicably, it is unclear whether applicants will be better off accepting settlement offers rather than proceeding to litigation. The paper charts the practice of friendly settlements before the Court from 1980s to today, mapping a shift in approach from seeking bilateral solutions to the proactive role of the Registry as mediator encouraging states and applicants to settle their cases to relieve the Court of the heavy workload. The study of 10,500 cases reveals how strategies adopted by the Registry – from procedural changes to how and when consent is given to settlement, to the framing of settlement offers and a close relationship with representatives of the respondent state – have favoured the most frequent violators of the Convention and sidelined the interests of the applicant. The analysis uncovers that the imbalance between parties and lack of enforcement are very much present in the ECtHR settlement system and that the active role of the Registry has reinforced, rather than redressed these concerns. The findings expose the dangers of pursuing *en masse* settlement in the human rights context and raise concerns about achieving long-term justice for victims of human rights violations through other means than adjudication.

[1] University of Copenhagen. The work on this project was funded by the ERC HRNUDGE project (803891), ESRC Future Research Leaders grant (ES/N000927/1), the Isaac Newton Trust, and the Cambridge Humanities Research Grant, as well as by a fellowship at the NYU Jean Monnet Centre. I am grateful to Anne van Aaken and Grainne de Burca for their feedback and to members of the Registry and practitioners (amongst them Piers Gardner, Philip Leach, and Jess Gavron) who spoke to me freely about the practice of the Court and about how victims perceive and feel during the settlement process. Their anonymity is protected through random numbering.

Friendly settlement has become an integral part of every case before the European Court of Human Rights. Since 2019, every case coming to the Court has to go through an initial 12-week 'friendly settlement phase', followed by a 12-week contentious phase.[2] Parties are strongly encouraged to settle cases before any consideration is given to the content of the case or the issues it raises. Though the friendly settlement process is not new, it has thus far been used mostly for the settlement of routine, repetitive cases. The move to put all cases coming to the Court through a mandatory friendly settlement phase promises to change the architecture of dispute settlement before the ECtHR. By changing the normal trajectory of a case through the ECtHR machinery, it seeks to nudge individual victims towards settlement, accelerate proceedings in less contentious cases and free up time for the Court to dedicate to cases raising new issues.[3]

States have enthusiastically welcomed these changes as reducing the workload of the Court and allowing them to 'establish a culture of resolving human rights [disputes] inside the country, so that people are no longer forced to prove their truth abroad.'[4] Some applicants' counsel also appear to be excited. In an aptly titled 'Let's be friends instead', one such lawyer notes that the practice will 'not affect the level of human rights protection itself, since the state concerned acknowledges the prejudice caused and it will pay compensation as well. In our view, the lack of a formal meritorious judgement will be more than compensated by the fact that our case ends much sooner.'[5] But not everyone shares in the excitement. In a revealing blog, Leach and Jamrjidze argue that the Court's increasing reliance on friendly settlements and unilateral declarations to resolve its heavy workload puts more strain on the follow-up enforcement phase and on the Committee of Ministers as the body supervising compliance.[6] If agreements between individual victims and states can bypass the

[2] Leach, Philip, Jomarjidze, Nino. 'What Future for Settlements and Undertakings in International Human Rights Resolution? | Strasbourg Observers'. 15 April 2019. https://strasbourgobservers.com/2019/04/15/what-future-for-settlements-and-undertakings-in-international-human-rights-resolution/.

[3] The fact that friendly settlements are used as a workload management tool is widely accepted. Keller, Helen, Magdalena Forowicz, and Lorenz Engi. *Friendly Settlements Before the European Court of Human Rights: Theory and Practice*. OUP Oxford, 2010.

[4] Abazadze, Tamar. 'European Human Rights Advocacy Centre - Friendly Settlements and Unilateral Declarations at the European Court of Human Rights'. https://ehrac.org.uk/resources/friendly-settlements-and-unilateral-declarations-at-the-european-court-of-human-rights/.

[5] Karsai, Daniel. 'The Friendly Settlement Procedure and the ECHR'. https://drkarsai.hu/en/friendly-settlement-procedure/.

[6] Leach (n 2).

evaluation of the Court, their enforcement surely has to be appropriately scrutinised within the Council of Europe. Leach and Jamrijdze in this context worry that the role of the Committee in assessing the enforcement of friendly settlements has been limited or even non-existent and that the possibility to have cases restored before the Court if enforcement is not forthcoming has not proved successful. If friendly settlements and unilateral declarations become the norm, the new regime may enable states to make promises that then remain unfulfilled.

This article aims to contribute to the examination of the friendly settlement procedure before the ECtHR by raising concerns about the current operation and impact of settlements on the individual victim. In light of the greater reliance placed on friendly settlements in the new framework, it is important to understand precisely how the process of settlement affects individuals. For example, the label 'friendly' appears to suggest a participatory process in which both state and the applicant can air grievances, outline expectations, discuss potential outcomes and agree on a compromise remedy. However, already in 1980s Owen Fiss noted that this was misleading. In a powerful article entitled *Against Settlement* he took issue with the fact that when settlement occurs, it often takes place between parties of unequal power, eg state or government officials and a member of racial minority over alleged brutality or injured workers suing a large corporation over work-related injuries.[7] In these unequal relationships consent is often coerced, with the weaker party unable to really say 'no'. As he puts it: 'first, the poorer party may be less able to amass and analyse the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process. Second, he may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment... Third, the poorer party might be forced to settle because he does not have the resources to finance the litigation...'[8]

Fiss' writing addressed settlements in domestic civil proceedings, between parties of equal standing. In this article, I explore how some of his concerns apply to the process of settlement at international level, where the negotiation takes place between the state that enjoys unlimited power, resources and access to information and an individual victim. In this context, I highlight especially the fact that settlements

[7] Fiss, Owen. 'Against Settlement'. *Yale Law Journal* 93 (1984): 1073, 1076.
[8] Ibid., 1076.

in the ECtHR system are not conducted by judges, who consider negotiations 'incompatible' with the requirement of impartiality of their office[9] and stay away from settlements 'as a matter of principle'.[10] Instead, friendly settlements take place via the Registry, the secretariat of the Court, who acts as a third-party mediator to facilitate and propose the suggested terms of settlement. If in the early years of friendly settlements, Registry's role had mostly been limited to a 'postal box', where the state and the applicant would send their settlement proposals and from which the Registry as a 'messenger' would then forward the proposals to the other party, today, the Registry actively shapes the settlement process and in turn, the number, scope and content of settlements. [11] Although the Registry is unelected and unaccountable to states, its active presence promises to bring balance in the inherently unequal relationship between the victim and the state. But the active involvement of the Registry also raises questions about its motives in the settlement process.

In this article, I therefore seek to better understand the settlement process adopted by the European Court of Human Rights and the changes that were instituted in 2010, when the practice of settling became more prominent and the Registry took on a more active role.[12] In the article, I empirically analyse all of the cases reported in HUDOC, which were settled between 1980s to today (10,500 settled cases).[13] This quantitative analysis is complemented with interviews with practitioners, members of the Registry as well as my own experience having worked at the Court. Building on this evidence, the article seeks to examine how the position of three key actors in the settlement process has changed through this time: the applicant as the aggrieved party, the state as the potential violator, and the Registry as the mediator between the two. Since the new approach promises to redesign the normal path of applications – and thus victims – coming to the Court and put the settlement centre stage, the article addresses two main questions: first, how the Registry works to bring the parties together, and second, what impact the settlement system and the involvement of the

[9] Keller et al (n 3) 83, 158, Interview with Judge Fura. Keller speaks of being surprised at how little role judges have in settlement proceedings (138).
[10] Ibid., interview with Judge Garlicki, ibid., 148. Judge Wildhaber adopts the same position.
[11] In fact, the letters proposing settlement and settlement terms although carrying the Court's logo are signed by the Registrar. Interview 29 April 2021.
[12] The paper builds on the book by Helen Keller and others, which is the first source to discuss the Court's approach to friendly settlements. Keller et al (n 3).
[13] The study is based on all cases (decisions and judgments) *reported* in the HUDOC databases. These represent only a small percentage of all applications received by the Court (between 5-12%). The explanation of the gathering of data, coding tree and illustrative tables are included in the Annex.

Registry has on the victim and the state. To answer these questions, I draw in particular on insights from behavioural economics and psychology to understand how different processes and interactions affect the people involved. In particular, I wish to understand how applicants' cognitive biases might affect their interaction with international institutions.[14] Through this behavioural lens, I therefore look at the new procedure adopted by the ECtHR and investigate in particular to what extent the inherent imbalance between the applicant and the state is addressed through the active involvement of the Registry.

I. Why Victims Settle?

In human rights law, individual claims are traditionally adjudicated. The system allows individuals to bring their applications onto the international level in order to complain that the state has failed to provide adequate rights protection at home. By the time things reach the international level, relationships have broken down, the applicants are bitter and disappointed about having invested effort and money into domestic proceedings and not having received acknowledgement or redress at home. In this context, international adjudication serves multiple functions: first, it may provide the first opportunity for the applicant to be heard and for their grievances to be aired. Second, the process of adjudication serves to uncover and recognise that there is a problem inside the state and then proceeds to reveal its scope. Third, the court's assessment of the infringement as well as its reasoning are obviously relevant for the development of human rights law. This has implications not only for the party who has to comply with the judgment, but precedential value for other states, who check to ensure that their practice does not raise similar issues. Of course, the case law also has persuasive value for other courts and tribunals who refer to it and are inspired by it. It is therefore evident from this that 'international human rights litigation is rarely only a matter of private concern'.[15] Even if issues are narrow, the impact of litigation may be broad. The beneficiaries of such cases are not only victims and public authorities, who might be deterred not to repeat similar acts in the future, but they

[14] The cognitive biases I explore are individual and universal. There is no evidence that they change when an individual interacts with authorities on the international level compared to his/her interaction on domestic level. V. Fikfak, D. Peat, E. van der Zee. 'Bias in International Law' (2022) 23(1) *German Law Journal* (forthcoming); V. Fikfak, D. Peat, E. van der Zee. 'Limitations of the Behavioral Turn in International Law' (2021) 115 *American Journal of International Law Unbound* (forthcoming).

[15] Anne van Aaken, 'Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of Provisions for *Ius Standi*' 23 (1) Conferences on new political economy, 29-58, 29.

extend to other countries and other courts and tribunals. A victim's decision to bring a complaint to the Court therefore often contributes to the provision of a public good. When therefore decisions to settle a human rights dispute are made, they act to privatise the dispute between the applicant and the state. We – as scholars, human rights lawyers or the general public – are deprived of knowing what provision of the Convention the state is said to have violated, of having an insight into the process of decision-making, or of enjoying the benefit of the development of human rights law and the social transformation that ensues as a consequence. Yet, in spite of this, settlement between parties is often encouraged as an alternative to litigation. Why?

Both practitioners and scholars agree that settlements allow greater party participation and are more responsive to the needs and underlying preferences of the parties. The two opposing sides can save money and time by avoiding litigation, they can be inventive in the range of outcomes, flexible with regards to solutions and creative when it comes to remedies. In the end, the compromise that is reached can work for both sides and studies have shown that often such decisions lead to increased party satisfaction and better enforcement than decisions of a court.[16] Participants often speak of having experienced the process of negotiation as a transformation, the process of back and forth allowing both sides to air their grievances and outline expectations whilst seeking to understand the other side.[17] This enthusiasm for settlement has been reflected in practice, with courts encouraging settlement of cases as a way of enabling court efficiency, ie a tool to save courts time and resources and conserving judicial attention for only the hard cases. As a consequence, in certain areas of domestic law settlement rates currently stand at 90% of all cases brought.[18]

The push towards settlement is felt not only in domestic law. At international level too settlement is encouraged.[19] In the Inter-American Court of Human Rights,

[16] In the Inter-American Court of Human Rights: Contesse, Jorge. 'Settling Human Rights Violations'. *Harvard International Law Journal* 60 (2019): 346-7; Natalia Saltalamacchia Ziccardi, et al, Friendly Settlements in the Inter-American Human Rights System: Efficiency, Effectiveness and Scope, in The Inter-American Human Rights System: Impact Beyond Compliance 65 (Pär Engström ed., 2018).
[17] Silbey, Susan, and Sally Merry. 'Mediator Settlement Strategies' 1986 *Law and Policy*.
[18] Australia, though high settlement rates have also been reported in the UK and certain US states. Chang, Yun-chien and Klerman, Daniel M., Settlement Around the World: Settlement Rates in the Largest Economies (February 25, 2021). USC Legal Studies Research Paper Series No. 21-8.
[19] Contesse (n 16); Alschner, Wolfgang. 'Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System'. *World Trade Review* 13 (2014): 65. In the African Court human rights system settlement is pursued in order to avoid negative publicity associated with 'having to defend potentially scandalous human rights violations'. Ayeni, V. O., & Ibraheem, T. O. (2019). Amicable Settlement of Disputes and Proactive Remediation of Violations under the African Human Rights System. Beijing Law Review, 10, 406-422. https://doi.org/10.4236/blr.2019.103024.

for example, settlements have been taking place since 1985, with the Commission – the body before which initial submissions are made by petitioners – 'urg[ing] the parties' to attempt to reach an agreement and settle their dispute.[20] In the ECtHR, the picture is similar. Once an individual brings an application before the European Court, parties are actively encouraged to seek to resolve the dispute through friendly means. In both foras, the process of friendly settlement is promoted as less costly than adjudication, as providing faster resolution and a promise of better enforcement. For the State, such settlements are especially attractive because they remain unreported and do not count towards the annual statistics published by the Court about human rights violations.[21] For the Court, whose decisions are often disregarded and unenforced, friendly settlements promise to provide a strong alternative to adjudication. Because they enjoy a higher compliance rate than regular judgments, friendly settlements can become a powerful case load management tool, freeing up ECtHR's valuable time.

For individuals, the decision to settle is somewhat less rational. Costs aside, studies show that one of the main reasons that parties find settlement more satisfactory than adjudication is that it fosters greater victim participation and the possibility of individualising outcomes.[22] As Contesse analyses the Inter-American human rights system, he notes that victims will be motivated to settle cases because of a 'critical feature not found in judicial proceedings' – agency. He notes that given the 'radically unequal power relationship' between the victim and the state, in settlement proceedings the individual has the opportunity to meet the state 'under conditions of parity'.[23] In comparison to adjudication, 'in friendly settlement negotiations, petitioners sit at a table with the other parties. The physical horizontality of the layout is expressive of the normative principle underlying these proceedings.'[24] The petitioner has control over the procedure. As a former official of the Inter-American

[20] Contesse (n 16) 319.
[21] Some states may be motivated to hide the actual number of potential violations when compliance with decisions is an indicator of their 'democratic status' or 'rule of law'. These indicators are crucial for countries wishing to join the EU. As a rule, EU membership is conditional on countries complying with the Convention and addressing systemic changes in their own state to comply with ECtHR judgments. The number of open cases before the Court is used as an indication of such compliance. As a consequence, in the years pre-and post- joining the EU, states usually settle more cases than in the years after joining the EU.
[22] McEwen, Craig A., and Richard J. Maiman. 'Small Claims Mediation in Maine: An Empirical Assessment'. *Maine Law Review* 33 (1981): 237, 256-7.
[23] Contesse (n 16) 343.
[24] Ibid.

