Against settlement before the European Court of Human Rights

Veronika Fikfak*

Even though they represent almost 50% of all reported cases before the European Court of Human Rights (ECtHR), settlements of human rights violations escape scholars' attention. While 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 article charts the practice of friendly settlements before the Court from the 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 favored the most frequent violators of the European Convention on Human Rights 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.

* iCourts, University of Copenhagen, Copenhagen, Denmark; Institute of Law and Economics, Hamburg, Germany; University College London, United Kingdom. Email: v.fikfak@ucl.ac.uk. The work on this project was funded by the ERC HRNUDGE project (803981), ESRC Future Research Leaders grant (ES/N000927/1), the Isaac Newton Trust, and the Cambridge Humanities Research Grant, as well as by a Humboldt Fellowship at the Institute for Law and Economics, Hamburg, and an Emile Noel Fellowship at the Jean Monnet Centre at New York University.I am grateful to Anne van Aaken for her feedback and to members of the Registry and practitioners (among them Piers Gardner, Philip Leach, and Jess Gavron) who spoke to me freely about the practice of the Court and about how victims perceive the settlement process and how they feel during it. Their anonymity is protected through random numbering. The author has no conflict of interest to declare. The article was written before the author was added to the list of potential ad hoc judges at the Court.

1. Introduction

Friendly settlement has become an integral part of every case before the European Court of Human Rights (ECtHR). Since 2019, every case coming to the Court has had to go through an initial twelve-week "friendly settlement phase," followed by a twelve-week contentious phase.[1] Parties are strongly encouraged to settle cases before any consideration is given to the content of the case or the issues it raises. Although 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.[2]

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."[3] Some applicants' counsels 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."[4] But not everyone shares in the excitement. In an insightful blog post, 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.[5] If agreements between individual victims and states can bypass the evaluation of the Court, their enforcement surely has to be appropriately scrutinized by the Council of Europe. Leach and Jamrijdze worry in this context that the role of the Committee in assessing the enforcement of friendly settlements has been limited, or even non-existent, and that the possibility of having cases restored before the Court if enforcement is not forthcoming has not proved successful. If friendly settlements and unilateral declarations become

[1] Philip Leach & Nino Jomarjidze, *What Future for Settlements and Undertakings in International Human Rights Resolution?*, Strasbourg Observers (Apr. 15, 2019), https://strasbourgobservers.com/2019/04/15/what-future-for-settlements-and-undertakings-in-international-human-rights-resolution/.

[2] The fact that friendly settlements are used as a workload management tool is widely accepted. *See* Helen Keller, Magdalena Forowicz, & Lorenz Engi, Friendly Settlements Before the European Court of Human Rights: Theory and Practice 1, 3 (2010).

[3] Tamar Abazadze, *European Human Rights Advocacy Centre: Friendly Settlements and Unilateral Declarations at the European Court of Human Rights*, Eur. Hum. Rts. Advocacy Ctr., https://ehrac.org.uk/resources/friendly-settlements-and-unilateral-declarations-at-the-european-court-of-human-rights/ (last visited Aug. 21, 2021).

[4] Daniel Karsái, *The Friendly Settlement Procedure and the ECHR*, Karsái Daniel, Ügyvédi iroda (Mar. 22, 2019), https://drkarsai.hu/en/friendly-settlement-procedure/.

[5] Leach & Jomarjidze, *supra* note 1.

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 the state and the applicant can air grievances, outline expectations, discuss potential outcomes, and agree on a compromise remedy. However, already in the 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, for example state or government officials and a member of a racial minority over alleged brutality, or injured workers suing a large corporation over work-related injuries.[6] In these unequal relationships consent is often coerced, with the weaker party unable to really say "no." As he puts it:

> [F]irst, 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. ...[7]

Fiss's 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 an international level, where the negotiation takes place between the state that enjoys unlimited power, resources, and access to information and an individual victim. I highlight especially the fact that settlements in the ECtHR system are not conducted by judges, who consider negotiations "incompatible" with the requirement of impartiality of their office[8] and stay away from settlements "as a matter of principle."[9] Instead, friendly settlements take place via the Registry, the secretariat of the Court, which acts as a third-party mediator to facilitate and propose the suggested terms of settlement. If in the early years of friendly settlements, the 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.[10] Although the Registry is unelected

6 Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076 (1984).

7 *Id.*

8 Keller, Forowicz, & Engi, *supra* note 2, at 83, 158 (interview with Judge Fura, Jan. 12, 2009). Keller speaks of being surprised at how small a role judges have in settlement proceedings (*id.* at 138).

9 *Id.* at 83; *see also id.* at 148 (interview with Judge Garlicki, Feb. 2, 2002). Judge Wildhaber adopts the same position (*id.* at 36 (interview with Judge Wildhaber, Jun. 19, 2009)).

10 In fact, the letters proposing settlement and settlement terms although carrying the Court's logo are signed by the Section Registrar. *See* Interview no. 1 with Lawyer1 over Zoom (Mar. 29, 2021).

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.[11] In this article, I empirically analyze all of the cases reported in the HUDOC database, which were settled from the 1980s to December 2019 (10,500 settled cases).[12] This quantitative analysis is complemented by interviews with practitioners, members of the Registry, as well as my own experience having worked at the Court.[13] Building on this evidence, the article seeks to examine how the position of three key actors in the settlement process has changed over 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 re-design the normal path of applications—and thus victims—coming to the Court and put the settlement center 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 Registry have on the victim and the state. To answer these questions, I draw in particular on insights from behavioral economics and psychology to understand how different processes and interactions affect the people involved. I wish to specifically understand how applicants' cognitive biases might affect their interaction with international institutions.[14] Through this behavioral lens, I therefore look at the new procedure adopted by the ECtHR and investigate, in particular, the extent to which the inherent imbalance between the applicant and the state is addressed through the active involvement of the Registry.

[11] This article builds on the book by Helen Keller and others, which is the first source to discuss the Court's approach to friendly settlements. Keller, Forowicz, & Engi, *supra* note 2. Throughout the article, the terminology of "victim" and "applicant" is used interchangeably since the Registry only allows settlements for cases that would otherwise result in a violation.

[12] 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% and 12%). The methodology of the gathering of data, coding tree, and tables are included in the online Appendix.

[13] The list of interviews is in the online Appendix. I also undertook an experiment (with Benedikt Pirker and Izabela Skoczeń) to test the perception of the process by 2064 members of the general public (in lieu of victims). In the experiment, we sought to duplicate the ECtHR settlement process from the perspective of the victim and understand the likelihood of settlement at each step. The results will be published in a separate paper, but they serve as a basis for the narrative in this article. See *As Predicted: Friendly Settlement Experiment (#68230)* (June 11, 2021), https://aspredicted.org/blind.php?x=u7j9ag (containing preregistration of the experiment).

[14] The cognitive biases I explore are individual and universal. There is no evidence that they change when an individual interacts with authorities at the international level compared to his/her interaction at the domestic level. *See* Veronika Fikfak, Daniel Peat, & Eva van der Zee, *Bias in International Law*, 23 Ger. L.J. 281 (2022); Eva van der Zee, Veronika Fikfak, & Daniel Peat, *Limitations of the Behavioral Turn in International Law*, 115 Am. J. Int'l L. 237 (2021).

