KRAJOWA SZKOŁA ADMINISTRACJI PUBLICZNEJ

Third Informal Seminar for Government Agents and Other Institutions on Pilot Judgment Procedure in the European Court of Human Rights and the Future Development of Human Rights' Standards and Procedures

Warsaw, 14–15 May 2009

In memory of Prof. Andrzej Stelmachowski
(1925–2009)

KONTRAST
Warsaw 2009

Layout:
Bogusław Spurgjasz

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ISBN 978-83-927138-2-1

Printed in Poland by
KONTRAST
ul. Skaryszewska 12
03-802 Warszawa
(22) 818 27 14 w. 405; 0-601 912 821
e-mail: kontrast@ekspert.net.pl

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Foreword

by Jakub Wołąsiewicz

Warsaw Informal Seminars have become an inherent part of the discussion on the future of the European Court of Human Rights. At these meetings the participants have had the opportunity to voice their opinions on various aspects of the Court's work in a frank and unhindered manner. Some of those ideas have become an inspiration for further developments and discussions.

As was the case with the previous Warsaw Seminars, the aim of the present seminar was to raise awareness among certain groups of persons in Poland of various issues connected to the European system of human rights protection. In the past the seminars were addressed to judges and prosecutors. This time I have also extended my invitation to lecturers and students of the National School of Public Administration in Warsaw. The school trains future civil servants, and the School's curriculum includes, *inter alia*, the European standards on human rights protection. I have the honour of being a lecturer at the National School of Public Administration, where I teach issues related to the Convention for the Protection of Human Rights and Fundamental Freedoms. When I asked the Director of the School, Dr. Jacek Czaputowicz, for assistance in the organisation of this seminar I received his full support and aid, for which I would like to express my deepest gratitude. I would also like to thank the students of the School for their contribution to the creation of the present publication. I also hope sincerely that, by participating in the seminar, they were able to meet fascinating participants from different countries and acquire greater knowledge of the problems currently arising in proceedings before the European Court of Human Rights.

This year the main topics of the Seminar were: pilot judgments, effective remedies against the excessive length of proceedings, the problem of impunity and a concept for the creation of the Court's Statute. These topics were not chosen by chance.

The concept of pilot judgments is a compromise between the present role of the Court as a body adjudicating on each individual application and its proposed parallel role of European Constitutional (Super)

Court. At this point, the Court has not worked out a uniform concept for pilot judgment procedure, and it may even be said that diverse procedures are being applied. It seems that, at the present stage, this is not a disadvantage, but a virtue of the concept of pilot judgments. Personally, I think that the potential codification of the pilot judgments procedure would hinder the creative development of the concept. The procedures should be flexible and should meet the expectations of all the parties concerned, something that which would make them resemble axiologically the American concept of legal peace.

The issue of the excessive length of domestic proceedings is the most frequent subject in Strasburg proceedings. It is a legal cancer which leads to a permanent dysfunction of the judicial system. Unfortunately, the excessive length of proceedings problem also concerns the European Court of Human Rights and radical action is now required. I believe that a remedy for this pathology would entail more extensive recourse to pilot judgment proceedings. It would relieve the Court of a considerable number of pending and new applications. Solving the problem of excessive length of proceedings in that way would be the fastest way of reducing the Court's case-load, without any changes to the Convention itself heeding to be made.

The other problem discussed during the Seminar was the fight against impunity. This problem is widespread, and in the near future we may expect this issue to be taken up by the group of experts established by the Steering Committee for Human Rights (CDDH).

Finally, the concept of the "creation of the Court's Statute" was discussed during the seminar. However the name of this idea is confusing. It does not assume the creation of a new legal instrument that would be attached to the Convention and regulate some procedural issues, but rather seeks to establish a new flexible mechanism by which to introduce changes to some of the procedural provisions of the Convention. In a way, Protocol No. 14 bis became a forced experiment in that field: while preserving the structure of the Convention, it allowed for the possibility of a flexible approach to modifying procedure before the Court. Therefore, within one system there may appear various modalities, and each State has a choice à la carte as to which it intends to apply. One should distinguish two principal routes the reform of the Court may pursue: one introducing changes in a traditional way, developing new concept for reforming the procedure. Because of this, the discussion about the concept of creating the Court Statute is really a debate on the future of the Court as such.