Commission stated: 'Victims are empowered because they can withdraw from the procedure if they feel it is not satisfactory [...], their participation has real impact. They are able to decide.'[25]

This search for 'horizontality', as Contesse puts it, is an important part of the draw of settlement. Domestic studies have shown for example that in majority of cases rather than making rational decisions about minimising litigation costs and maximising benefits of proposed settlement offers, individuals appear to be seeking ways to re-establish equity in their relationship with the other party. As Korobkin argues: 'people want what they are legally entitled to, but they also want recognition of their claim's validity.'[26] Whilst rational models of settlement assume that people decide on settlement based on comparison of expected monetary values of trial and settlement and speed of proceedings, often for individuals the process of settlement is not *only* about money. Interpersonal comparisons influence individual behaviour.[27] People want to be treated justly and they become distressed in an 'unjust relationship'.[28] Often, this means that victims appear more concerned with 'issues of vindication and with obtaining an adequate hearing of their dispute than with the actual award that they obtain.'[29]

Yet, in a relationship between the state and an individual, achieving such equity or 'horizontality' is not self-evident. This is for two reasons. First, when an applicant turns to the Court, they have had to exhaust all available domestic remedies and failed to obtain redress in their own country. By the time the applicant's application is received by Strasbourg or San José, often years after the initial event, they are likely to feel aggrieved but also suspicious of the actions of the Government. In this regard, expecting that they will voluntarily or willingly proceed to settle would be naïve. Namely, when an offer of settlement is made by the other side, individuals are likely to automatically devalue it because that party has wronged them or is perceived as

[25] Ibid, citing Interview with L7, former official on 3 July 2018.
[26] Guthrie, Chris, and Russell Korobkin. 'Psychological Barriers to Litigation Settlement: An Experimental Approach'. *Michigan Law Review* 93 (1 January 1994): 107,
[27] Loewenstein, George F., Leigh Thompson, and Max H. Bazerman. 'Social Utility and Decision Making in Interpersonal Contexts'. *Journal of Personality and Social Psychology* 57, no. 3 (September 1989): 426–41. https://doi.org/10.1037/0022-3514.57.3.426.
[28] Walster, Elaine, Ellen Berscheid, and G. William Walster. 'New Directions in Equity Research' Journal of Personality and Social Psychology 1973, Vol. 25, No. 2, 151-176.
[29] MacCoun, Robert J., E. Allan Lind, and Tom R. Tyler. 'Alternative Dispute Resolution in Trial and Appellate Courts'. In *Handbook of Psychology and Law*, edited by Dorothy K. Kagehiro and William S. Laufer, 95–118. New York, NY: Springer, 1992.

blame worthy. The sole fact that the offer originates from an adversary means that respondents treat it less favourably and that they give way to personal feelings of vindication and retaliation over economically rational calculations ('reactive devaluation' bias). The offer will appear to them 'disadvantageous' or even disingenuous.[30] This cognitive bias often comes out of spite or because of a fear of the adversary having access to more information or ill feeling towards them. In the end, the offer made will be 'unpalatable'[31] and applicants will want to reject it, even if the proposal would make economic sense.[32]

The other obstacle to voluntary friendly settlement lies in the 'radically unequal power relationship'[33] between the individual and the state. In the ECtHR context, for example, some scholars have noted the significant imbalance of power within negotiation between the state and the victim 'due to the resources available to states and their position as "repeat players"'.[34] In the Inter-American context, they have argued about implicit pressures to agree to settle 'given how long international litigation typically takes and the risk that even if the eventual decision is in favour of the applicant, the state may fail wholly or partly to comply with it or delay its implementation'.[35] In order to establish trust and voluntarily submit to settlement, applicants therefore have to be reassured of the State's good faith and likelihood that its promises will be followed through. But this reassurance has to come not from the State itself, but from a neutral third party, a mediator.

This is in fact how settlements in many contexts take place. In the Inter-American system, for example, settlements are made with the help of the Inter-American Commission as the mediator between the two parties. It is the Commission that receives the petitions and has powers 'to seek an amicable solution' before these are taken to Court.[36] It is the Commission that leads the meetings and mediates negotiations between the parties, providing guidance about the contours of the

[30] Stillinger, Ross. *The Reactive Devaluation Barrier to Conflict Resolution*. Stanford Center on Conflict and Negotiation, Stanford University, 1988, 3.
[31] Guthrie and Korobkin (n 26): 155.
[32] It is important to underline that interviews with practitioners confirm this position. Many recognise that by the time the case makes it before the Court, applicants 'become entrenched in their views' and do not want to settle their cases. Interview 19 March 2021.
[33] Contesse (n 16) 343.
[34] McGregor, Lorna. 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR'. (2015) 26(3) *European Journal of International Law* 607–34. https://doi.org/10.1093/ejil/chv039, 619.
[35] Contesse (n 16) 343.
[36] Ibid, 335.

agreement. And it is 'the personal involvement of the individual commissioners' that proves 'critical' to the success of the negotiation.[37]

The presence of a mediator, a neutral third party, is crucial because they can repackage and reframe offers made by the other side into neutral proposals.[38] Especially when the third person has expertise as a dispute settler and 'commands a store of experience and knowledge that they can bring to the ... case',[39] they can seek to re-establish the balance in the relationship between the state and the individual: e.g. they can give the parties an opportunity to be heard, to discuss the different ways in which the dispute could be resolved; they can serve as a source of information, providing an objective assessment of the offer that is being made (and compare it with offers in other disputes), thus packaging it within a 'positive frame'; they can help parties develop consensus rather than articulate competing interests and rights, and agree mutually acceptable solutions, which require behavioural change.[40] An intervention of a third party into an inequitable, imbalanced relationship can importantly increase the likelihood of a successful settlement. It can also help re-establish the previous relationships.

This is precisely the issue that this paper seeks to investigate. Since 2010, a major shift has occurred in the practice of settlement before the European Court. If, before, the state and the victim could negotiate on their own, under a new practice, the Court's Registry has taken an active and key role in the settlement process. Now the communication in pursuit of friendly settlement does not take place between the victim and the state (or its representatives) but between the Registry and the State and then in parallel, the Registry and the victim. This paper aims to determine how the proactive role of the Registry has influenced the friendly settlement system and whether individuals are now better off not only materially but also in terms of process and balance of power. The question is whether the presence of a third party, a neutral body like the Registry, has improved the friendly settlement experience for the victim and in turn redressed the unequal relationship between the victim and the state.

[37] Ibid, 335 and 366.
[38] Ibid., 164.
[39] Silbey and Merry (n 17) 13.
[40] Guthrie and Korobkin (n 26) 138.

II. Friendly Settlement in the ECtHR

The European Convention of Human Rights provides a brief legal basis for friendly settlement. Article 39 of the Convention, entitled 'friendly settlements' provides that at any stage of proceedings, 'the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.' In the second paragraph, the Convention adds 'If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.'[41]

The provision reveals a recognition on the part of the Court that friendly settlements may take place and that the Court will enable these to take place as long as they reveal respect for human rights. In practice, however, the Court – beyond acknowledging their existence and providing the blessing for settled outcomes – has had no role in friendly settlements. Rather, most friendly settlements have either been achieved in bilateral negotiations between the State and the victim and its representatives or with the help of the Registry. In fact, as I map out in the next few pages, since the Court's inception to today, it is the role of the Registry in friendly settlements that has changed the most drastically.

In the first decades after its creation, the former Commission of Human Rights was responsible for the conclusion of friendly settlements. The first friendly settlements were decided in 1965, but instances of other settlements at this time were few and far between.[42] At the time, the Commission would indicate to the state whether it thought a violation had taken place.[43] This provisional view was used as an incentive to the parties to enter into negotiations with the victim, but only few of those took place. Instead, victims – encouraged by the preliminary holding of the Commission – often refused to accept settlements and insisted on having their day in Court. It was only when the Commission was disbanded in 1998[44] and the individuals could make an application directly to the Court, that the number of settlements picked up. The State – now without a clear preliminary view about the violation – sought to

[41] Article 39 of the Convention as amended by Protocol 14.
[42] In fact, the Court's search engines report the first settlements only from 1980s.
[43] In many ways the Inter-American system operates in the same way and confers on the Commission the same role it had in the European system. As Contesse notes, however, the Commission now takes a more active role. Contesse (n 16) 343.
[44] Protocol 11.

settle more cases. The victims, perhaps unsure of their success, appear to have accepted more offers. Yet, because judges still wanted to remain out of friendly settlements, it was the Registry that assumed a role in the friendly settlement procedure. This initial role was limited to being a 'postal box', ie a channel of communication between the State and the victim.[45] In this regard, whilst the Registry assumed a passive role, the real negotiation took place between the State and the victim. As Keller reports, 'those friendly settlements ... were often the final solution of a real [negotiation] process', a process of back and forth in which parties showed incredible creativity and inventiveness.[46] The negotiations were well-documented either in a report or after 1998 in a decision or judgment of the Court. In most of these, the Court acknowledged the offer made by the Government had been accepted by the victim and found that there was no reason to reject the settlement reached and struck out the cases. The settlement therefore was reached outside the ECtHR system, with parties merely reporting what they had agreed on.

This arrangement held until 2010, when a new protocol changed the practice of friendly settlements. Overburdened with thousands of cases received every day from across the Council of Europe, the Registry had been instructed to take on a pro-active role in encouraging the settlement of disputes, especially in cases with established case law (eg systemic violations generating repetitive cases), where there was clearly a violation. Suddenly, the Registry no longer functioned merely as a post box, but communicated closely with the Government and the victim, participated in the formation of offers made to the victim, formulating new, original proposals to the parties and encouraged both the State and the victim to conclude the case through a settlement.[47] This new approach and the pro-active role of the Registry meant that the friendly settlement process was now advertised as very much part of the Convention system. Whilst, before, settled cases were struck out without any follow up as to enforcement, now they were classified as 'settled', which triggered automatic oversight by the Committee of Ministers. If the state did not enforce the solution reached, then the victim was in principle allowed to restore the case before the Court.

[45] Keller et al (n 3) 35, Interview with Michael O'Boyle.
[46] Ibid.
[47] This process is described in Keller as well as confirmed in interviews with applicants' lawyers (19 March 2021).

This new approach to settlement has now been extended to all cases coming to the Court. Since 2019, every case will first go through a 12-week settlement phase, during which parties will be encouraged to reach a settlement of the dispute. This indicates clearly the intention of the Court to expand the settlements to more than just routine cases.

In addition to settlements, since 2001 states have been allowed to make 'unilateral declarations'.[48] Unilateral declarations provide that when a 'friendly settlement has been unsuccessful, the respondent Government may make a declaration acknowledging the violation of the European Convention and undertake to provide the applicant with redress.'[49] This means that especially in areas in which there is sufficient well-established case law, the State can make a unilateral declaration acknowledging the violation, upon which the Court will strike the case. It is important to underline that although the state may acknowledge the violation, the case is *not* classified as a violation but is struck out. In this regard, it is treated like other settlement cases.[50] Yet in these types of cases, the victim has very little say in whether they accept the unilateral declaration. Even if the applicant wishes the examination of the application to be continued, the unilateral declaration and its content is agreed with the Registry (as is the case for other settlements), after which the Court decides whether it is justified and if so, strikes out the case. The State can therefore achieve a unilateral closure of the case without the consent from the individual. Furthermore, the Committee of Ministers has no role in supervising the execution of such a declaration and there is no further follow up of the decision. Only the Court can restore such cases to its list.[51]

The three types of settlement – the bilateral negotiation between the state and the litigant victim, the communication through the Registry, and finally the adoption of the unilateral declaration, which is imposed on the victim – are examined in the sections below and show to what extent the active role of the Registry has changed the

[48] The first UD was made by Turkey in *Akman v Turkey*, (Appl. No. 37453/97), 26 June 2001. Glas, Lize R. 'Unilateral Declarations and the European Court of Human Rights: Between Efficiency and the Interests of the Applicant'. (2018) 25(5) *Maastricht Journal of European and Comparative Law* 607–30.
[49] Rules of the Court, art 62a. The Rule entered into force 2 April 2012 however, unilateral declarations were accepted before the Court before this date.
[50] In many respects, however, UDs cannot be seen as settlements, a point which is addressed in the Annex. Yet, its operation is tied closely to settlements and they therefore have to be studied together. This is the main reason that – like Keller – I treat unilateral declarations alongside other settlements.
[51] Rule 43 of the Court.

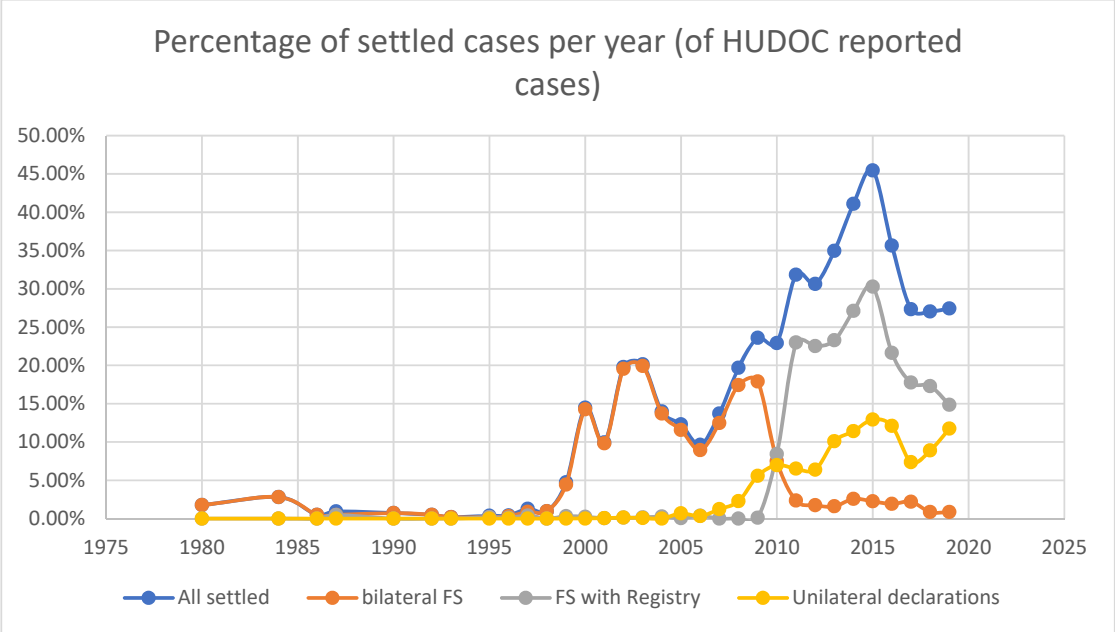
nature of settlements and their content. The description of data together with the coding tree and descriptive results are provided in the Annex.

a. An Active Mediator and its Strategies

Since 1980 when the first cases involving friendly settlement arose to today – over 40 years later, friendly settlement has gradually but steadily increased in importance. If initially only about 2-3% of all reported cases[52] ended up in friendly settlements, by 2000 that number had jumped to between 10-20% and in 2010 up to 35-45% of all HUDOC reported cases were resolved this way (blue line on graph below). Today that number appears to sit at a steady 27%.