2. Why do victims settle?

In human rights law, individual claims are traditionally adjudicated. The system allows individuals to bring their applications to the international level in order to complain that the state has failed to provide adequate rights protection at home. By the time the dispute reaches the international level, relationships have broken down and the applicants are bitter and disappointed about having invested effort and money in domestic proceedings and having received no 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 recognize 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 relevant for the development of human rights law. This has not only implications for the party which must comply with the judgment, but also precedential value for other states, which check to ensure that their practice does not raise similar issues. 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 the victims and the public authorities—who might be deterred from repeating similar acts in the future—but they include 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 decisions to settle a human rights dispute are made, they act to privatize the dispute between the applicant and the state. We—as scholars, human rights lawyers, and the general public—are deprived of knowing what provision of the European Convention on Human Rights (ECHR, or "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 such decisions often lead to greater party satisfaction and better enforcement than decisions of a court.[16] Participants often speak

[15] Anne van Aaken, *Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of Provisions for* Ius Standi, 23 Conferences on New Pol. Econ. 29, 29 (2005).

[16] For the Inter-American Court of Human Rights, see Jorge Contesse, *Settling Human Rights Violations*, 60 Harv. Int'l L.J. 317, 346–7 (2019); 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 59, 65 (Pär Engström ed., 2018).

of having experienced the process of negotiation as a transformation—a process of back-and-forth allowing both sides to air their grievances and outline expectations while 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, i.e. a tool to save courts time and resources and conserve 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 submitted.[18]

The push towards settlement is felt not only in domestic law. At the international level, too, settlement is encouraged.[19] In the Inter-American Court of Human Rights (IACtHR), 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 Court, parties are actively encouraged to seek to resolve the dispute through friendly means. In both fora, the process of friendly settlement is promoted as less costly than adjudication, as providing faster resolution, and as 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 the 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 individualizing outcomes.[22] In his analysis of the Inter-American human rights

[17] Susan Silbey & Sally Merry, *Mediator Settlement Strategies*, 8 Law & Pol'y 7 (1986).

[18] Australia, though high settlement rates have also been reported in the United Kingdom and certain US states. *See* Yun-chien Chang & Daniel Klerman, *Settlement Around the World: Settlement Rates in the Largest Economies* (Univ. S. Calif. Legal Stud. Res. Paper No. 21-8, Feb. 25, 2021), https://ssrn.com/abstract=3793078.

[19] Contesse, *supra* note 16; Wolfgang Alschner, *Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System*, 13 World Trade Rev. 65 (2014). 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." Victor Ayeni & Tajudeen Ibraheem, *Amicable Settlement of Disputes and Proactive Remediation of Violations under the African Human Rights System*, 10 Beijing L. Rev. 406 (2019).

[20] Contesse, *supra* note 16, at 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 European Union. 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 before joining the European Union, states usually settle more cases than in the years after joining the European Union.

[22] Craig McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 Maine L. Rev. 237, 256–7 (1981).

system, Contesse 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 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 the majority of cases, rather than making rational decisions about minimizing litigation costs and maximizing benefits of proposed settlement offers, individuals appear to be seeking ways to reestablish 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] While 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, for individuals the process of settlement is often not *only* about money. Interpersonal comparisons influence individual behavior.[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

[23] Contesse, *supra* note 16, at 343.
[24] *Id.*
[25] *Id.* (citing Interview with L7, former Inter-American Commission of Human Rights official (July 3, 2018)).
[26] Chris Guthrie & Russell Korobkin, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 Mich. L. Rev. 107 (1994).
[27] George Loewenstein, Leigh Thompson, & Max H. Bazerman, *Social Utility and Decision Making in Interpersonal Contexts*, 57 J. Personality & Soc. Psych. 426 (1989).
[28] Elaine Walster, Ellen Berscheid, & G. William Walster, *New Directions in Equity Research*, 25 J. Personality & Soc. Psych. 151 (1973).
[29] Robert MacCoun, E. Allan Lind, & Tom R. Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts*, *in* Handbook of Psychology and Law 95 (Dorothy K. Kagehiro & William S. Laufer eds., 1992).

as blameworthy. The sole fact that the offer originates from an adversary means that respondents treat it less favorably 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 stems from spite or ill feeling towards the adversary, or from fear that they will have access to more information. In the end, the offer made will be "unpalatable,"[31] and applicants will want to reject it, even if the proposal makes 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 a significant imbalance of power in negotiation between the state and the victim "due to the resources available to states and their position as 'repeat players.'"[34] There are also implicit pressures to agree to settle, "given how long international litigation typically takes and the risk that even if the eventual decision is in favor 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 the likelihood that its promises will be followed through. But this reassurance must 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 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 reestablish the balance in the relationship between the state and the individual: for example, they can give the parties an opportunity to be heard, to discuss the different

[30] Ross Stillinger, The Reactive Devaluation Barrier to Conflict Resolution 3 (1988).
[31] Guthrie & Korobkin, *supra* note 26, at 155.
[32] It is important to underline that interviews with practitioners confirm this position. Many recognize that by the time a case makes it before the Court, applicants "become entrenched in their views" and do not want to settle their cases. *See* Interview no. 1 with Lawyer2 over Zoom (Mar. 19, 2021).
[33] Contesse, *supra* note 16, at 343.
[34] Lorna McGregor, *Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR*, 26 Eur. J. Int'l L. 607, 619 (2015).
[35] Contesse, *supra* note 16, at 343.
[36] *Id.* at 335.
[37] *Id.* at 335, 366.
[38] *Id.* at 164.
[39] Silbey & Merry, *supra* note 17, at 13.

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 presenting the offer within a "positive frame"; they can help parties develop consensus rather than articulate competing interests and rights, and agree mutually acceptable solutions, which require behavioral change.[40] An intervention of a third party in an inequitable, imbalanced relationship can significantly increase the likelihood of a successful settlement. It can also help reestablish the previous relationships.

This is precisely the issue that this article 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, between the Registry and the victim. This article 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.

3. 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 its blessing for the 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 or with the help of the Registry. In fact, as I map out in the next few pages, since the Court's inception, it is the role of the Registry in friendly settlements that has changed the most drastically.

[40] Guthrie & Korobkin, *supra* note 26, at 138.

[41] European Convention on Human Rights, art. 39, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR], as amended by Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 13, 2004, in force Jun. 1, 2010, ETS No. 177 [hereinafter Protocol No. 14].

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 for the parties to enter into negotiations with the victim, but only a few such negotiations 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 settle more cases. The victims, perhaps unsure of their success, appear to have accepted more offers. Yet, because judges still wanted to stay 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," i.e. a channel of communication between the state and the victim.[45] While 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 decisions, the Court acknowledged that 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 proactive role in encouraging the settlement of disputes, especially in cases with established case law (e.g. 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 and participated in the formation of offers made to the victim, formulating new, original proposals to the parties and encouraging both the state and the victim to conclude the case through a settlement.[47] This new approach and the proactive role of the Registry meant that the

[42] In fact, the ECtHR's search engines report the first settlements only starting in the 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, *supra* note 16, at 343.

[44] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, in force Nov. 1, 1998, ETS No. 155 [hereinafter Protocol No. 11].