In regard to the above, it is worth mentioning the conference in Interlaken, planned for the year 2010. After the Warsaw Seminar, the President of the European Court of Human Rights prepared a Memorandum to the Member States with a view to preparing the Interlaken Conference. The participants of the Warsaw Seminar have not had the opportunity to comment on this document, however I have the feeling that most of them share the ideas expressed therein – this was visible during the discussions at the Seminar. Taking into account the great value of the President's Memorandum on the future of the Convention system and role of the European Court, I have been successful in asking the Court for permission to disseminate this important text by including it in the documents from the Warsaw Seminar.

We have a lot of time to think about the President's Memorandum and about the subject to be discussed at the Interlaken Conference, in which fields not only a road map but a whole atlas of undertakings ought to be planned. The starting point for further discussions should be the assumption that the new system of the Convention should meet all the expectations of the participants in the debate. Without doubt, the present catalogue of rights and freedoms protected by the Convention must be preserved. However it is important to consider if it should not be broadened in an optional form through the introduction of certain social rights. The Court's current case-law indicates that the recognition of certain social rights is possible, even without any changes to the Convention being introduced. However, adding new rights to the Convention night appear to be a better solution.

More than at present the future Court should be based axiologically on the principle of subsidiarity. Between the Court and domestic superior courts there should not only be a dialogue of ideas but also a flow of personnel (in this context, the idea of secondments at the Registry for judges and officials of domestic courts, as been presented at the Seminar, is worth considering).

I am convinced that the President's Memorandum, together with the materials from the 3rd Informal Warsaw Seminar and the compendium recently published by the Council of Europe on *Reforming the European Convention on Human Rights*, will be an inspiration when it comes to preparations for the conference in Interlaken.

3 July 2009

Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken conference

During its Chairmanship of the Committee of Ministers of the Council of Europe, Switzerland has agreed to organise on 18 and 19 February 2010, a conference in Interlaken on the future of the European Court of Human Rights. This initiative is both unprecedented and important, and it is to be welcomed.

The purpose of the conference, which will bring together State actors capable of engaging the responsibility of their country at the political level, is to reaffirm the commitment of the States to the protection of human rights in Europe. At the same time, it should aim to build for the future, and to establish a roadmap for the evolution of the European Court of Human Rights, as an essential component of this international protection mechanism.

I. The achievements of the European Convention and Court of Human Rights

The European Convention on Human Rights which was opened for signature in 1950 was the Council of Europe's first major act. It was also the first successful attempt to give binding legal effect to the ideals embodied in the Universal Declaration of Human Rights. The Convention is an international treaty which sovereign States have accepted freely from the UN. They have agreed, as is stimulated in Article 1 of the Convention, to guarantee the fundamental rights defined in the Convention to all those within their jurisdiction.

The Convention also sets up an international mechanism to ensure that States respect the commitments they have entered into. Since 1998 this function has been performed by a fully independent judicial body, the European Court of Human Rights.

The right of individual petition, proclaimed in 1950, became compulsory and general in 1998. It is the cornerstone of a mechanism of

collective guarantee whose reach extends to 800 million persons within the jurisdiction of the Contracting States.

The independence and impartiality of the Court and its Judges (and of its Registry) are the absolutely necessary conditions for an effective review of compliance with Convention obligations. The Court's independence and impartiality must therefore be maintained and indeed reinforced by concrete guarantees.

The Convention system and the Court have achieved remarkable success. They exert considerable influence on the rights and freedoms in the forty-seven States. As a source of inspiration their impact extends even beyond the frontiers of Europe. They have, through the process of protecting and developing rights, contributed to the establishment of peace and stability, and to the strengthening of democracy, especially in countries where authoritarian regimes have given way to democracy and during the period of transition which followed the fall of the Berlin Wall.