The graph below seeks to map out the different types of settlement through the years: The orange line shows how states initially sought to negotiate with individual applicants directly outside the ECtHR system. The grey line reveals how the Court has sought to bring the friendly settlements within the ECtHR system and how the number of settlements post 2010 has gradually increased. The yellow line, which maps out the number of cases in which efforts to reach a friendly settlement had failed and which were resolved by a unilateral declaration, is equally on the rise and represents around 12% of all reported cases.

[52] Only about 5-12% of all cases get reported in HUDOC. The majority of allocated applications (between 88-95%) are rejected as inadmissible in single-judge formation and are never reported. The analysis is therefore based only on the small percentage of cases that are included in decisions and judgments in HUDOC and that are decided by a panel of judges. Out of all allocated applications, settlements represent between 1-7% of all allocated applications, though the percentage exceptionally rose to 11% in 2015. The numbers are consistent with the Court's Annual Reports, though as the Annex explains, whilst the Court only includes in its statistics settlements reached in judgments, I also include settlements documented in decisions: https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf. On my approach and the limits of the HUDOC database please see the Annex.



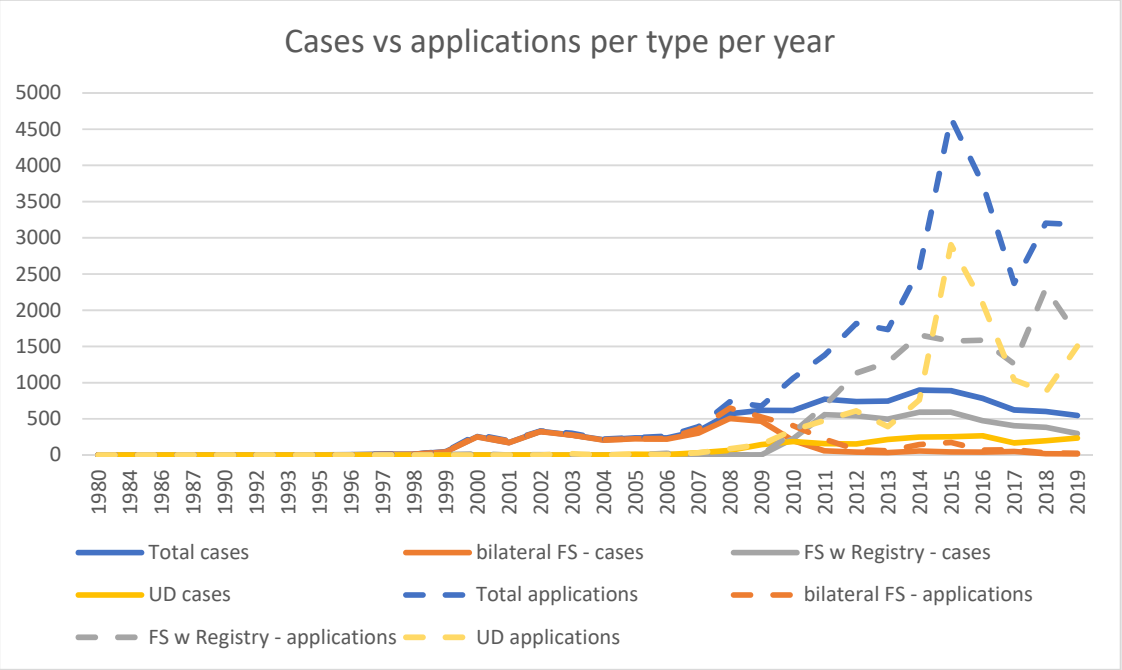
Graph 1: Percentage of three types of settlements out of all HUDOC reported cases

It is clear from the graph that the year 2010 represents a key year for friendly settlements in the ECtHR and is statistically significant. If before this year, states were allowed to seek out solutions with potential victims in a bilateral manner, the involvement of the Registry post-2010 considerably increases the number of cases that conclude through settlement. To understand accurately, how much states are allowed to settle, it is important to look at the number of applications settled, rather than just a number of cases. Namely, when victims before the Court file applications, the Court (at the request of the Registry) may of its own motion join together several claims.[53] The process of joining, or packaging, is often done on the basis of similarity of claims against the same member state. As a consequence, when we study the number of cases as a unit of analysis, this conceals the actual number of applications, which have been resolved (or allowed to be resolved) through settlement. The difference between the two sets of numbers is often striking.

The graph below distinguishes between the absolute number of reported cases settled and the absolute number of actual applications contained in those cases. If the case lines appear almost flat (eg reaching up to merely 900 cases), the dashed lines

[53] Rules of the Court, art 42.

reveal the real story. In total, the number of applications resolved in those cases approaches 5000 claims per year. In fact, we can see clearly that the number of applications resolved through friendly settlement with the Registry's help reaches up to 2000 claims, whilst – and this is even more striking – up to 3000 claims per year are resolved through unilateral declarations. It is also clear that the trend of settlement is increasing and that more and more applications appear to be resolved through settlements.



Graph 2: Number of reported settled cases and applications per type of settlement

There are important conclusions we can draw from this brief description: First, the orange line, depicting the cases settled through bilateral settlement remains largely the same through the 70-year period. This is because bilateral settlements take place on a one-to-one basis and include only single applications. Applications are not packaged together, which allows victims' claims to be considered individually.[54] In contrast, the post-2010 settlement scheme facilitated by the Registry sees a clear jump in the number of applications closed. Multiple applications – up to 360 per case – are packaged together in order to allow for more swift closure of a number of repetitive

[54] In fact, out of 3589 cases settled through bilateral means, only 127 appear to contain more than one application (3%). On average, the number of applications per case is 1.28.

claims.[55] In this context, especially unilateral declarations stand out. Up to 840 claims can be resolved within one unilateral declaration.[56]

The post-2010 jump shows clearly how the involvement of the Registry facilitates the identification and packaging of similar claims together and their resolution through settlement. It is apparent from these numbers that the amount of settled claims goes into thousands of applications per year and that the settlement mechanism is therefore having a considerable impact on the workload of the Court. This was suggested even in the early days of friendly settlement, when Helen Keller and others argued that settlements were being used primarily 'as a case management tool'.[57] The manner in which the friendly settlement system currently works has therefore led to a considerable reduction of the Court's workload.[58] The pro-active approach of the Registry to encourage states to settle is therefore understandable, but it also reveals a clear motive on the part of the Registry to utilise this mechanism for Court's own purpose – ie to manage its own workload.

The question is how does the Registry achieve such a high settlement rate? When government agents speak of the Registry in this context, they talk of its role as a 'mediator': 'The role of the Registry is very open; it does not only mediate in the negotiations, but it also gives advice and information about previous case law.'[59] In other contexts – like the IACtHR, the third party – Commission, which facilitates the settlement is also referred to as mediator.[60]

As anthropologists Silbey and Merry observe, mediators can adopt a range of strategies to control the process of mediation, including how they present themselves to the parties, how they control the process of settlement, the flow of information and communication between the parties, and how they present the substantive issues discussed and solutions reached.[61] Silbey and Merry describe that in this regard

[55] On average, there are 3 applications per cases settled within the Court.
[56] On average, there are 5 applications per cases settled with unilateral declaration.
[57] Keller et al (n 3) 49 ff.
[58] This correlates with a considerable decrease in the number of judgments since 2012, which scholars have argued is related to the increase in settlements. Forowicz, Magdalena. 'Friendly Settlement: European Court of Human Rights (ECtHR)'. Max Planck Encyclopedia Oxford Public International Law.
[59] Keller et al (n 3) 174, Interview with Polish Advocate General.
[60] Contesse (n 16) 340-1, also tackling the issue of tension between Commission's role as a prosecutor and mediator.
[61] Silbey and Merry (n 17); Wrong, Dennis Hume. *Power, Its Forms, Bases, and Uses*. Harper and Row Publishers, 1979.

mediators can move between two different approaches to mediation – the therapeutic to the bargaining approach. In the therapeutic approach, the mediator will use a number of different strategies in order to bring the parties together. First, they will present themselves to the parties as having the expertise in salvaging interpersonal relationships. In this context, they will leave time for parties to meet, to engage and share their feelings and attitudes. The mediators give each party time to tell their story, to explain 'how they feel', to explore emotions and help them communicate with the other party and identify areas of agreement. The hope is that the mediation process is less about the legal language, but more focused on mutuality, reciprocity and identification of areas of agreement.

In many ways this image of mediation is what victims assume they will get when 'friendly settlement' is mentioned. They hope to articulate their individual experiences, to describe why and how the relationship or situation is unjust or unfair and to have their claims recognised. The therapeutic approach, in which the mediator adopts a predominantly passive role, leaves extensive room to parties to identify substantive issues they wish to resolve and to dictate the progress of mediation. But the therapeutic approach is time consuming and wears down the participants. Settlements are often reached less frequently, if at all. Because a search for common language by a therapeutic approach may not lead to convenient, expedient or legitimate solutions, most mediators will sooner or later move from 'a communication process which resembles therapy' to one which looks more like bargaining.[62]

The bargaining approach allows mediators themselves to assert more control over the proceedings. First, the mediators 'claim authority as professionals with expertise in process, law, and the court system, which is described as costly, slow and inaccessible.'[63] They present themselves to the parties as experts in the field – having knowledge of the caselaw, the court, the process of reaching settlements, the content of previous settlements, the amounts of previous damages agreed. The bargaining approach is more structured. Instead of enabling or maximising communication between the parties, direct communication is eliminated or minimised. Instead, the mediator holds private meetings with parties. This process enables the mediator to find a way to narrow and rephrase the issues at stake. The bargaining approach

[62] Ibid., 20 and ff.
[63] Ibid., 19.

therefore seeks to eliminate emotion and focus parties' attention on issues that can be resolved. Ultimately, the mediator is also the one to draft the agreement without the presence of the parties, summarising what they have heard, avoiding what is likely to endanger a settlement and sidestepping any differences. They are the ones to 'eschew[] the language of individual rights' and justice in favour of legal language applying to interdependent relationships.[64] This rephrasing of the dispute means that creative solutions which parties would have reached through direct communication – like apologies and other behavioural demands – most frequently give way to monetary solutions.

In the ECtHR context, the Registry clearly adopts some strategies which are particular to the bargaining approach. First, as the administrative arm of the Court, the Registry has extensive expertise in the case law of the Court. Although members of the Registry are international civil servants and thus neutral, they usually work on files which come from their country of origin. This is done for language purposes but also so that the Registry lawyer can bring the knowledge and expertise of the domestic legal system when they summarise the file and potential violations for the Court. This means that individual lawyers will specialise in country-specific claims, and that – when these are repetitive – they will develop expertise particular to a certain violation of the Convention.[65] The knowledge of the Court's case law therefore cannot be doubted. But members of the Registry assigned to cases of their specific country will also be closely involved in the determination of remedies and damages, they will develop close relationships with state representatives and will know what the state had agreed to previously and what it was able or willing to enforce.

In this regard, the Registry can take extensive control of the process of settlement. When settlements took place outside the system (pre 2010), the state approached the applicant or his representative and asked the victim whether they were favourable to settle the dispute in a friendly manner. The discussion then centred on how the claim should be settled and what remedy should be acceptable to the victim. In this regard, 'friendly settlements [were] primarily understood as an *individual solution*' to a case[66] and parties' revealed incredible creativity about the remedies that

[64] Mather, Lynn, and Barbara Yngvesson. 'Language, Audience, and the Transformation of Disputes'. *Law & Society Review* 15, no. 3/4 (1980): 775–821.
[65] Contrast this with the arrangements in the Inter-American system, where there is a specialized friendly settlement unit within the Commission, which oversees settlements. Contesse (n 16) 362.
[66] Keller et al (n 3) 19.

could be agreed. Numerous such settlements speak of a 'very individual character of friendly settlements'[67] and of the strong position of the victim, who was able to negotiate remedies beyond monetary damages that would efficiently address his/her human right situation. Yet, once the settlement process was moved within the ECtHR system and the Registry took command of it, the process became entirely written. Today, the applicant is no longer approached by the state, but by the Registry. The applicant receives a letter (with the Court's letterhead) explaining to them that the Registry considers the case suitable for settlement and indicating what the payment to the applicant should be taking into account the circumstances of the case and the Court's case law. Attached to this letter is a draft declaration, effectively a letter of acceptance, helpfully filled out with the applicant's name and details, which only requires the victim's signature by the specified date, for the settlement to be agreed.[68]

The Registry's role has therefore changed considerably. It has taken over the communication with the applicant and has taken it upon itself to propose and draft the settlement offer in light of the Court's case law. Such active involvement of the Registry considerably changes the once bilateral relationship between the State and the victim and shifts the locus of where the *real* negotiation occurs. If in traditional settlement negotiations, the communication took place directly between the victim and the state, now the negotiation takes place through two parallel channels - between the state and the Registry and between the victim (and her advocate) and the Registry. Yet, the two relationships are not equally important. It is the state and the Registry that together identify cases suitable for settlement and hold discussions about what type of remedy would be appropriate to bring cases to a close. Although the victim is contacted, the communication takes place in written form.[69] As a consequence, their input is negligible and the opportunity for individual solutions is minimised. Most often, in such cases, acknowledgements of violation and non-monetary remedies are off the table.[70] Instead, as the next sections show, the negotiation (if we can call it that given its exclusively written nature) is focused solely on the amount of payment. In the