[45] Keller, Forowicz, & Engi, *supra* note 2, at 35 (interview with Michael O'Boyle, Feb. 2, 2009).

[46] *Id.*

[47] This process is confirmed in interviews with applicants' lawyers. Interview no. 1 with Lawyer2 over Zoom (Mar. 19, 2021).

friendly settlement process was now advertised as very much part of the Convention system. While, before, settled cases were struck out without any follow-up, 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.

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 twelve-week settlement phase, during which parties will be encouraged to reach a settlement of the dispute. This clearly indicates 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 of 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 which show to what extent the active role of the Registry has changed the nature of settlements and their content. The description of data together with the coding tree and descriptive results are provided in the online Appendix.

[48] The first unilateral declaration was made by Turkey in Akman v. Turkey, Appl. No. 37453/97, [2001] ECHR 399; Lize Glas, *Unilateral Declarations and the European Court of Human Rights: Between Efficiency and the Interests of the Applicant*, 25 Maastricht J. Eur. & Comp. L. 607 (2018).

[49] Rules of the Court of Jun. 3, 2022, r. 62a, www.echr.coe.int/documents/rules_court_eng.pdf (accessed Aug. 21, 2022) [hereinafter Rules of Court]. The Rule entered into force on Apr. 2, 2012; however, unilateral declarations were accepted before the Court before this date.

[50] In many respects, however, unilateral declarations cannot be seen as settlements, a point which is addressed in the online Appendix. Yet, their operation is tied closely to settlements and they therefore have to be studied together. This is the main reason that—like Keller and colleagues—I treat unilateral declarations alongside other settlements.

[51] Rules of Court, *supra* note 49, r. 43.

3.1. An active mediator and its strategies

Over the past forty years, since 1980, when the first cases involving friendly settlement arose, friendly settlement has gradually but steadily increased in importance. If initially only about 2–3% of all reported cases ended up in friendly settlements,[52] by 2000 that number had jumped to between 10% and 20%, and in 2010 up to 35–45% of all HUDOC reported cases were resolved this way (see Figure 1, "All Settled" line). In 2019, that number stood at a steady 27%.

Figure 1 seeks to map out the different types of settlement through the years. The line labeled "Bilateral FS" shows how states initially sought to negotiate with individual applicants directly outside the ECtHR system. The "FS with Registry" line reveals how the Court has sought to bring the friendly settlements within the ECtHR system and how the number of settlements has gradually increased post-2010. The "Unilateral declarations" line, which maps 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.

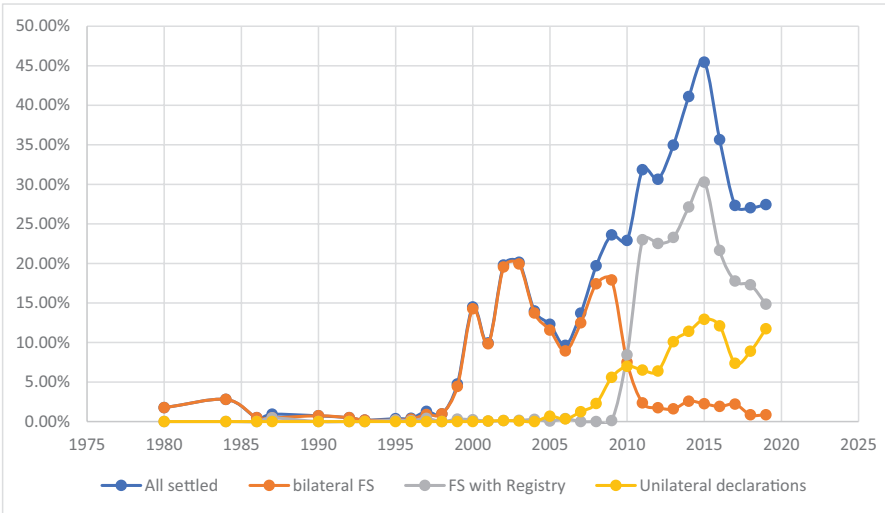

Figure 1. Percentage of three types of settlements out of all HUDOC reported cases

[52] Only about 5–12% of all cases get reported in HUDOC. The majority of allocated applications (between 88% and 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 collected in HUDOC and that were decided by a panel of judges. Out of all allocated applications, settlements represent between 1% and 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 online Appendix explains, while the Court only includes in its statistics settlements reached in judgments, I also include settlements documented in decisions: Eur. Ct. Hum. Rts., Analysis of Statistics 2020 (Jan. 2021), www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf. On my approach and the limits of the HUDOC database, please see the online Appendix.

It is clear from Figure 1 that the year 2010 represents a key year for friendly settlements in the ECtHR and is statistically significant.[53] If, before that 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 the number of cases. Specifically, when victims file applications before the Court, the Court (at the request of the Registry) may of its own motion join several claims together.[54] The process of joining, or packaging, is often done on the basis of similarity of claims brought 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 have been allowed to be resolved) through settlement. The difference between the two sets of numbers is often striking.

Figure 2 distinguishes between the absolute number of reported cases settled and the absolute number of actual applications contained in those joined cases. If the case lines appear almost flat (e.g. reaching up to merely 900 cases), the dashed lines reveal the real story. In total, the number of applications resolved in those cases approaches 5000 claims per year. In fact, we can clearly see that the number of applications resolved through friendly settlement with the Registry's help reaches up to 2000 claims, while—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

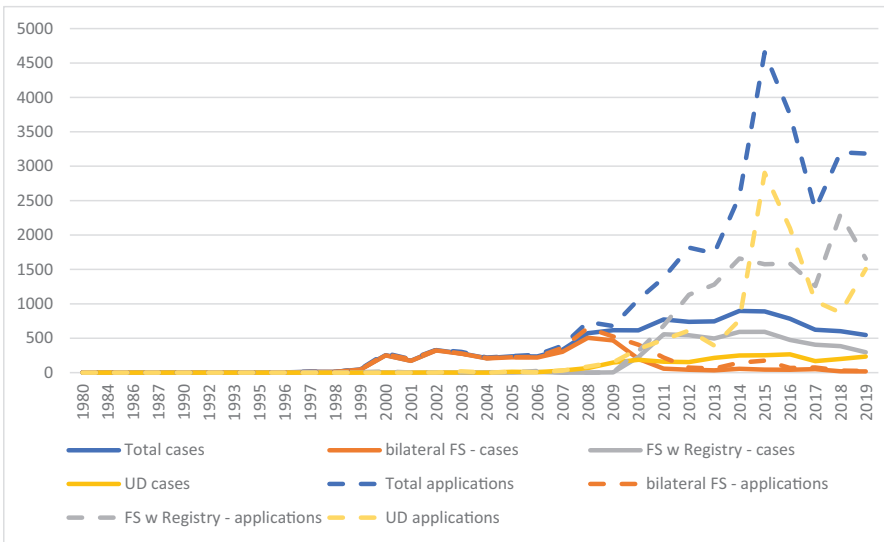

Figure 2. Number of reported settled cases and applications per type of settlement

[53] This is confirmed also through change point analysis (in the online Appendix).
[54] Rules of the Court, *supra* note 49, r. 42.

settlement is increasing and that more and more applications appear to be resolved through settlements.

We can draw important conclusions from this brief description. First, the line depicting the cases settled through bilateral settlement has remained largely the same over a seventy-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.[55] In contrast, post-2010, the settlement scheme facilitated by the Registry has seen a clear jump in the number of applications closed. Multiple applications—up to 360 per case—are packaged together in order to allow for swifter closure of a number of repetitive claims.[56] In this context, especially unilateral declarations stand out. Up to 840 claims can be resolved within one unilateral declaration.[57]

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 colleagues argued that settlements were being used primarily "as a case management tool."[58] The manner in which the friendly settlement system currently works has therefore led to a considerable reduction of the Court's workload.[59] The proactive 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 utilize this mechanism for the Court's own purpose—i.e. 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."[60] In other contexts—like the IACtHR—the Commission, which facilitates settlement, is also referred to as a mediator.[61]

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,

[55] 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.

[56] On average, there are three applications per case settled within the Court.

[57] On average, there are five applications per case settled with unilateral declaration.

[58] Keller, Forowicz, & Engi, *supra* note 2, at 49ff.

[59] This correlates with a considerable decrease in the number of judgments since 2012, which scholars have argued is related to the increase in settlements. Magdalena Forowicz, *Friendly Settlement: European Court of Human Rights (ECtHR)*, *in* Max Planck Encyclopedia Oxford Public International Law (Jun. 2017), https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3196.013.3196/law-mpeipro-e3196.

[60] Keller, Forowicz, & Engi, *supra* note 2, at 174 (interview with Government Agent for Poland, Jan. 30, 2009).

[61] Contesse, *supra* note 16, at 340–1, also tackling the issue of tension between the Commission's role as a prosecutor and mediator.

and communication between the parties; and how they present the substantive issues discussed and solutions reached.[62] Silbey and Merry describe that mediators can move between two different approaches to mediation—from 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. They will leave time for parties to meet, engage, and share their feelings and attitudes. The mediators give each party time to tell their story and explain "how they feel"; they will explore the emotions involved and help the parties communicate and identify areas of agreement. The hope is that the mediation process is less about the legal language, but more about 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 recognized. 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 the participants down. Settlements are often reached less frequently, if at all. Because the search for a common language through the 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.[63]

The bargaining approach allows mediators 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."[64] They present themselves to the parties as experts in the field—having knowledge of the case law, the court, the process of reaching settlements, the content of previous settlements, and the amounts of previous damages agreed. The bargaining approach is more structured. Instead of enabling or maximizing communication between the parties, direct communication is eliminated or minimized. 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 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, summarizing what he/she has heard, avoiding what is likely to endanger a settlement, and sidestepping any differences. The mediator is the one to "eschew[] the language of individual rights" in favor of legal language applying to interdependent relationships.[65] This reframing of the dispute means that creative solutions which the parties would have reached through direct communication—like apologies and other behavioral demands—most frequently give way to monetary solutions.

[62] Silbey & Merry, *supra* note 17; Dennis H. Wrong, Power, Its Forms, Bases, and Uses (1979).
[63] *Id.* at 20ff.
[64] *Id.* at 19.
[65] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1560 (1991).

In the ECtHR context, the Registry clearly adopts some strategies that are specific 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 draw on their knowledge and expertise of the domestic legal system when they summarize the file and potential violations for the Court. This means that individual lawyers will specialize in country-specific claims, and that—when these are repetitive—they will develop expertise particular to a certain violation of the Convention.[66] 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.

The Registry can thus take extensive control of the process of settlement. When settlements took place outside the system (pre-2010), the state approached the applicant or the applicant's representative, and asked them whether they were favorable to settling the dispute in a friendly manner. The discussion then centered on how the claim should be settled and what remedy should be acceptable to the victim. "[F]riendly settlements [were] primarily understood as an *individual solution*" to a case,[67] and parties revealed incredible creativity about the remedies that could be agreed. Numerous such settlements speak of a "very individual character of friendly settlements"[68] and of the strong position of the victim, who was able to negotiate remedies beyond monetary damages that would efficiently address his/her human rights situation. Yet, once the settlement process was moved over to the ECtHR system, and the Registry took command of it, the entire process took on a written form. 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 the *ex gratia* payment the applicant can expect to receive given the circumstances of the case and the Court's case law and practice. 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 applicant's signature by the specified date for the settlement to be agreed.[69]

The Registry's role has therefore changed considerably. The Registry has taken over the communication with the applicant and has taken it upon itself to propose and draft the settlement offer in accordance with the Court's case law. Such active involvement of the Registry changes the once bilateral relationship between the state

[66] Contrast this with the arrangements in the Inter-American system, where there is a specialized friendly settlement unit within the Inter-American Commission for Human Rights, which oversees settlements. Contesse, *supra* note 16, at 362.

[67] Keller, Forowicz, & Engi, *supra* note 2, at 19.

[68] *Id.*

[69] Interview no. 1 with Lawyer1 over Zoom (Mar. 29, 2021).

and the victim, and shifts the locus of *real* negotiation. Whereas, 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 lawyer) 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.[70] As a consequence, their input is negligible and the opportunity for individual solutions is minimized. Most often, in such cases, acknowledgments of violation and non-monetary remedies are off the table.[71] 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 end, the parties' stories are converted into "the categories and rules of exchange and bargaining."[72]

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.[73] The bargaining approach maximizes 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.[74] In reality, like most mediators, the Registry is also assessed by measures of efficiency—for example, the number of successful settlement resolutions, the rate of re-litigation, etc.—and, in our case, by the reduction of the Court's workload.[75] 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

[70] 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. Interview no. 1 with Lawyer2 over Zoom (Mar. 19, 2021).

[71] *See* Jessica Gavron, *Strasbourg Court's New Non-Contentious Phase: A Tax on Lawlessness?*, Strasbourg Observers (Nov. 14, 2019), https://strasbourgobservers.com/2019/11/14/strasbourg-courts-new-non-contentious-phase-a-tax-on-lawlessness/.

[72] Silbey & Merry, *supra* note 17, at 27.

[73] Interview no. 2 with Lawyer2 over Zoom (Mar. 19, 2021).

[74] Michael Taylor, Community, Anarchy and Liberty 284 (1982). 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 with Lawyer2 over Zoom (Mar. 19, 2021).

[75] 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. *See* Veronika Fikfak, *What Future for Human Rights? Decision-making by Algorithm*, Strasbourg Observers (May 19, 2021), https://strasbourgobservers.com/2021/05/19/what-future-for-human-rights-decision-making-by-algorithm/.

efficiency."[76] 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.[77]

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

Figure 3 maps out the number of applications settled and adjudicated against Italy in Article 6 ECHR cases between the 1980s and today.[78] These are mostly repetitive cases linked to the length of domestic proceedings and the enactment of the Pinto law,[79] which sought to provide a domestic remedy facilitating applicants to claim justice at home.[80] 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. Most importantly, the Registry did not actively encourage settlement, nor did it allow states to close multiple applications through unilateral declarations. Figure 3 can therefore reveal the "natural" behavior of litigant victims when faced with the choice between settlement and litigation.

Figure 3 shows that, in 1999 and 2000, the number of applications settled was similar to the number of applications ending in a finding of a violation. This means that during this time the number of applicants who pursued settlement equaled those who insisted on going 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 law 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.