[67] Ibid.
[68] Interview, 29 March 2021.
[69] All interviews with applicants' lawyers have confirmed that settlement proceedings take place in a written form. In fact, none of my interviewees or their clients have *ever* been 'invited' to sit down with the respondent state and discuss the terms of settlement. Interviews, 19 March 2021.
[70] This is also underlined by Jessica Gavron, 'Strasbourg Court's New Non-Contentious Phase – a Tax on lawlessness?' Strasbourg Observers, 14 November 2019, https://strasbourgobservers.com/2019/11/14/strasbourg-courts-new-non-contentious-phase-a-tax-on-lawlessness/.

end, the parties' stories are converted into 'the categories and rules of exchange and bargaining'.[71]

The shift from bilateral negotiation to settlement with the help of the Registry has considerably changed the interaction between the victim and the state, the two parties between whom the settlement takes place. As victims' lawyers see it, the Registry has assumed a role of 'manager' in this relationship and is there to control the settlement process, the flow of information, and the substantive issues discussed and solutions reached. [72] The bargaining approach maximises the role and power of the third party – the Registry. Yet, it is not a process of persuasion, but a form of manipulation because the parties (at least those who are new to the process) are not aware of the motivations and the intent of the mediator.[73] In reality, like most mediators – the Registry is also assessed by measures of efficiency – eg the number of successful settlement resolutions, the rate of relitigation, etc, and in our case, by the reduction of the Court's workload.[74] As Silbey and Merry conclude, because of these efficiency measures, all mediators (even those who wish to adopt a therapeutic approach) will become bargainers, forced into this role by the 'exigencies of some institutional umbrella to produce results competitive with some other yardstick of efficiency'.[75] Because the settlement system in the ECtHR is used with the purpose to reduce the workload, this compels the Registry to adopt the bargaining techniques above.[76]

b. The Impact of the Bargaining Approach on the Victim

That the Registry would be motivated by workload efficiency might seem obvious or inevitable, but what is perhaps obscured is the impact this approach has on the victim. In this section, I want to explain what the current process takes away from the normal

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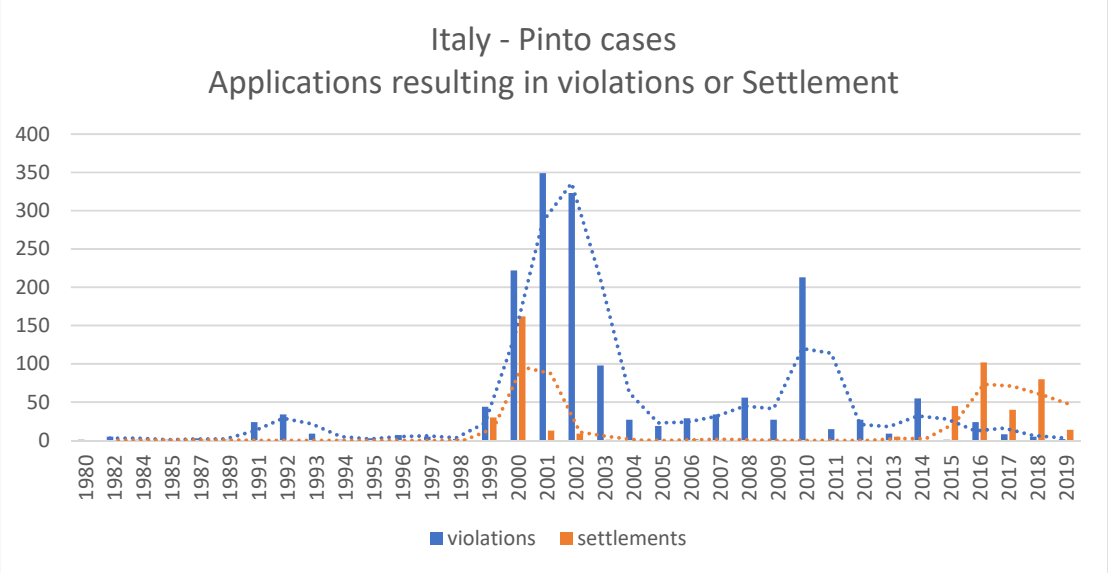
[71] Silbey and Merry (n 17) 27.
[72] Interview no. 2, 19 March 2021.
[73] Taylor, Michael. *Community, Anarchy and Liberty*. 1st Paperback Edition edition. Cambridge Cambridgeshire; New York: Cambridge University Press, 1982, 284. Interviewees admitted that it is difficult for new applicants and lawyers to understand the process and that as a consequence many inexperienced actors will settle when they should not and fight when they should settle. Interview no 2., 19 March 2021.
[74] I speak from my own experience working at the Court that productivity is appreciated. Given the Court's workload, the ability to dispose of several cases quickly is imperative. The Court is now even exploring the possibility of introducing an algorithm to quickly dispose of repetitive cases.
[75] Silbey and Merry (n 17) 30.
[76] Some applicants' lawyers acknowledged that the Registry was acting with an intent 'to dispose of cases' as quickly and efficiently as possible. Yet, although interviewees are aware of this, they are still pushed into settlement because other elements of the process pressure them into accepting offers they/their clients would prefer to reject. See (n 94). Interview no. 2, 19 March 2021.

behaviour of the victim applicant. In this context, it is important to understand how victims normally react to settlement offers in bilateral situations.

The graph below maps out the number of applications settled and adjudicated against Italy in Article 6 cases between 1980s to today.[77] These are mostly repetitive cases linked to the length of domestic proceedings and the enactment of the Pinto law,[78] which sought to provide a domestic remedy facilitating applicants to claim justice at home.[79] Particular attention should be paid to the period between 1999 and 2003, when settlements between the applicant and the state were not yet streamlined through the Registry. At the time, the Registry served merely as a postal box – it received offers and forwarded these to the applicants and their lawyers. Mostly importantly, the Registry did not actively encourage settlement, nor did it allow states to close multiple applications through unilateral declarations. The graph below can therefore reveal the 'natural' behaviour of litigant victims when faced with the choice between settlement and litigation.



[77] The data to portray the behaviour vis-à-vis Italian cases was generated separately from the main data. I mapped Article 6 length of proceedings/undue delay cases that ended up in a violation (number of judgments per year, generated from HUDOC) and then compared this with cases which ended up in a settlement.
[78] Law No. 98/2001.
[79] Please note that the graph contains 1036 applications which ended in violation of Article 6 between 1999 and 2003, and 215 applications which settled during the same time in relation to Article 6. Only 14 applications relating to Article 6 were rejected as not amounting to a violation and 67 were rejected as inadmissible.

Graph 3: The dynamics of applications resulting in a violation and friendly settlements

The graph shows that in 1999 and 2000, the number of applications settled (orange) was similar to the number of applications ending in a finding of a violation (blue). This means that during this time the number of applicants who pursued settlement equalled those who insisted to go to Court. From 2001, however, this changes: the number of settled cases drops drastically and the findings of violations double in 2001 and 2002, only dropping off in 2004, once the Pinto act had already come into force and applicants could turn to domestic authorities. This means that from 2001, applicants refused settlement offers and opted to try their luck in Court.

The graph reveals a pattern of how victims normally react to settlement in exclusively bilateral, one-to-one relationships: When it is unclear how the Court will rule and how likely the claim is to conclude in a violation (or indeed how high the remedy would be), settlement looks equally attractive as going to the Court. But this is only temporary. Once the ECtHR in 1999 in *Botazzi*[80] rules against Italy and once these violations start being widely publicised – both in legal and general circles (thus a lag of 1-2 years), then from 2001 onwards individuals insist on having their day in court and reject settlement. To applicants, settlement therefore does not appear clearly more appealing than litigation.[81] If anything, once it becomes clear that there is a systemic problem with length of procedure cases against Italy, parties appear much more interested in proceeding to litigation. In the end, having a day in court appears to be five times more preferred option than settlement.

It is important to note that this 'normal' pattern is not visible after 2010 when Italy is brought before the Court again for Article 6 violations relating to delays. When in 2010 in *Gaglione and others v Italy*, the Court held that the delay by the Italian authorities in paying compensation in Pinto applications itself constituted a violation of Article 6,[82] thousands of new applications were brought to the Court. Yet, bar *Gaglione*, none of these proceeded to litigation and instead the vast majority were

[80] *Bottazzi v Italy*, 28 Jul 1999, App. 34884/97.
[81] This is the case if we consider the number of cases as well as if we consider the number of applications settled and adjudicated.
[82] *Gaglione and others v Italy*, 21 Dec 2010, App. 45876/07. There was a delay of at least 19 months in 65% of all the applications.

resolved by the Registry through unilateral declarations.[83] In 2010 and after, therefore, the preferential option of continuing litigation before the ECtHR is displaced by settlement due to Registry's intervention.

It is clear from these two contrasting phenomena that the current system deprives the applicants of the opportunity to decline settlement. This is achieved structurally but also by playing on their behavioural biases. First, in the current ECtHR settlement system the applicant gets minimal say. Although the applicant in principle has the option of rejecting the offer, their position is different than it would be in an exclusively bilateral situation, where the applicant would still have the option (and threat) of going to the Court. Instead, frequently the applicant victim may even be advised that were they to reject the offer, their claim could potentially be resolved through a unilateral declaration, which cannot be rejected.[84] This is confirmed by lawyers for the Polish government who reveal that if the victim refuses the settlement offer, they will use unilateral declarations to bring the case to a close.[85] Structurally, therefore, the process of settlement has been set up in a manner that puts more pressure on the applicant to accept the initial offer made. Indeed, interviews with applicants' lawyers reveal that lawyers are concerned about what it might mean if they were to reject the Registry's terms. If they refuse to do so, there is a serious threat that proceedings might end through a unilateral declaration. [86] This set-up gives almost exclusive power to the state. In fact, this is what we are seeing in the Italian graph above. From 2015, the great majority of settlements that take place are through unilateral declaration. Not only are UDs clearly changing the natural settlement curves, depriving victims of the option to decline the settlement, but the power imbalance in the relationship between the victim and the state which proceedings before the Court are meant to redress is instead even further reinforced.

In addition, the role of the Registry in the process of communicating with the applicants is done in a manner, which plays on their cognitive biases and therefore

[83] In fact, 202 out of 208 applications are settled through unilateral declarations. The question of enforcement of unilateral declarations is discussed below. In this regard, for example, The Pinto Legislation mentioned earlier still remains problematic. In spite of the settlements and unilateral declarations, around 1300 similar cases are still pending before the Court and await the same fate.
[84] This was confirmed through interviews with practitioners. Interview, 29 March 2021. Also note that lawyers have argued that template letters are sent to the applicants and government at the same time and that the applicant has to accept the offer by the same date as the Government, creating a situation where the offer might be accepted before it is even given. Gavron (n 70).
[85] Keller et al (n 3) 171.
[86] Interview no. 2, 19 March 2021.

serves to enhance the chances of a successful settlement. First, the Registry – as the neutral expert in the relationship between the applicant and the state – is much more open about reporting on other similar cases that have been resolved through friendly settlement and is able to provide information to the victim about how much just satisfaction was paid in other similar cases. As the Polish Advocate put it: 'The role of the Registry is very open; it does not only mediate in the negotiations, but it also gives advice and information about previous case law.'[87] Yet, the role of information giving is also a role of 'expectation-setting'.[88] A lawyer frequently appearing before the Court, for example, argues that because the letters proposing settlement originate from the Registry, this creates 'pressure on the applicant' to accept the offer. The letter sends 'the inescapable signal ... to the applicant ... that the Court considers the case *not* to warrant further consideration'.[89] The fact that the Registry also sets out the terms of the settlement and provides a pre-filled template for the applicant to sign, stating 'I accept the offer...' shapes the victim's expectations, eg if no acknowledgement of violation is contained, this suggests that the Court does not 'think' there is a violation; if only a monetary ex gratia payment is suggested, this suggests that the Court considers 'that *no* non-monetary provisions, such as undertakings to investigate, are required.'[90] Through these formulations, the Registry helps shape the victim's expectations as to what and how much they might receive. As psychologists argue, once this first piece of information is offered and the 'anchor' is set, any future judgments about how much one should ask for or expect are made with reference to and around this anchor. The Registry – especially because it gives an appearance of neutrality – therefore provides a reference point around which the victims' anchoring bias is set. This has a double impact on the victim.

On the one hand, the settlement offer made by the state to the applicant and presented through the Registry appears different than it would in a bilateral negotiation. That it is sent by the Registry on the Court's letterhead means that the applicant is more likely to entertain it and is more likely to interpret the offer as fair. The risk of reactive devaluation mentioned above is therefore minimised. On the other hand, the way in which the settlement is phrased – eg referring to the Court's case law,

[87] Keller et al (n 3) 174.
[88] Ibid. Similar position provided in interviews with applicants' lawyers, with the emphasis that applicants have to be *actively* persuaded to accept the settlement offers. Interview no. 2, 19 March 2021.
[89] Gavron (n 70).
[90] Ibid.

potentially suggesting that in other similar cases other victim litigants received comparable payments, renders the settlement offer more likely to be accepted. As experiments have shown, 'when a settlement reflects the expected value of a lawsuit, plaintiffs will be far more likely to deem the settlement acceptable... A likely explanation is that plaintiffs view the money as a gain... This makes the plaintiffs risk-averse, preferring a certain settlement to the risk of a trial...'[91] As we know from prospect theory, a theory of how individuals assess potential gains and losses, faced with a risky choice leading to gains, individuals prefer solutions with higher certainty.

Together, both the anchoring effect as well as prospect theory, two biases that are well-established and pervasive, drastically reduce the spectrum of compensation within which the victim is likely to 'move' during the settlement negotiations. The results of the empirical analysis in the ECtHR context as well as interviews with government agents reveal that the compensation received in settlements is up to 10-20% lower than if victims waited for a judgment and in some countries even 20-25% less.[92] The rationale for this deduction is offered by referring to the fact that individuals do not have to wait for the judgment and are instead offered the settlement payment right away.[93] The set-up therefore uses individuals' loss aversion bias to induce them to take the certain outcome offered by settlement rather than wait for the uncertain one.

The shift from bilateral settlement to settlement with the help of the Registry has therefore considerably changed the interaction between the applicant victim and the state. Structurally and in practice, the process of reaching a settlement is fraught with problems that raise questions about how authoritative the applicant's consent to settlement really is. The final issue that should be highlighted is the impact on the applicant of the Registry's practice of packaging victims' claims. As I mentioned before, the bringing of friendly settlements within the system shifts the locus of the negotiation from the victim-state relationship into the relationship between the state

[91] John Bronsteen, Some Thoughts About the Economics of Settlement, 78 Fordham L. Rev. 1129 (2009). In fact, interviews confirm the operation of this bias, with lawyers stating that as long as the economic benefits are equivalent or close to equivalent to what an applicant would receive through adjudication, they then to recommend settlement. Interview, 29 March 2021

[92] Fikfak, Veronika. 'Non-Pecuniary Damages before the European Court of Human Rights: Forget the Victim; It's All about the State'. (2020) 33 *Leiden Journal of International Law* 335–69., https://doi.org/10.1017/S0922156520000035. Keller (n 3) 170, interview with Polish Advocate General.

[93] Ibid., 171.

and the Registry. This makes the individual victim less relevant. When subsequently the Registry facilitates the packaging of multiple applications by different victims into one case, the focus on victims (how impacted they were by the violation and what they might like as a remedy – from acknowledgement to non-monetary remedies) disappears altogether.[94] As psychologists have shown, when we are dealing with a large number of cases (eg large losses of human life, largescale atrocities or violations), our reactions are different than when we are dealing with a single case. Susskind and colleagues find that 'a single individual, unlike a group, is viewed as a psychologically coherent unit. This leads to more extensive processing of information and stronger impressions about individuals than about groups'.[95] People feel more distress and compassion when thinking about a single victim than when considering a group of victims. But when an application becomes a statistic (as it necessarily does when you are dealing with 3,000 similar applications), this leads to psychological numbing. In essence, the bigger the numbers, the more our view of, and consideration for, each individual victim is blurred.[96] When people in the applications dealt with by the Registry become unidentified statistical victims, this then 'leads to apathy and inaction'.[97]

This is precisely what concerned Fiss when he wrote his *Against Settlement* piece. As he argues: 'settlement forces the smaller litigants .... to shy away from justice. Thus, the concern is not settlement in traditional bipolar cases, but settlement in class actions and other aggregate cases that raise "deeper and more intractable problem[s]".'[98] Settlements in such cases are problematic for a variety of reasons, including the plaintiffs' relative lack of power compared to that of defendants; the inability of individuals in aggregate cases to consent to settlement; and the failure of settlement to achieve justice. To put it in simpler terms – for the victim, there is no individualisation or personalisation. They become merely a statistic.

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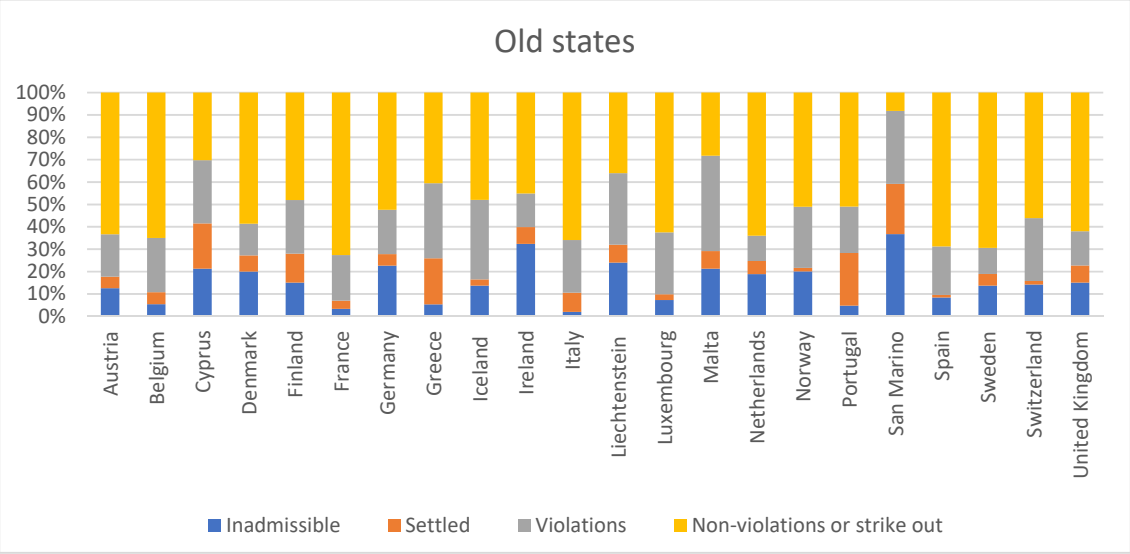
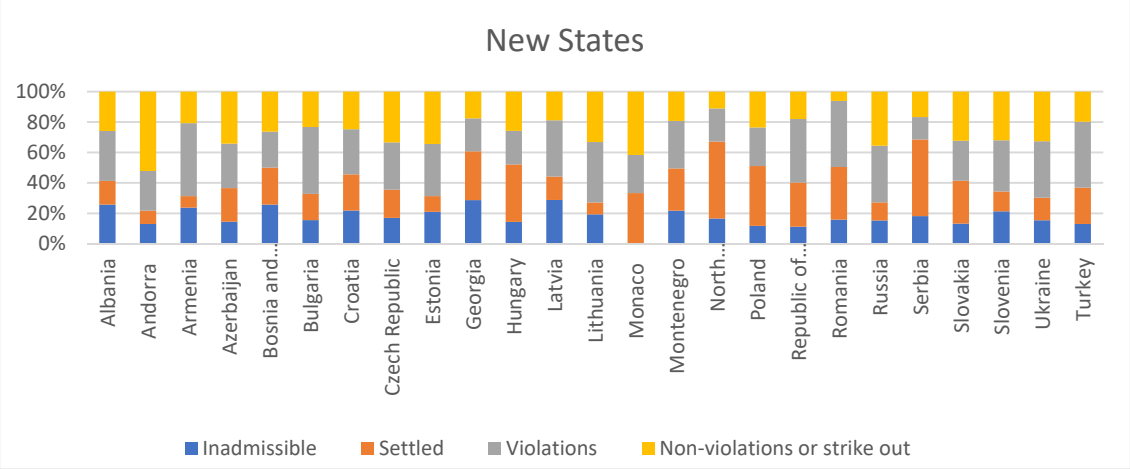
[94] In fact, individual measures are limited to exceptional cases, where they are included together with general measures. Keller et al (n 3) 179.
[95] Slovic and Zionits, 'Can International Law Stop Genocide When Our Moral Intuitions Fail Us?', in R. Goodman, D. Jinks and A. Woods (eds), *Understanding Social Action, Promoting Human Rights* (2012) 100, at 115, citing Susskind *et al.*, 'Perceiving Individuals and Groups: Expectancies, Dispositional Inferences, and Causal Attributions', 76(2) *Journal of Personality and Social Psychology* (1999) 181.
[96] Slovic and Zionits (n 79) 117.
[97] Ibid.
[98] Issacharoff, Samuel, and Robert Klonoff. 'The Public Value of Settlement'. *Fordham Law Review* 78, no. 3 (1 January 2009): 1177-8, citing Fiss (n 7) 1078.

c. The Position of Repeat players

Because the Registry is using the friendly settlement system as a workload management tool, this strongly affects its approach to whose cases get settled. As the empirical results suggest, there is a strong correlation between the most frequent 'customers' of the ECtHR and the states that get to settle the most cases. The empirical analysis shows clearly that there is a distinction between states who joined the Council of Europe (and consequently the Convention) before 1990 and those who joined the Council after. On average, so-called 'old' states only settle about 8% of all of their cases. In contrast, cases brought against 'new' countries lead to a settlement in 24% of cases. On average, new countries therefore settle about three times as many cases as old countries (compare the orange parts of the graph, which reveal the percentage of settled cases in each country).





Graphs 4 and 5: Percentage of settled cases per country (compared with percentage of inadmissible cases, violations and non-violations) in HUDOC

This difference between old and new states in the amount of settled cases may be due to different settlement cultures.[99] The Swiss Advocate, for example, argues that Switzerland rarely settles any cases before the Court. Instead, its *default* position is to 'defend the position of national authorities' before the ECtHR.[100] This can be contrasted with the practice of the Polish Government, whose advocate actively encouraged the introduction of the friendly settlement system into the ECtHR in order to get rid of cases which would end with a finding of a violation.[101] A similar approach to settlement was revealed by the Georgian Minister of Justice, when in November 2012 he introduced a new policy of settling cases in order to 'unburden the European Court from Georgian complaints and establish a culture of resolving human rights [disputes] inside the country, so that people are no longer forced to prove their truth abroad.'[102]

These two positions portray two contrasting approaches to settlement: one, which is based on the likelihood (or certainty) of outcome, and the other, which is unconcerned with outcome, but focused on giving a voice to and defending the position of national authorities before an international court. A statistical comparison reveals that the two groups of states have considerably different success rates in the Court: most of the reported cases against 'old' states, for example, lead to a finding of a non-violation or are struck out (52% of cases), compared to only 27% of cases against 'new' countries (half fewer)! When 'new' countries appear before the Court, the likelihood is much higher that the case will lead to a violation.[103] It is therefore not surprising that states, which are more likely to be found in violation of the Convention reach for settlement more often. The pragmatic approach of 'new' countries – to seek

[99] Contesse speaks about the same phenomenon in the IACtHR, see (n 16) 342 and ff. Interviews confirm similar differences between states. Interview, 29 March 2021.
[100] Keller et al (n 3) 187, Frank Schürmann, government agent of Switzerland. Resistance to settlement by some countries (eg France) was also noted in interviews with practitioners, 19 March 2021.
[101] Ibid., 157 and ff.
[102] Abazadze (n 3).
[103] There is also a high correlation between the Rule of Law Index and settlement numbers (-0.68, implying that countries with a higher Rule of Law Index settle less frequently), between the Rule of Law Index and a finding of non-violation (0.73, implying that the higher the country scores of the ROI index, the higher the chances of a finding of a non-violation), and between the Rule of Law Index and compliance (0.64).

to settle cases in order to avoid more findings of a violation – is therefore understandable.

Whilst states may have a number of reasons to seek to avoid a finding of a violation, the question is *when* (and *who*) the Registry allows to settle its cases? In this regard, one of the strongest correlations exists between the absolute number of cases brought against a specific country and the absolute number of cases it settles: this correlation sits at a high +0.83. It means that the most frequent customers of the European Court, such as Turkey, Poland, Romania, Russia, Hungary, Italy, and Ukraine, are allowed to settle their cases most frequently. This is to be expected. [104] However, for many of these countries, the involvement of the Registry has facilitated a drastic increase in the number of settled cases compared to the pre-2010 times. Hungary, Poland, Romania, Russia, Turkey, Ukraine and many others have all settled substantially more cases since 2010 than before.[105] Hungary has settled seven times more cases with the help of the Registry and through unilateral declarations than before, whilst Ukraine has settled five-fold, with Romania and Russia concluding about four times more cases through friendly settlement. Strikingly, in some contexts, countries have been allowed to settle more than half of cases reported as having been brought against them. In the case of North Macedonia and Serbia, for example, the two countries have settled 51% and 50% of all reported cases brought against them. Poland and Hungary have similarly closed 40% and 38% of reported cases respectively. A third of all countries of the Council of Europe who appear before the Court, have been allowed to settle 25% or more of all reported cases against them.

The empirical results suggest that there is a strong correlation between the most frequent 'customers' of the ECtHR and the states that get to settle the most cases. These players are more interested in getting cases settled but they may also – as 'repeat players' – get to develop skills and expertise and have a 'richer and more nuanced grasp of relevant precedents' than the occasional 'one shot' participants. [106] As a

[104] This result should not be surprising (even statistically it is to be expected) since it is expected that in absolute terms countries that bring more cases will get to settle more cases. The relative correlation (% of settled vs % of violations) is low (correl=0.03), with old countries settling on average 0.38 case for every one violation. In contrast, new countries settle about 0.9 case for everyone one case of violation.
[105] Adding together cases settled with the help of the Registry and through unilateral declarations, the numbers are considerably higher than pre-2010. On average, states have settled 4 times more cases after 2010 than before.
[106] M. Galanter and M. Cahill '"Most Cases Settle": Judicial Promotion and Regulation of Settlements' (1994) 46 Stanford Law Rev 1339, 1386.

consequence, these savvy negotiators are able to reach much higher rates of success in out-of-court settlement than one-shot players.[107] Some players are able to 'amass a considerable library of settlement information and will enjoy corresponding strategic advantage in subsequent cases.'[108]

Before the ECtHR, however, repeat players are in an even more advantageous position. The Court is often inundated with thousands of applications against specific countries. The 'repeat players' who hold the most information and expertise are therefore also those who hold the most power over the Court's workload.[109] In this regard, they hold the key to the 'efficiency yardsticks' according to which the Registry and its members, and ultimately the Court, may be assessed. It is therefore unsurprising that they develop a special relationship with members of the Registry and thus increase the likelihood of a successful resolution of the case. The Polish Advocate General, for example, speaks of a developing 'confidence between the parties, namely the Government Agent and the Court'.[110] The term 'confidence' refers to trust, but what is most striking is that the trust is to be established between the Government Agent and the Registry, rather than between the victim and the State.[111] Referring to the specific person in the Registry as 'my main partner', [112] the close link between the Registry and the Government Agents is visible in references to 'comprehensive discussions' with the Registry, reaching a 'mutual understanding', agreeing a way to finalise 'all groups of cases according to some sort of scheme which is acceptable to the Court and the Government Agent', and in the end, agreeing on an 'amount which would not be rejected by the Court.'[113] To foster this relationship, the Registry visits the member states and seeks to reach oral agreements about how cases will be settled.[114]

This type of close relationship between members of the 'civil service', ie in our case Registry, and the repeat players, is not unknown in other areas. In domestic public law, for example, scholars have revealed close ties and mutual dependence

[107] Contesse speaks of Mexico as an example in the Inter-American system, (n 16) 342.
[108] Galanter and Cahill (n 106) 1386.
[109] Keller et al (n 3) 170 and ff.
[110] Ibid., 172.
[111] The advocate does underline at several points in the interview that 'the Registry is absolutely independent'. Ibid., 174.
[112] Ibid.
[113] Ibid., 178.
[114] Ibid., 172.