[76] Silbey & Merry, *supra* note 17, at 30.

[77] Some applicants' lawyers acknowledged that the Registry was acting with an intent "to dispose of cases" as quickly and efficiently as possible. 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. Interview no. 1 with Lawyer2 over Zoom (Mar. 19, 2021).

[78] The data to portray the behavior vis-à-vis Italian cases was generated separately from the main data. I mapped Article 6 ECHR 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.

[79] Legge 24 Marzo 2001, n.89, in G.U. Apr. 3, 2001, n. 78 (It.) [hereinafter Legge Pinto].

[80] Please note that Figure 3 contains 1036 applications which ended in violation of Article 6 ECHR between 1999 and 2003, and 215 applications which settled during the same time in relation to Article 6. Only fourteen applications relating to Article 6 were rejected as not amounting to a violation and sixty-seven were rejected as inadmissible.

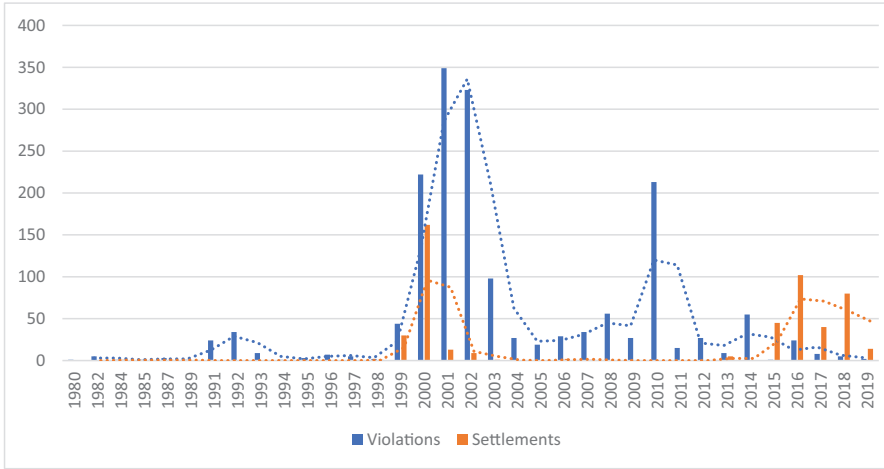

Figure 3. Applications in Pinto cases in Italy resulting in a violation and friendly settlements

Figure 3 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. Since the ECtHR ruled against Italy in the 1999 *Botazzi* case,[81] and once these violations started being widely publicized—both in legal and general circles (thus a lag of one to two years), from 2001 onwards individuals have insisted on having their day in court and rejected settlement. To applicants, settlement therefore does not appear to be unequivocally more appealing than litigation.[82] 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 a 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,[83] thousands of new applications were brought to the Court. Yet, bar *Gaglione*, none of these proceeded to litigation and instead the vast majority were resolved by the Registry through unilateral

[81] Bottazzi v. Italy, App. No. 34884/97, Jul. 28, 1999.
[82] This is true if we consider the number of cases as well as if we consider the number of applications settled and adjudicated.
[83] Gaglione and others v. Italy, App. No. 45876/07, Dec. 21, 2010, https://hudoc.echr.coe.int/eng?i=001-102517. There was a delay of at least nineteeen months in 65% of all the applications.

declarations.[84] In 2010 and after, therefore, the preferential option of continuing litigation before the ECtHR is displaced by settlement due to the 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 behavioral biases. First, in the current ECtHR settlement system, the applicant gets minimal say. Although, in principle, the applicant 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, 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.[85] 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.[86] 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. Indeed, interviews with applicants' lawyers reveal that the lawyers are concerned about what it might mean if they were to reject the Registry's terms. If they refuse to accept them, they face a serious threat that proceedings might end through a unilateral declaration.[87] This set-up gives almost exclusive power to the state. In fact, this is what we are seeing in Figure 3. From 2015, the great majority of settlements have taken place through unilateral declaration. Not only are unilateral declarations 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 that plays on their cognitive biases and therefore 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 Government Agent for Poland has stated: "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

[84] 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. Settlements and unilateral declarations notwithstanding, around 1300 similar cases are still pending before the Court and await the same fate.

[85] This was confirmed through interviews with practitioners. Interview no. 1 with Lawyer1 over Zoom (Mar. 29, 2021). Lawyers have also argued that template letters are simultaneously sent to the applicants and the Government, 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, *supra* note 71.

[86] Keller, Forowicz, & Engi, *supra* note 2, 171.

[87] Interview no. 1 with Lawyer2 over Zoom (Mar. 19, 2021).

law."[88] Yet, the role of information-giving is also a role of "expectation-setting."[89] 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."[90] 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. For example, if no acknowledgment of violation is present, this suggests that the Court does not "think" there is a violation; if only a monetary *ex gratia* payment is indicated, this suggests that the Court considers "that *no* non-monetary provisions, such as undertakings to investigate, are required."[91] 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 expect or ask for 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 minimized. On the other hand, how the settlement is phrased—for example referring to the Court's case law and potentially suggesting that in other similar cases other victim litigants received comparable payments—makes 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. . .."[92] As we know from prospect theory—a theory of how individuals assess potential gains and losses—when faced with a risky choice promising gains, individuals prefer solutions with higher certainty and lower gains.

[88] Keller, Forowicz, & Engi, *supra* note 2, at 174 (interview with Government Agent for Poland, Jan. 30, 2009).

[89] *Id.* 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. 1 with Lawyer2 over Zoom (Mar. 19, 2021).

[90] Gavron, *supra* note 71.

[91] *Id.*

[92] 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 nearly equivalent, to what the applicant would receive through adjudication, they then do recommend settlement. Interview no. 1 with Lawyer1 over Zoom (Mar. 29, 2021).

Taken together, the anchoring effect and the prospect theory, two well-established, pervasive biases, drastically narrow the range of possible compensation, leaving the victim little room to maneuver 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 it is even 20–25% less.[93] This reduction is justified by the fact that individuals do not have to wait for the judgment and are instead offered the settlement payment right away.[94] The set-up therefore uses individuals' loss-aversion bias to induce them to take the certain outcome offered by the settlement rather than wait for an 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 and the Registry. This makes the individual victim less relevant. When the Registry subsequently facilitates the packaging of multiple applications by different victims into one case, the focus on the victims (how impacted they were by the violation and what remedy they might prefer—ranging from acknowledgment of wrongdoing to non-monetary remedies) disappears altogether.[95] As psychologists have shown, when we are dealing with a large number of cases (e.g. large losses of human life, mass atrocities, or other grave 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."[96] 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 3000 similar applications), this leads to psychological numbing. In essence, the bigger the number, the more our view of, and consideration for, each individual victim is blurred.[97] When people in the

[93] Veronika Fikfak, *Non-Pecuniary Damages before the European Court of Human Rights: Forget the Victim; It's All about the State*, 33 Leiden J. Int'l L. 335 (2020); Keller, Forowicz, & Engi, *supra* note 2, at 170 (interview with Government Agent for Poland, Jan. 30, 2009).

[94] Keller, Forowicz, & Engi, *supra* note 2, 171.