between interest groups who appear regularly before the courts and the state's civil service, responsible for implementing these decisions.[115] These studies also speak of the fluidity, a back-and-forth of personnel between the civil service and the 'other side'. At the ECtHR, it is clear that States enjoy a central role in the current friendly settlement system. At the very least, the current system fosters a close partnership between the State and the Registry, in which there is some influence of the former on the latter. At its very worst, it reveals an incestuous relationship between the Registry who manages the cases and the Court's repeat players, a partnership in which States with the Registry can dictate the terms of settlement.[116]

d. The Content of Settlements and their Enforcement

One of the main arguments in favour of settlement concerns the increased probability of compliance with the agreed solution. It is said that when parties reach a conclusion through a compromise, they are more likely and willing to comply with dispositions of the settlement. Studies of the Inter-American Court of Human Rights have shown that compliance rates are much higher than when decisions result from adjudication. Zaccardi and others for example show that 32% of settlements are complied with in full and an additional 67% are complied with at least partially (in total almost 99% compliance). In comparison, judgments of the IACtHR are fully complied with in only 5% of cases, and partially complied with in 56%.[117] As Zaccardi insists, these statistics suggest that 'for victims, petitions are more effective when they are channelled through the friendly settlement mechanism instead of through ordinary procedure.'[118]

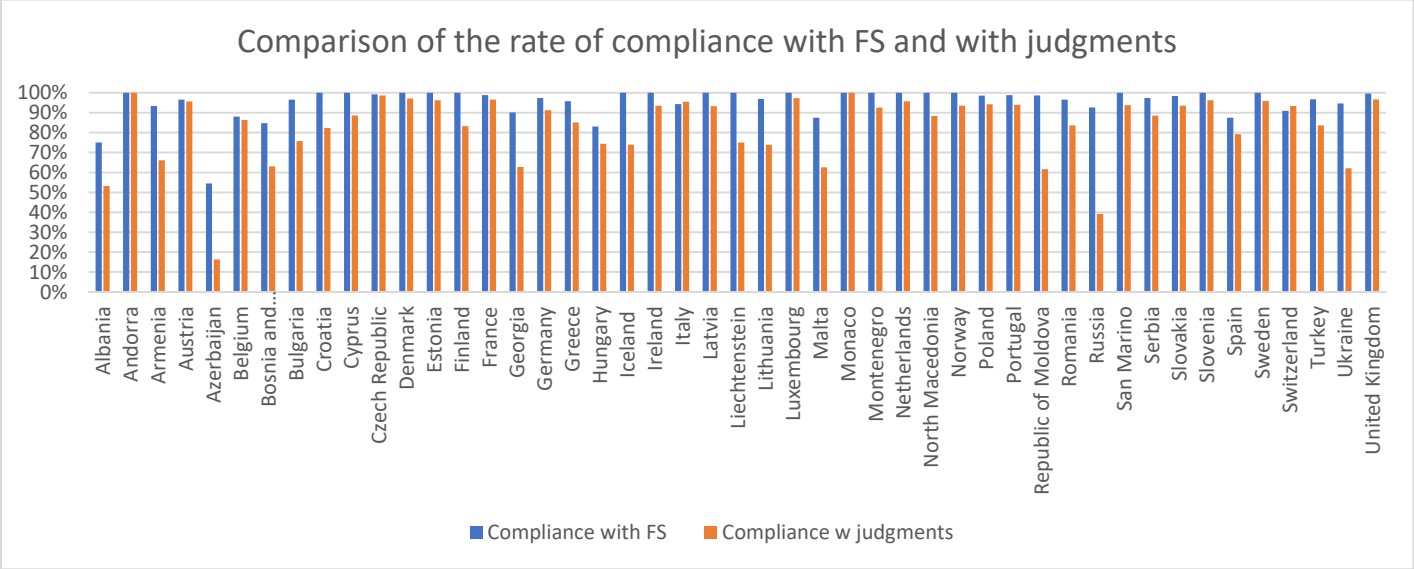
On domestic level, the arguments are very similar. In one study, Craig McEwen and Richard Maiman compared small claims courts in Maine where cases were mediated with courts where cases were adjudicated. They found that parties were more likely to comply with conclusions reached through settlements than with judgments. This difference was attributed in great part to the reported higher level of satisfaction and sense of fairness among those whose cases were settled (eg through

[115] Mshai, Yael. 'Interest Groups and Bureaucrats in a Party-Democracy: The Case of Israel'. *Public Administration* 70, no. 2 (1992): 269–85. https://doi.org/10.1111/j.1467-9299.1992.tb00938.x.
[116] Applicants' lawyers agree that in relation to certain (though not majority of) countries, the relationship between the Registry and the respondent states could be described in those terms. Interview, 19 March 2021.
[117] Zaccardi et al (n X) 74-5; Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights', 6(1) Journal of International Law and International Relations, 1712, 2008.
[118] Ibid.

mediation). 'Mediation was less intimidating and more understandable, giving participants the opportunity to explain their side, to explore all issues, and to vent and dissipate anger.'[119] More importantly, better compliance is also linked to a wider range of outcomes. Through participation and direct communication parties are allowed to brainstorm new solutions and develop new options that satisfy the needs of both sides. Because settlement is said to be a compromise, it allows for intermediate outcomes rather than 'all or nothing', 'win or lose' results. 'Settlement permits greater flexibility and inventiveness in devising outcomes and remedies'.[120] Overall, settlement is said to offer a 'superior' outcome.

Looking at the ECtHR, it is clear that a lot of these findings are reflected also in the ECtHR database. States are much better at complying with friendly settlements than with conclusions reached in judgments. The graph below portrays the difference between the rate of compliance with friendly settlements in comparison to the rate of compliance with ECtHR judgments. On average, friendly settlements enjoy 94% compliance, compared with other judgments, which lead only to 81% compliance.[121] There is on average a 13% difference between the two. Yet, looking closely it becomes clear that for certain countries compliance with friendly settlements comes *considerably more* easily than with judgments. Azerbaijan, for example, complies with only 16% of its judgments, whilst it complies with 54% of the settlements. Russia, Moldova, Georgia and even Ukraine have almost a 2-fold better compliance with settlements than with judgments.

[119] Galanter and Cahill (n 106) 1355.
[120] Ibid., 1351.
[121] This result on the general rate of compliance is interesting and is based on all of the data contained in hudoc.exec.coe.int. However, it does not square with reports that compliance rates at the Court are around 50%. I intend to explore the statistic therefore in future.



Graph 6: Comparison of rate of compliance for friendly settlements vs normal judgments

Several scholars have warned that increased compliance in settled cases may 'well be due to the fact' that a settlement 'asks less of the defendant, rather than from its creating a more amicable relationship between the parties.'[122] For example, some studies found that mediated cases had a higher rate of compliance than adjudicated cases because of effect selection.[123] That is, the settled cases were not random, but included mostly those cases in which defendants admitted partial liability. Once wrongdoing was admitted, parties were more likely to comply voluntarily and these were also cases that tended to be successfully mediated. Similarly, McEwen and Maiman show that compliance will be better when parties agree on a lower award, rather than higher.[124]

Looking at the content of settlements in the ECtHR case law, it becomes apparent that in the majority of cases countries like Azerbaijan, Georgia, Moldova, Russia and Turkey are merely asked to pay a payment in response to the alleged violation. For example, before 2010, settlements included a number of different individual measures. In criminal matters concerning procedural guarantees,

[122] Fiss and Rendleman (n 108) 1004; McEwen & Maiman (n 22).
[123] Michele Hermann et al, University of New Mexico Center for the Study and Resolution of Disputes, the Metrocourt Project Final Report (1993).
[124] McEwen & Maiman (n 22) 37.

settlements included provisions on a stay of the enforcement of a prison sentence (ie use of pardon powers), sentence reduction, closing of criminal proceedings, reduction of a life sentence to 15 years imprisonment, quashing of a conditional sentence, release of applicant, reopening of proceedings, transfer to a prison of applicant's choice, construction of a chapel in prison for religious purposes etc. In immigration matters, settlements also provided for a repeal of a deportation order or a grant of a residence permit, visa, or travel documents, delisting of the applicant from a list of fugitives. In civil proceedings similarly creative remedies were agreed, such as definition of the right to visit a child, repeal of a decision to destroy applicant's dog, promise to amend national legislation etc. In many cases, an explicit acknowledgement of the violation also accompanied the settlement. Today, the undertakings are mostly limited to the requirement to enforce domestic judgments[125] and to asylum and immigrations claims, including requests for family reunification.[126]

There are about 324 cases of this type amongst the case law of the ECtHR before 2010. After 2010 and up to 2020, the absolute number remains similar (eg 351), but in relative terms the undertaking to adopt individual or general measures represents a much lower proportion of all settled cases. Today, only 4,8% of all settled cases contain a provision containing an undertaking from the Government. Before 2010, the number stood around 9,7%. In spite of the rise of settlements, the content of the settlements has not become more onerous on the state or indeed more specific. Instead, there seems to be a regression in terms of what is expected from the state.

For many years, for example, friendly settlements against Turkey as a rule contained an acknowledgement of a violation. This was done mostly in cases involving allegations of violations of Articles 2 and 3 of the ECHR. The Government expressed regret at 'the occurrence of the actions which have led to the bringing of the present applications' and accepted that the actions lead to violations of the Convention. [127] It undertook 'to issue appropriate instructions and adopt all necessary measures' to ensure that similar violations are fully and accurately redressed by the authorities at home and in accordance with the Convention. Scholars argue that this formula was probably added to settlements due to pressure put by the Court on the Turkish

[125] Serbia, Bosnia and Herzegovina and Azerbaijan, 254 settlements with undertaking adopted between 2010 and 2020.
[126] Belgium, France and Spain.
[127] *Aydın v. Turkey*, 10 July 2001, App. 28293/95 and others, [13].

Government and that, as a rule, settlements in Article 2 and 3 cases were only approved if such statements (even if general) included acknowledgement of a violation and expression of regret.[128] Such phrasing was at times copied by other Governments, however, since 2010, the terminology of 'regret' only rarely appears in settlements, even in cases concerning allegations of serious human rights violations.[129] In fact, a direct acknowledgement of a breach appears to have been explicitly made in only one case.[130]

In unilateral declarations, which were imposed on the alleged victim without their consent, a similar acknowledgement of the violation was also expected.[131] Initially, when such admission was not provided or when the acknowledgement was in some sense limited, the Court rejected the whole declaration.[132] Yet, in *Tahsin*, the Court also added that 'a full admission of liability in respect of an applicant's allegations under the Convention *cannot be regarded* as a condition sine qua non for the Court's being prepared to strike an application out on the basis of a unilateral declaration by a respondent Government.'[133] This is an important caveat and seems to have had an instant impact on the behaviour of states in subsequent cases. In subsequent settlements involving Turkey the statements made by the Government contained no expressions of regret or acknowledgment of specific violations.[134] In fact, in a sort of cascading behaviour, other states too have sought new ways of nuancing their admission of breach. Some have, for example, added that the applicant's case presented 'special circumstances'[135] or that the 'interference ... does not conform with the requirements of the Convention.'[136] Some also regretted the events, rather than the

[128] Ibid.
[129] *Avul v Turkey*, (App. No, 24957/04), 4 September 2012; *Okushko v Cyprus*, (App. No. 59222/18), 17 December 2020.
[130] This was in *Societatea Romana de Televiziune v Moldova*, (Appl. No. 36398/08), Judgment of 15 October 2013.
[131] Rule 62A of the Court, which requires that the state must clearly acknowledge a violation and must undertake to provide adequate redress. See eg *Wetjen v Germany*, (Appl. No. 68125/14), 22 March 2018.
[132] *Estate of Nitschke v. Sweden* (Appl. No. 6301/05), 27 September 2007, [39]; *Galiullin and Others v. Russia*, (Appl. No. 51816/09), 28 May 2013; *Zierd v. Germany*, (Appl No. 75095/11), 8 April 2014.
[133] *Tahsin v Turkey*, 6 May 2003, App. 26307/95, [84]. In her piece, Gavron (n 70) speculates that the lack of acknowledgement is due to the fact that the Registry suggests settlement before it has had time to assess the merits.
[134] *Yücetürk v. Turkey* (Appl. No. 76089/01), Decision, 4 October 2005; *Arslan and Arslan v. Turkey* (Appl. No. 57908/00), Judgment 10 January 2006, para. 18.
[135] Kiisa v. Estonia, Application No. 16587/10, Judgment of 13 March 2014, para. 43, etc. As Glas (n 48) finds (and this study confirms), the Macedonia (FYROM) added such a clause in 38 out of 169 applicants complaining about a delay in getting a fair hearing; Georgia did similarly in 10 out of 11 applicants complaining about inadequate medical treatment in prison.
[136] Sagaltıcı v. Turkey, Application No. 27670/10, Judgment of 15 September 2015; etc.

breach.[137] Even when concerns are raised by NGOs or applicants about the vagueness of these acknowledgements, the declarations have been allowed to close the case.[138] As Gavron argues, the lack of acknowledgement of a violation, renders all monetary payments *ex gratia*, stripping them of the label 'compensation' (receivable in response to a wrongdoing), thus sending 'a signal to the applicants that recognition of violations is unnecessary'.[139]

Looking at the content of settlements, therefore, there has been a gradual decrease in undertakings and indeed clarity of acknowledgements required of the Government.[140] Instead, in 95% cases, the remedy has been exclusively monetary. These results are consistent with other, similar studies. In studies of the Inter-American Court of Human Rights, which is known and praised for its creativity in relation to remedies, Zaccardi and others find that monetary compensation is the primary agreed remedy in 80% of all friendly settlements. Contesse confirms by finding that out of 137 agreements, 104 included monetary payments as reparation.[141] On domestic level, Craig McEwen and Richard Maiman report that in small claims court mediations contrary to 'the expectation that flexible and creative settlements would occur, few mediation agreements involved any conditions besides payment.' Only 12% of cases stipulated non-monetary remedies. This is not because non-monetary issues were never present in these disputes (eg respondents reported presence of issues besides money in 40% of the mediated cases). However, 'it appears that with few exceptions such matters were converted into dollars and cents for purposes of the agreement.' [142]

In the ECtHR, these monetary solutions ultimately mean that the agreed settlements are "closed" soon after payment takes place. On average, the applicants wait 250 days for payment and it takes another 200 days for the case to be closed.[143] If other actions are needed (ie if non-monetary remedies were imposed), the time to payment and closure is much longer. For example, *friendly settlements with an*

[137] *Okushko v Cyprus*, (App. No. 59222/18), 17 December 2020.
[138] Helsinki Foundation for Human Rights, 'Victors Jeronovics v Latvia Written Comments', Helsinki Foundation for Human Rights (2015), p. 2.
[139] Gavron (n 70).
[140] For those where an undertaking is made, the issue of enforcement arises. This is discussed in next section.
[141] Zaccardi et al (n X) 76; Contesse (n 16) 352.
[142] McEwen & Maiman (n 22) 253.
[143] On average it takes 414 days from the date of the settlement agreement to the closure of a case.

undertaking, ie settlements which include either individual or general measures, rather than just monetary payment, on average take 555 days to lead payment and 835 to closure.[144] In comparison, a regular judgment award takes about a year pay and another 5 years to close. It is therefore 'difficult to deny' that for states friendly settlement that is limited to a monetary payment is an optimal choice. As a consequence, it is perhaps unsurprising that 'in these areas the Court is nothing more than a claims tribunal facilitating large numbers of financial settlements.'[145] Money therefore appears to have become the currency of human rights.

Both the lack of variety in remedies as well as the lower settlement amounts discussed earlier suggest that the involvement of the Registry has *reduced* the inventiveness of the parties and that its intervention has encouraged victims to accept less in compensation than they would expect to get in a judicial proceeding. Although the compliance rate is better, the respondent State is asked to do less and pay less than it would be in ordinary proceedings. It is therefore in its interest to comply and to do so faster than in normal cases.[146] The bigger question that arises, however, relates to the more long-term impact of settlements. If settlement does indeed succeed in fostering better compliance to the agreed outcome, does it produce more compliance with the underlying norm whose alleged violation gave rise to the dispute? In his article, for example, Contesse argues that friendly settlements can have a comparable systemic and structural impact as judgments but only if states take them seriously and put in the effort to redress the underlying problems.[147] At the same time, he also highlights that an experienced state with savvy negotiators could use the friendly settlement system – if allowed – as a vehicle to 'effectively halt petitions', hide a substantial and systemic problem, and thereby prevent cases from ever reaching the Court.[148] Friendly settlement is therefore potentially more dangerous than adjudication. Whilst judgments – even when unimplemented – publicly condemn the conduct of the state and recognise the validity of the victim's claim, in friendly

[144] Some countries like Azerbaijan and Russia delay payment in such cases to as much as 1055 days (ie 3 years).
[145] Keller et al (n 3) 49.
[146] Ibid., 170: for the Government 'friendly settlements do not only save time but also money.'
[147] Contesse (n 16) 353. In fact, Contesse shows that in the Inter-American system, where settlements seek to address collective violations, parties reach for remedies which are as invasive and comparable to those contained in judgments and when respected, they do achieve comparable social transformation as remedies ordered by the Inter-American Court of Human Rights.
[148] Contesse (n 16) 342.

settlements all that can be lost. And if – in addition – settlements never lead to an improvement in the underlying system, then they remain merely 'window dressing'.[149]

III. Conclusion: *Against Settlement* in the ECtHR?

If settlements become as widespread as the policy of the Court appears to suggest, then the question arises whether they provide long-term justice, rather than merely appeasing the party that brought the case in the first place. The issue of long-term justice relates directly to whether the ECtHR remains actively involved in the follow up and enforcement of the settlements and the specific undertakings made by the respondent States. This in particular relates to unilateral declarations, which have become the go-to tool to rid the Court of repetitive cases. If litigant victims are being made to accept these offers, then their enforcement has to lead to a change in behaviour or indeed a structural change. Yet, contrary to other settlements, unilateral declarations do not get to be followed into compliance by the Committee of Ministers. In this context, it is even more important for the Court to allow applicants to request the restoration of their claims before the Court if undertakings are not fully followed through.

In this context, a recent example has been reported by Leach and Jomarjidze, lawyers who have taken numerous cases to the Court.[150] In a group of cases concerning police and prison abuses in Georgia, which also included a death of a person, the Court allowed settlements of such claims either through the Registry or through a unilateral declaration, with the Georgian government acknowledging a violation of the Convention and giving an undertaking to carry out an effective investigation into the incidents in question.[151] Yet, since 2015 when these settlements were reached, the Georgian authorities have undertaken no or only negligible investigatory steps. In 2018, the advocates raised the issue before the Court, underlining the lack of very basic steps, which had not been carried out, thus making the investigations in these cases neither effective nor timely. They also emphasised that the cases brought had not been 'isolated incidents' and that 'ineffectiveness of investigations into violations

[149] Keller (n 3) 49.
[150] Leach and Jomarjidze (n 2).
[151] Note that in many ways remedies agreed upon in settlements and UDs can go further than in judgments. Compare *Bekauri and others v Georgia* (No. 312/10) v *McCaughey and others v United Kingdom*, *Abuyeva and others v Russia*, *Benzer and others v Turkey* and *Tagayeva and others v Russia*.

perpetrated by law enforcement officials has been a serious, systemic problem in Georgia for a number of years'.[152] The Court could re-open the case under Article 37(2)) of the Convention, on the basis that the undertakings made by the Government have not been clearly complied with.

Yet, their application to have the cases restored was rejected, noting that it did not 'refer to any exceptional circumstances ... which would justify the restoration of these applications to the list of cases'.[153] Going further, however, the Court's letter stated: 'Moreover, I should inform you that the Court and its Registry have a very heavy workload. The Registry can therefore no longer answer your letters nor accept any telephone calls from you regarding the above-mentioned applications'.[154] The statement suggests that for the Court the matters are closed and that they remain so regardless of whether the state has properly enforced its undertaking or whether the settled cases highlight systemic problems.[155]

As Leach and Jomarjidze argue: 'These important cases from Georgia suggest a clear incongruity between the Court's increasing reliance on friendly settlements and UDs as a means of resolving cases on its books, and the limited extent to which pivotal government undertakings are being assessed for compliance.'[156] That a lack of refusal to follow up enforcement of Article 3 settlement is happening is especially concerning because Article 3 cases represent about 20% of all settled cases. In fact, put together Articles 2, 3, and 5, which protect the physical integrity of the person (life, body, and detention) represent the second most settled group after the 'length of proceedings' cases. Since 2010 the frequency of settling these claims has increased, with cases settling Article 5 complaints seeing a three-fold increase, whilst applications involving Article 3 violations, including torture, inhuman and degrading treatment ended up increasing seven-fold, from 202 cases settled by the end of 2009, to an additional 1392 cases settled between 2010 and 2020.[157]

In the end, it is clear that the Registry's proactive role in pushing settlements in pursuit of internal efficiency measures and workload reduction, even in areas of human rights where settlement might be questionable and even in relation to states

[152] Leach and Jomarjidze (n 2).
[153] Ibid.
[154] Ibid.
[155] In fact restoration of cases has been granted only exceptionally, in seven cases: Glas (n 48).
[156] Leach and Jomarjidze (n 2).
[157] See Graph 2 in the Annex.

which are repeat, systemic violators, does not appear to have been mirrored by an increase in follow up measures or assessment of enforcement.[158] This coupled with the fact that the applicant victim is hardly able to provide authoritative consent to settlement, means that repeat players win-out. The focus on reducing the workload has meant that the Registry has effectively taken a side in a dispute between the victim, who is seeking equity, and the respondent state, which is trying to avoid a finding of a violation. The motives of the Registry and the interests of the State are in synergy – both want cases to go away and they are willing to work together to make sure this happens.

The recent changes to the architecture of the dispute settlement mechanism before the ECtHR therefore affect individual victims in several ways: first, the new default rule that all cases have to go through a settlement phase necessarily acts as a 'nudge', encouraging individuals to settle their cases and renounce the examination of their complaints in substance.[159] Second, the close relationship between the state and the Registry acts to reinforce certain biases that favour the state and its position as a repeat player. Even more, once we understand the operation of the settlement process in detail and the lack of enforcement oversight, it becomes clear – as Fiss argues - that settlement provides little or no room for long-term justice. Not only can the settlement remain unenforced, if a unilateral declaration closes a dispute which is part of general, systemic problem, these infringements will remain hidden and unreported, and they will keep occurring. The settlement has resolved little or nothing.

Given how central the Registry is to the work of the Court, when it assumes the role of mediator in settlement claims, its 'exercise of power will go largely unnoticed... It appears instead as a simple extension of an accepted logic and practice.'[160] Yet, as one interviewee put it: 'it is difficult to reconcile the primacy of the right to individual application, which the Court protects, with the practice which has developed'.[161] Although 'dockets are trimmed' through settlement, it is hard to see that justice is

[158] Keller et al (n 3) 19, raises the moral issues related to whether Article 3 cases ought to be settled in the first case.
[159] On the dark side of nudging and concerns about how it unconsciously shapes individuals' decisions, see McCrudden, C., & King, J. (2016). The Dark Side of Nudging: The Ethics, Political Economy, and Law of Libertarian Paternalism. In A. Kemmerer, C. Möllers, M. Steinbeis, & G. Wagner (Eds.), *Choice Architecture in Democracies: Exploring the Legitimacy of Nudging* (1st ed., Vol. 6, pp. 75-139). [2] (Recht im Kontext; Vol. 6)..
[160] Silbey and Merry (n 17) 30.
[161] Interview 19 March 2021.

being done.[162] The conclusion is therefore inevitable: as the ECtHR system currently works, 'settlement should neither be encouraged nor praised'.[163]

[162] Fiss (n 7) 1075.
[163] Ibid.

Annex to

Friendly Settlement before the European Court of Human Rights

The paper builds on the book by Helen Keller and others, which is the first source to discuss the Court's approach to friendly settlements. Whilst the book contains information up to 2010, this paper covers the whole period from 1980s when the first friendly settlement cases can be identified, to today, ie 40 year period.

Data

The article relies on data generated in relation to 10,513 reported cases, which were retrieved from HUDOC ECHR and HUDOC EXEC database, both run by the European Court of Human Rights.[164] The first batch of cases were generated from the HUDOC Exec database, which lists all cases that have been settled and followed up for compliance. The cases were generated first automatically through the keyword 'friendly settlement'. This keyword search was complemented with a lexical search for "friendly settlement", "settlement" or "settled" and also its French equivalents (eg "reglèment amiable").[165] All of the cases generated from HUDOC EXEC are categorised as having taken place within the ECHR system, ie with the help of the Registry and entitled to follow up from the Committee of Ministers. Often, these cases include multiple victims and join together multiple applications (in about 20% of cases, 915 of 4614 cases).

The second batch of cases was generated to supplement the HUDOC EXEC dataset. These cases were generated from the HUDOC ECHR database by searching for cases that had been struck out, but which contained terms "friendly settlement", "settlement" or "settled" and also its French equivalents (eg "reglèment amiable").[166] These cases contain only a description of the agreement achieved between the state and an individual applicant and do not receive any follow up from the Committee of

[164] We have explicit authorisation from the European Court of Human Rights to use the data contained in the HUDOC websites for HRNudge project. ©Council of Europe/European Court of Human Rights - Conseil de l'Europe/Cour européenne des droits de l'homme.
[165] All coding, analysis and interpretation were undertaken by the authors; all errors therefore remain my own.
[166] Please note that HUDOC ECHR database also includes a 'friendly settlement' keyword, however, this only contains 846 cases, out of 3589 generated from the same database.

Ministers. As the analysis shows, almost all of these cases concerned one victim (eg in 3462 of 3589 cases, 96%). These were classified as having taken place outside the ECHR system and as constituting bilateral settlements.

In addition, unilateral declaration cases were generated from both databases by searching for terms "unilateral declaration", "unilateral" and its French equivalents. Only cases in which a unilateral declaration had been made and accepted were analysed. When 'unilateral declaration' was rejected by the Court and the judgment resulted in a judgment, those cases were removed from the dataset. In total, there were 2310 unilateral declarations.[167]

HUDOC Databases and the concept of 'reported cases'

It is important to underline that the ECHR considers the HUDOC databases as the 'official case law database of the ECtHR'.[168] Whilst HUDOC databases are a wonderful source of judgments and compliance materials, they only contain reports of cases that are resolved in judicial panels. All applications disposed of in single-judge formation remain unreported. From 2000 onwards, these represent between 88-95% of all applications allocated.[169] This means that any HUDOC based analysis are based on a small subset of all applications allocated (eg between 5-12%). This study is therefore based on these 'reported cases'.

In addition, the HUDOC databases are often incomplete – information is entered only after a certain time has passed, some of the material is only available in French, and the keywords/labels that are automatically added to cases (eg 'friendly settlement') are often incomplete, though rarely incorrect. To mitigate for this, the study employed several strategies: first, the study includes the full population of cases, in order to avoid any issues with sampling; second, the study includes only cases to 2019, thus allowing

[167] The number for the period 2012-2017 is consistent with Glas, Lize R. (n 48), who in her article analyses 1285 declarations.
[168] https://www.echr.coe.int/Pages/home.aspx?p=library/collections&c=
[169] Term "allocated applications" has been used by the Court since the year 2007 to refer to applications which were not rejected automatically as incomplete, but which were allocated to a single-judge formation. In 2007, the Court therefore changed the counting and retroactively amended figures for 1998 onwards. For years before 1998, annual reports refer to applications as all received applications. See Court's Annual Report for 2007, https://www.echr.coe.int/Documents/Annual_report_2007_ENG.pdf, p 133.

for a year for all the cases to be entered; third, when labels/keywords were used to narrow the search, the search results were complemented with a lexical search; finally, all of the lexical searches were conducted both in English and French. In addition, a check was done to identify any duplicates of cases, which were then promptly removed.

In spite of all of these efforts, the numbers of settlements differ from the database used by Keller et al. For the period in which the paper and the book overlap, the two sets of numbers differ, sometimes considerably. For 2008, for example, Keller et al state that there were 670 friendly settlements and arrangements and 78 unilateral declarations. In my database for 2008, there are 506 friendly settlements and 66 unilateral declarations. It is possible that Keller's access to Court's own list of cases might include additional cases which are not in HUDOC or do not contain 'settlement' terminology or/and are not classified as settlements. It is also possible that these discrepancies are limited to pre-2010 times, and that the HUDOC reporting has improved since 2010 (especially with the HUDOC EXEC database). If this is the case, then although some cases pre-2010 might be unreported, it is possible that the Court's open policy towards friendly settlements means that the new HUDOC numbers are more reliable. Nevertheless, given the lack of clarity as to HUDOC's completeness, it is possible that my dataset, although aiming to present the full population of settled cases, does not contain all the relevant cases. As a consequence, settlement percentages may be even higher than reported here.

Finally, it is important to note that both my numbers as well as Keller's are higher than the statistics published in ECtHR's annual reports, which consistently underreport the number of settled cases per country.[170] The Court's reports include only settlements reached in *judgments*, whilst my numbers include also settlements reached in *decisions*, which are struck out. Since 2012 about 4-7% of settlements were contained decisions, whilst between 2004-2010 as much as 65-86% of all reported settled cases were contained in decisions, rather than judgments. This means that by extending my analysis to decisions, I am able to provide a fuller picture of the settlement practice at the Court.