[95] In fact, individual measures are limited to exceptional cases, where they are included together with general measures. Keller, Forowicz, & Engi, *supra* note 2, at 179.

[96] Paul Slovic & David Zionits, *Can International Law Stop Genocide When Our Moral Intuitions Fail Us?*, *in* Understanding Social Action, Promoting Human Rights 100, 115 (Ryan Goodman, Derek Jinks, & Anthony Woods eds., 2012), citing Joshua Susskind et al., *Perceiving Individuals and Groups: Expectancies, Dispositional Inferences, and Causal Attributions*, 76 J. Personality & Soc. Psych. 181 (1999).

[97] Slovic & Zionits, *supra* note 96, at 117.

applications dealt with by the Registry turn into unidentified statistical victims, this "leads to apathy and inaction."[98]

This is precisely what concerned Fiss when he wrote "Against Settlement." 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].'"[99] Settlements in such cases are problematic for a variety of reasons, including the plaintiffs' relative lack of power compared to that of the 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 individualization or personalization. They become merely a statistic.

3.3. 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 that joined the Council of Europe (and consequently signed the ECHR) before 1990 and those that joined the Council after. On average, so-called "old" states settle only about 8% of cases (Figure 4). In contrast, cases brought against "new" countries lead to settlement in 24% of cases (Figure 5). On average, new countries therefore settle about three times as many cases as old countries.

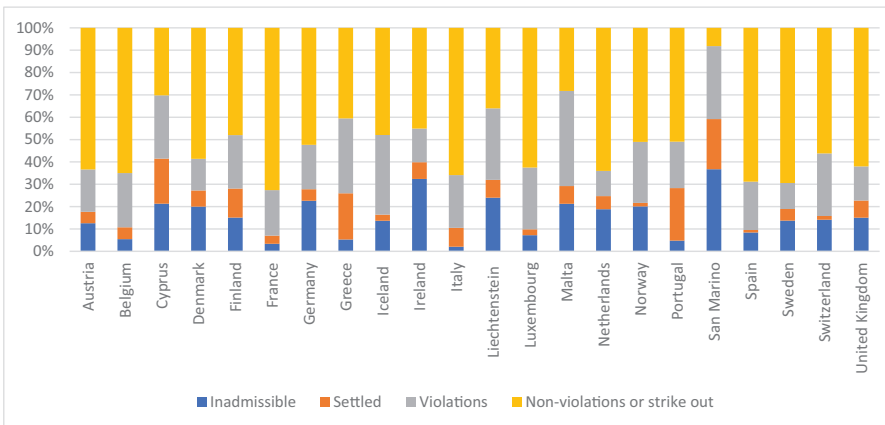

Figure 4. Percentage of settled cases per country (compared with percentage of inadmissible cases, violations, and non-violations) in HUDOC (old states)

[98] *Id.*

[99] Samuel Issacharoff & Robert Klonoff, *The Public Value of Settlement*, 78 Fordham L. Rev. 1177, 1177–8 (2009), citing Fiss, *supra* note 6, at 1078.

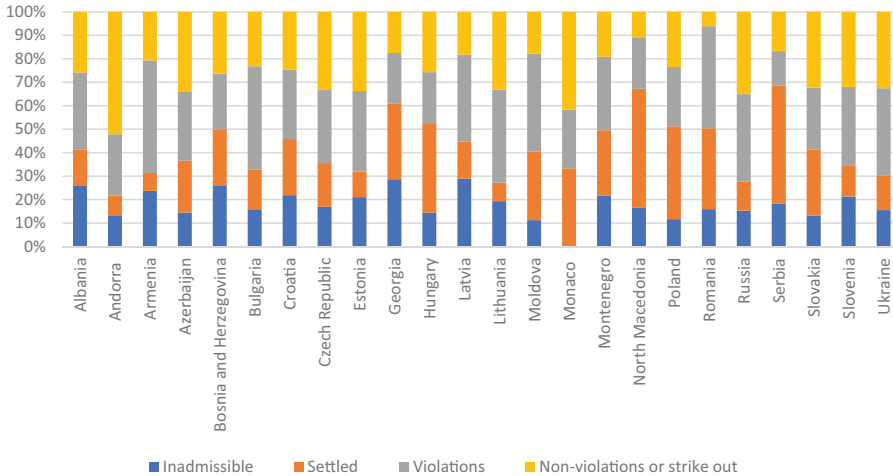

Figure 5. Percentage of settled cases per country (compared with percentage of inadmissible cases, violations, and non-violations) in HUDOC (new states)

This difference between old and new states in the amount of settled cases may be due to different settlement cultures.[100] The Government Agent for Switzerland, 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.[101] This can be contrasted with the practice of the Polish Government, whose Government Agent 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.[102] 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."[103]

These two positions portray two contrasting approaches to settlement: one based on the likelihood (or certainty) of outcome and the other, unconcerned with the 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 non-violation or are struck out (52% of cases), compared to only 27% of cases against "new" countries (half as many!). When "new" countries appear

[100] Contesse speaks about the same phenomenon in the IACtHR: Contesse, *supra* note 16, at 342ff. Interviews confirm similar differences between states. Interview no. 1 with Lawyer1 over Zoom (Mar. 29, 2021).

[101] Keller, Forowicz, & Engi, *supra* note 2, at 187 (interview with Frank Schürmann, Government Agent for Switzerland, Jan. 30, 2009). *See also* Interview no. 1 with Lawyer2 over Zoom (Mar. 19, 2021) (noting resistance to settlement by some countries (e.g. France)).

[102] Keller, Forowicz, & Engi, *supra* note 2, at 157ff.

[103] Abazadze, *supra* note 3.

before the Court, the likelihood is much higher that the case will lead to a violation.[104] It is therefore not surprising that states that are more likely to be found in violation of the Convention resort more often to settlement. The pragmatic approach of "new" countries—to seek to settle cases in order to avoid more findings of a violation—is therefore understandable.

While states may have a number of reasons to seek to avoid a finding of a violation, the question is *when* (and *whom*) 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 +0.75, whilst the correlation between countries being found in violation and the absolute number of cases settled is +0.82. 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.[105] However, for many of these countries, the involvement of the Registry has facilitated a drastic increase in the number of settled cases, as compared to the period prior to 2010. Hungary, Poland, Romania, Russia, Turkey, Ukraine, and others have all settled substantially more cases since 2010 than they had before that date.[106] Hungary has settled seven times as many cases with the help of the Registry and through unilateral declarations as it had before, while Ukraine has settled five times as many, and Romania and Russia concluded 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, respectively, 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 member states of the Council of Europe that 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.[107] As a consequence, these savvy negotiators are able to reach much higher rates of success

[104] There is also a high correlation between the Rule of Law Index (ROI) 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).

[105] This result should not be surprising (statistically it is even to be expected), since it is expected that in absolute terms countries that file more cases will get to settle more cases. The relative correlation (% of settled vs % of violations) is low (correlation = 0.03), with old countries settling on average 0.38 cases for every one violation. In contrast, new countries settle about 0.9 cases for everyone one case of violation.

[106] The sum total of cases settled with the help of the Registry and through unilateral declarations is considerably higher post-2010. On average, states have settled four times more cases after 2010 than they did before.