[170] For 2015, for example, the Annual Report cites 8 cases as having resulted in a settlement. My database – generated from HUDOC – contains 637 such cases, excluding unilateral declarations. See Annual report: https://echr.coe.int/Documents/Annual_report_2015_ENG.pdf.

The inclusion of unilateral declarations into the study

In my discussions with practitioners, the argument regularly came up that unilateral declarations should not be treated as settlements. The implication was that perhaps they should not be included in the study of the friendly settlement phenomenon before the Court.

In many respects, I agree that UDs cannot be seen as settlements, since they do not ask for or require the consent of the victim. Yet, in the ECtHR context, their operation is closely tied to settlements: at Stage 1, the Registry prefers to reach the settlement between the alleged victim and the state through an agreement, to which both parties consent in writing. However, if this fails, at Stage 2, the State is still able to unilaterally bring the consideration of the cases to a close by making a unilateral declaration, which then leads to the case being struck out. Although the two stages are therefore separate, they are inextricably linked and only a rejection of the settlement offer leads to Stage 2. I hope that the article's explanation of how the process functions and the operation and interaction of the different biases that come into play, makes clear that the two stages cannot be divorced from each other and have to be studied together. It is only by knowing that there is a threat of the UD, that we can understand the victim's decision to accept even an unfavourable offer, and it is only by having explained the danger of the case being struck out due to the will of the state, that the extent of the imbalance between the two parties becomes clear. It is for this reason, that I – like Keller in her book – study UDs and settlements together.

The coding tree

I coded the following information from the databases. The coding was partly automatic (eg search for 'friendly settlement' labels, terms) and partly manual. The accuracy of autocoding was checked in Maxqda.

Types of settlement

a) settlements which were entered into between the state and the applicant;

b) settlements which included the Registry and were followed up by the Committee of Ministers; and
c) unilateral declarations.

Judgment information

a) Year and Date of judgment
b) Section responsible
c) Respondent State, including in categories (old = 1, new = 2, Turkey = 3)[171]
d) Brief description of decision (eg struck out, friendly settlement, friendly settlement with undertaking)
e) Number of applications per each case
f) Article violations alleged (0/1 for each article)
g) Number of violations alleged
h) Manual coding of the content of settlements

Remedies data

a) Damages and Total amount
b) Recognition of violation
c) Undertaking: individual measure
d) Undertaking: general measure

Compliance data for each case[172]

a) Supervision status (closed, standard, enhanced)
b) Date of payment of compensation/settlement
c) Date of closure

[171] The coding mirrors the coding adopted by the Max Planck Study, S Altwicker, T. Altwicker, A Peters. 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights' Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)/Heidelberg Journal of International Law (HJIL) 76 (2016), 1-51; Fikfak, Veronika. 'Non-Pecuniary Damages before the European Court of Human Rights: Forget the Victim; It's All about the State'. *Leiden Journal of International Law* 33, no. 2 (June 2020): 335–69. https://doi.org/10.1017/S0922156520000035. Fikfak V, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) 29 European Journal of International Law 1091.

[172] The coding and analysis of compliance mirrors the approach undertaken in Fikfak, Veronika and Kos, Ula, Slovenia – An Exemplary Complier With Judgments of the European Court of Human Rights? (March 9, 2021). (2021) 40(8) Pravna Praksa, Special Edition, pp II-XI, Available at SSRN: http://dx.doi.org/10.2139/ssrn.3801105. Generally on compliance with ECtHR decisions: Andreas von Staden *Strategies of Compliance with the European Court of Human Rights* (UPenn, 2018).

d) Days to payment (number of days between the date of payment and the date of judgment)
e) Days to closure (number of days between the date of closure by the Committee of Ministers via final resolution and the date of judgment)

State data

a) Number of settled cases for each country
b) Number of violations (from HUDOC ECHR database)
c) Number of inadmissible cases
d) Number of unsuccessful, but admissible cases
e) Number of all applications filed against state

Illustrative tables

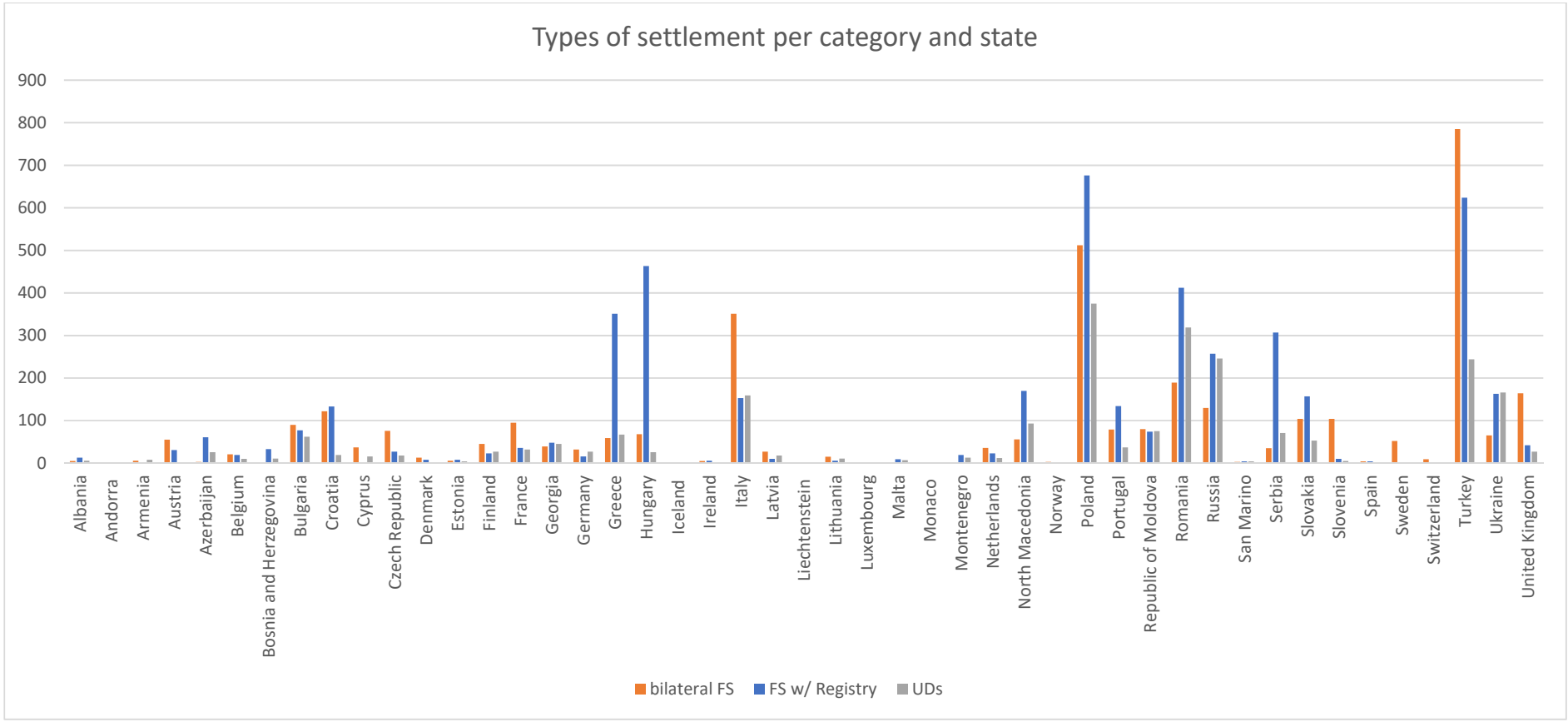
Annex Table 1: States' settlement practices (limited to reported cases only)

State	FS Reg	FS bilat	UDs	FS sum	all cases	inadm	violati	inadmiss	violat	% sett	no-vio
Albania	13	5	6	24	155	40	51	26%	33%	15%	26%
Andorra	0	2	0	2	23	3	6	13%	26%	9%	52%
Armenia	1	6	8	15	198	47	95	24%	48%	8%	21%
Austria	31	55	1	87	1695	213	321	13%	19%	5%	63%
Azerbaijan	61	3	23	87	407	59	119	14%	29%	21%	35%
Belgium	19	21	10	50	939	51	228	5%	24%	5%	65%
Bosnia and Herzeg	33	2	11	46	190	49	45	26%	24%	24%	26%
Bulgaria	77	90	62	229	1327	207	583	16%	44%	17%	23%
Croatia	133	122	18	273	1147	251	340	22%	30%	24%	25%
Cyprus	0	37	15	52	258	55	73	21%	28%	20%	30%
Czech Republic	27	76	18	121	652	111	203	17%	31%	19%	33%
Denmark	8	13	0	21	290	58	41	20%	14%	7%	59%
Estonia	8	6	3	17	166	35	57	21%	34%	10%	34%
Finland	23	45	26	94	723	109	173	15%	24%	13%	48%
France	36	95	32	163	4472	150	911	3%	20%	4%	73%
Georgia	48	39	45	132	411	118	89	29%	22%	32%	18%
Germany	16	32	27	75	1461	331	290	23%	20%	5%	52%
Greece	351	59	67	477	2305	122	772	5%	33%	21%	41%
Hungary	463	68	26	557	1472	212	325	14%	22%	38%	26%
Iceland	0	2	0	2	73	10	26	14%	36%	3%	48%
Ireland	6	5	2	13	173	56	26	32%	15%	8%	45%
Italy	153	351	158	662	7804	159	1842	2%	24%	8%	66%
Latvia	10	27	16	53	346	100	128	29%	37%	15%	19%
Liechtenstein	0	0	2	2	25	6	8	24%	32%	8%	36%
Lithuania	6	15	11	32	408	79	162	19%	40%	8%	33%
Luxembourg	1	2	1	4	152	11	42	7%	28%	3%	63%
Malta	9	0	7	16	202	43	86	21%	43%	8%	28%
Monaco	1	1	2	4	12	0	3	0%	25%	33%	42%
Montenegro	19	0	13	32	115	25	36	22%	31%	28%	19%
Netherlands	23	36	12	71	1201	226	135	19%	11%	6%	64%
North Macedonia	170	56	93	319	631	105	137	17%	22%	51%	11%
Norway	0	3	0	3	194	39	53	20%	27%	2%	51%
Poland	676	512	373	1561	3956	463	1001	12%	25%	39%	24%
Portugal	134	79	37	250	1064	51	221	5%	21%	23%	51%
Republic of Moldo	74	80	73	227	782	88	326	11%	42%	29%	18%
Romania	412	189	319	920	2671	426	1161	16%	43%	34%	6%
Russia	257	130	225	612	5079	776	1890	15%	37%	12%	35%
San Marino	4	3	4	11	49	18	16	37%	33%	22%	8%
Serbia	307	35	71	413	820	149	121	18%	15%	50%	17%
Slovakia	157	104	53	314	1113	147	293	13%	26%	28%	32%
Slovenia	10	104	5	119	910	194	306	21%	34%	13%	32%
Spain	4	4	0	8	712	60	154	8%	22%	1%	69%
Sweden	2	52	1	55	1050	144	122	14%	12%	5%	69%
Switzerland	2	9	0	11	664	94	186	14%	28%	2%	56%
Turkey	624	785	243	1652	6934	905	3007	13%	43%	24%	20%
Ukraine	163	65	164	392	2658	413	987	16%	37%	15%	33%
United Kingdom	42	164	27	233	3020	454	461	15%	15%	8%	62%

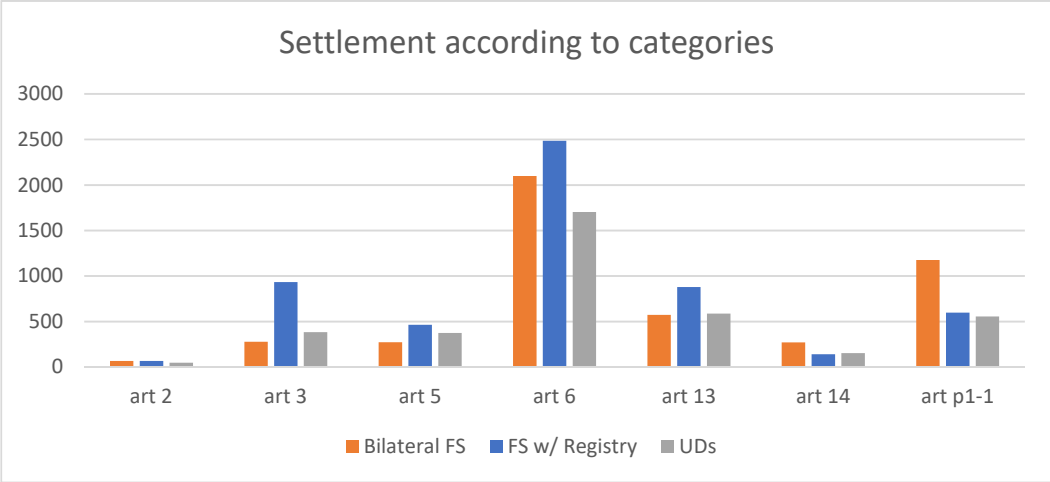
The table above contains information about states' settlement practices in cases reported in HUDOC. The first four columns contain information about the number of cases of different settlement categories (settlement with help of Registry, bilateral settlements, and unilateral declarations). This is followed by information about all the cases reported in HUDOC as having been brought against the state, the precise number of those that ended in a violation or were rejected as inadmissible. In the last four columns, the percentages are given by dividing the number of cases in each category with the total number of reported cases.

It is important to emphasise again (as mentioned above) that the reported cases represent only a small subset of all applications received by the Court or allocated to a judicial formation (between 5-12%), whilst the majority between 88-95% are disposed of in single-judge formation and remain unreported. The percentages of violations, settlements, etc, therefore relate to this small subset.

Annex Graph 2: Different types of settlements per state



Annex Graph 2: Different types of settlement per alleged article of violation



Graph 2 shows that since 2010 the frequency of settling these claims has increased. Looking both at UDs (grey bar) and FS (blue bar), cases settling Article 5 complaints have seen a 3-fold increase, from 281 affairs pre-2010 to 833 cases after 2010, whilst applications involving Article 3 violations, including torture, inhuman and degrading treatment ended up increasing 7-fold, from 202 cases settled by the end of 2009, to an additional 1392 cases settled between 2010 and 2020.

The jump is even more significant if we consider that numerous applications may be 'packaged' into one case. The cases before 2010 include mostly single application settlements, whilst settlements after 2010 include numerous applications. In total the jump is 14-times higher than pre-2010 levels, ie from 266 settled applications to 3749 applications after the reform in 2010. Even in Article 6 cases, which

represent the majority of all settled cases, the rise in settlements was not so statistically significant (increasing from 2127 pre-2010 to 4162 afterwards, ie a less than 2-times increase).