[107] Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1386 (1994).

in out-of-court settlement than one-shot players.[108] Some players are able to "amass a considerable library of settlement information and will enjoy corresponding strategic advantage in subsequent cases."[109]

Repeat players before the ECtHR, however, enjoy 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 have the greatest impact on the Court's workload.[110] They thus hold the key to the "efficiency yardsticks" used to assess the Registry and its members, and ultimately the Court. 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 Government Agent for Poland, for example, speaks of a developing "confidence between the parties, namely the Government Agent and the Court."[111] 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, "my main partner", rather than between the victim and the state.[112] The close link between the Registry and the government agents is visible in references to "comprehensive discussions" with the Registry, in reaching a "mutual understanding," in agreeing a way to finalize "all groups of cases according to some sort of scheme which is acceptable to the Court and the Government Agent," and, in the end, in 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," i.e. here, the 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 between interest groups that appear regularly before courts and the state's civil service, responsible for implementing these courts' decisions.[115] These studies also speak of the coming-and-going 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 the former exerts some influence on the latter. At its very worst, the system reveals an incestuous relationship between the Registry, which manages the cases, and the Court's repeat players—a partnership in which states with the Registry can dictate the terms of settlement.[116]

[108] *See* Contesse, *supra* note 16, at 342 (speaking of Mexico as an example in the Inter-American system).
[109] Galanter & Cahill, *supra* note 107, at 1386.
[110] Keller, Forowicz, & Engi, *supra* note 2, at 170ff.
[111] *Id.* at 172.
[112] The Government Agent does underline at several points in the interview that "the Registry is absolutely independent." *Id.* at 174 (interview with Government Agent for Poland, Jan. 30, 2009).
[113] *Id.* at 178.
[114] *Id.* at 172.
[115] Yael Mshai, *Interest Groups and Bureaucrats in a Party-Democracy: The Case of Israel*, 70 Pub. Admin. 269 (1992).
[116] Applicants' lawyers agree that in relation to certain (though not the majority of) countries, the relationship between the Registry and the respondent states could be described in those terms. Interview no. 1 with Lawyer2 over Zoom (Mar. 19, 2021).

3.4. The content of settlements and their enforcement

One of the main arguments in favor of settlement concerns the increased probability of compliance with the agreed solution. It is said that when parties reach a conclusion through compromise, they are more likely and willing to comply with the 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. Ziccardi 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 Ziccardi 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]

At a 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 (e.g. through 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 also reflected in the HUDOC database. States are much better at complying with friendly settlements than with conclusions reached in judgments. Figure 6 portrays the difference between the rate of compliance with friendly settlements and the rate of compliance with ECtHR judgments. On average, friendly settlements enjoy 95% compliance, compared with other judgments, which lead only to 83% compliance.[121] There is on average a 12% difference between the two. Yet, looking closely, it becomes clear that

[117] Ziccardi et al., *supra* note 16, at 74–5; Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights*, 6 J. Int'l L. & Int'l Rel. 1712 (2008).
[118] Ziccardi, *supra* note 16, at 74–5.
[119] Galanter & Cahill, *supra* note 107, at 1355.
[120] *Id.* at 1351.
[121] This general rate of compliance result is based on comprehensive HUDOC database data. However, it does not square with reports that compliance rates at the Court are around 50%. I therefore intend to explore the statistic in future. Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2017: 11th Annual Report of the Committee of Ministers 7 (2018).

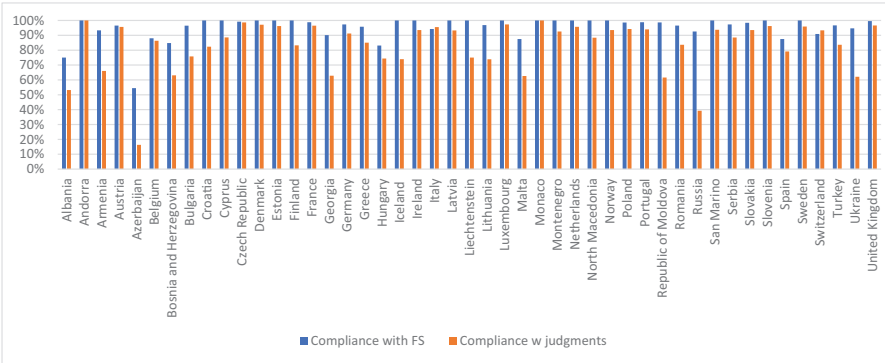

Figure 6. Comparison of rate of compliance for friendly settlements (FS) vs. normal judgments

for certain countries compliance with friendly settlements comes *considerably more* easily than with judgments. Azerbaijan, for example, complies with only 16% of its judgments, while it complies with 54% of the settlements. Russia, Moldova, Georgia, and even Ukraine have almost a twice as good compliance with settlements as with 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 have 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.[124]

Looking at the content of settlements in 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, settlements included provisions on a stay of the enforcement of a prison sentence (i.e. use of pardon powers), sentence reduction, closing of criminal proceedings, reduction of a life sentence to fifteen years imprisonment, quashing of a conditional sentence, release of

[122] Owen Fiss & Doug Rendleman, Injunctions 1004 (2d ed. 1984); McEwen & Maiman, *supra* note 22.
[123] Michele Hermann et al., The MetroCourt Project Final Report: A Study of the Effects of Ethnicity and Gender in Mediated and Adjudicated Small Claim Cases at the Metropolitan Court Mediation Center, Bernalillo County, Albuquerque, New Mexico: Cases Mediated or Adjudicated September 1990–October 1991 (1993).
[124] McEwen & Maiman, *supra* note 22, at 37.

the applicant, reopening of proceedings, transfer to a prison of the 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 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 an 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 were about 324 cases of this type among the case law of the ECtHR before 2010. Between 2010 and 2020, the absolute number remained similar (e.g. 351), but in relative terms the undertaking to adopt individual or general measures represented 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 at around 9.7%. In spite of the rise in settlements, the content of 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 example, for many years, 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 ECHR. The Turkish Government expressed regret at "the occurrence of the actions which have led to the bringing of the present applications" and accepted that the actions had led 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 the pressure put by the Court on the Turkish Government and that, as a rule, settlements in Article 2 and 3 ECHR cases were only approved if such statements (even if general) included an acknowledgment of the violation and an expression of regret.[128] Such wording was at times copied by other governments; however, since 2010, the terminology of "regret" has only rarely appeared in settlements, even in cases concerning allegations of serious human rights violations.[129] In fact, a direct acknowledgment 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 acknowledgment of the violation was also

[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, App. Nos. 28293/95, 29494/95, 30219/96, July 10, 2001, ¶ 13.
[128] *Id.*
[129] Avul v. Turkey, App. No. 24957/04, Sept. 4, 2012; Okushko v. Cyprus, App. No. 59222/18, Dec. 17, 2020.
[130] *See* Societatea Romana de Televiziune v. Moldova, Appl. No. 36398/08, Oct. 15, 2013.

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 behavior of states. 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 behavior, 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. . . [did] not conform with the requirements of the Convention."[136] Some also regretted the events, rather than the 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]

The content of settlements shows that there has been a gradual decrease in undertakings and in the level of clarity of acknowledgments required of the Government.[140] Instead, in 95% of 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, Ziccardi 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

[131] *See* Rules of the Court, *supra* note 49, r. 62A (requiring that the state must clearly acknowledge a violation and must undertake to provide adequate redress). *See also, e.g.*, Wetjen v. Germany, App. No. 68125/14, 22 Mar. 22, 2018.

[132] Estate of Nitschke v. Sweden, App. No. 6301/05, Sept. 27, 2007, ¶ 39; Galiullin & Ors v. Russia, App. No. 51816/09, May 28, 2013; Zierd v. Germany, App. No. 75095/11, Apr. 8, 2014.

[133] Tahsin v. Turkey, App. 26307/95, May 6, 2003, ¶ 84. *See also* Gavron, *supra* note 71 (speculating that the lack of acknowledgment is due to the fact that the Registry suggests settlement before it has had time to assess the merits).

[134] Yücetürk v. Turkey, App. No. 76089/01, 4 Oct. 4, 2005; Arslan and Arslan v. Turkey, App. No. 57908/00, Jan. 10, 2006, ¶ 18.

[135] Kiisa v. Estonia, App. No. 16587/10, Mar. 13, 2014, ¶ 43. *See aso* Glas, *supra* note 48 (finding—as confirmed by this article—that Macedonia added such a clause in thirty-eight out of 169 applications complaining about a delay in getting a fair hearing; Georgia did similarly in ten out of eleven applications complaining about inadequate medical treatment in prison.

[136] *See, e.g.*, Sagaltıcı v. Turkey, App. No. 27670/10, Sept. 15, 2015.

[137] Okushko v. Cyprus, App. No. 59222/18, Dec. 17, 2020.

[138] Victors Jeronovics v. Latvia, Written Comments, Helsinki Foundation for Hum. Rts. 2 (May 11, 2015), www.hfhr.pl/wp-content/uploads/2015/05/hfhr_opinia_wielka_izba_11052015.pdf (last visited Sep. 12, 2022).

[139] Gavron, *supra* note 71.

[140] For those where an undertaking is made, the issue of enforcement arises. This is discussed in the next section.

agreements, 104 included monetary payments as reparation.[141] On a 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 (e.g. respondents reported the 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 (i.e. if non-monetary remedies were imposed), the time to payment and closure is much longer. For example, *friendly settlements with an undertaking*, i.e. settlements which include either individual or general measures, rather than just monetary payment, on average take 555 days to payment and 835 to closure.[144] In comparison, a regular judgment award takes about a year to pay and another five 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

[141] Ziccardi et al., *supra* note 16, at 76; Contesse, *supra* note 16, at 352.
[142] McEwen & Maiman, *supra* note 22, at 253.
[143] On average, it takes 414 days from the date of the settlement agreement to the closure of a case.
[144] Some countries like Azerbaijan and Russia delay payment in such cases to as much as 1055 days (i.e. three years).
[145] Keller, Forowicz, & Engi, *supra* note 2, at 49.
[146] *Id.* at 170 (for the Government, "friendly settlements do not only save time but also money").
[147] Contesse, *supra* note 16, at 353 (showing that in the Inter-American system, in cases where settlements seek to address collective violations, parties reach for remedies which are as invasive as, and comparable to, those contained in judgments; and when these settlements are respected, they do achieve comparable social transformation as remedies ordered by the Inter-American Court of Human Rights).

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. While judgments—even when unimplemented—publicly condemn the conduct of the state and recognize the validity of the victim's claim, in friendly 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]

4. Conclusion: *Against settlement* in the ECtHR?

If settlements have 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 the enforcement of those offers has to lead to a change in state behavior or even structural change. Yet, contrary to other settlements, unilateral declarations do not get to be enforced by the Committee of Ministers. It is thus 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.

Leach and Jomarjidze, lawyers who have taken numerous cases to the Court,[150] have recently reported a group of cases concerning police and prison abuses in Georgia. In these cases, one of which involved the death of a person, the Court allowed settlements of the 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 lawyers raised the issue before the Court, underlining the fact that very basic steps had not been carried out, making the investigations into these cases neither effective nor timely. Leach and Jomarjidze also emphasized that the cases did not represent "isolated incidents," and

[148] Contesse, *supra* note 16, at 342.
[149] Keller, Forowicz, & Engi, *supra* note 2, at 49.
[150] Leach & Jomarjidze, *supra* note 1.
[151] Note that in many ways remedies agreed upon in settlements and unilateral declarations can go further than in judgments. *Compare* Bekauri & Ors. v. Georgia, App. No. 312/10, Sep. 15, 2015, https://hudoc.echr.coe.int/eng?i=001-157942; McCaughey & Ors. v. United Kingdom, App. No. 43098/09, Jul. 16, 2013, https://hudoc.echr.coe.int/eng?i=001-122370; Abuyeva & Ors. v. Russia, App. No. 27065/05, Dec. 2, 2010, https://hudoc.echr.coe.int/eng?i=001-101936; *and* Benzer & Ors. v. Turkey, App. No. 23502/06, Nov. 12, 2003, https://hudoc.echr.coe.int/eng?i=001-128036 *with* Tagayeva and others v Russia, App. No. 26562/07, Apr. 13, 2017, https://hudoc.echr.coe.int/eng?i=001-172660.

that "ineffectiveness of investigations into violations perpetrated by law enforcement officials has been a serious, systemic problem in Georgia for a number of years."[152] The Court could reopen the case under Article 37(2) ECHR, on the basis that the undertakings made by the Government have not been clearly complied with.

Their application to have the cases restored, however, was rejected, and the Court noted 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, 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 matter is closed and that will 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 [unilateral declarations] 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 ECHR cases represent about 20% of all settled cases. In fact, put together, Articles 2, 3, and 5 ECHR, 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, while applications involving Article 3 violations, including torture and inhuman and degrading treatment, ended up increasing sevenfold, 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 that 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

[152] Leach & Jomarjidze, *supra* note 1.
[153] *Id.*
[154] *Id.*
[155] In fact, restoration of cases has been granted only exceptionally, on seven occasions: Glas, *supra* note 48.
[156] Leach & Jomarjidze, *supra* note 1.
[157] *See* Figure A.5 in the online Appendix.
[158] Keller, Forowicz, & Engi, *supra* note 2, at 19 (raising the moral issues related to whether Article 3 cases ought to be settled in the first case).

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 favor 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 a general, systemic problem, these infringements will remain hidden and unreported, and they will keep recurring. 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 being done.[162] The conclusion is therefore inevitable: the way the ECtHR system currently works, "settlement should neither be encouraged nor praised."[163]

[159] On the dark side of nudging and concerns about how it unconsciously shapes individuals' decisions, see Chris McCrudden & Jeff King, *The Dark Side of Nudging: The Ethics, Political Economy, and Law of Libertarian Paternalism*, *in* 6 Choice Architecture in Democracies: Exploring the Legitimacy of Nudging 75, 75 (Alexandra Kemmerer, Christoph Möllers, Maximillian Steinbeis, & Gerhard Wagner eds., 2017).

[160] Silbey & Merry, *supra* note 17, at 30.

[161] Interview no. 1 with Lawyer2 over Zoom (Mar. 19, 2021).

[162] Fiss, *supra* note 6, at 1075.

[163] *Id.*