The Court's judgments have far-reaching effects on national legal systems. At the same time, the sheer number of its judicial decisions is striking. Since 1 November 1998 alone (when Protocol No. 11 entered into force), the Court has pronounced no fewer than 188,000 inadmissibility decisions and some 10,000 judgments on the merits. In 2008 it disposed of a total of over 32,000 applications, nearly 1,900 by judgment delivered and approximately 30,000 by way of inadmissibility decision.

II. Current situation of the Convention and the Court

Ratified by forty-seven States, the Convention, with its several additional Protocols, occupies a prominent rank in the hierarchy of legal norms applicable in those States, even if the precise level of the rank varies from State to State. While judges, lawyers, academics and the actors of civil society are now much more familiar with it, there is still room for progress.

While the Court's situation presents a somewhat mixed picture, its case load is evidently too heavy.

1. Firstly, the number of new applications has increased substantially over the last ten years (8,400 in 1999, compared with almost 50,000 en 2008), as has the number of cases pending (almost 100,000 at the end of 2008). In ten years the number of pending cases has been multiplied by ten! However, the figures vary considerably from country to country, and not necessarily in proportion to their respective populations: 57% of the cases pending concern only four countries, and about 80% concern only

12 out of 47 States. The consequence of the volume of cases is that the length of proceedings before the Court can be excessive.

Yet applications vary enormously in nature. Broadly speaking, three categories can be identified:

- The very numerous applications dismissed as inadmissible even without being communicated to the Respondent State. The causes of this phenomenon need to be analysed. One of the reasons lies in the fact that many applicants are not familiar with either the substantive limits of the Convention or the procedural conditions for admissibility.
- Repetitive applications, usually well founded and reflecting a structural problem already diagnosed by the Court and found to be incompatible with the Convention.
- More isolated applications raising new questions, whose level of importance and gravity can be very different.

2. The Court is constantly striving to modernise and improve its methods, to be able to adjudicate more cases. In recent years it has created a Fifth Section, opted in most cases to decide on admissibility and the merits at the same time, encouraged friendly settlements and accepted unilateral declarations of violations, developed the "pilot judgment" procedure, simplified the drafting of judgments and drawn up a new order for processing applications based on well-defined criteria. It is also giving thought to the just satisfaction awarded to applicants. Just satisfaction constitutes an important feature of its judgments and their effects. It has substantially improved its data processing tools and developed its Research Division.

In spite of all these efforts, the continuing increase in the volume of new cases means that there is still a large and even widening gap between the number of decisions delivered and the number of incoming applications.

3. Over the last few years, the Member States of the Council of Europe have increased the Court's budget significantly. However, the Court has still had to seek additional reinforcement of the Registry, involving the recruitment of 225 staff over three years. Further recruitment, beyond this three-year programme, would create a situation in which the current number of Judges would be insufficient to cope with the work produced by the Registry.

4. Lastly, this Court is bound by numerous regulatory and bureaucratic constraints (as has often been pointed out, for example in the Wise

Persons' Report to the Committee of Ministers in 2006), these hampering its efficacy, be it in the recruitment and management of its staff, its budget or even its internal organisation. One aspect of this is its lack of administrative autonomy within the Council of Europe. Another relates to the organisation of its judicial work. As amended by Protocol No. 11, the Convention makes detailed provision for the Court's judicial formations and the number of judges that compose them, which explains why another Protocol (No. 14) is necessary to change these purely judicial mechanisms. The fact that Protocol No. 14 has not been able to enter into force in its entirety has fortunately been compensated for to some extent by the decisions taken at the Ministerial Meeting in Madrid on 12 May 2009 (Protocol No. 14 bis and provisional application of certain provisions of Protocol No. 14). It is nevertheless an anomaly that such provisions appear in the Convention and not in an instrument which is easier to amend, for example the Rules of Court, adopted and amended by the Court itself.

III. What should the aims and results of the conference be?

A conference such as is planned for Interlaken should aim to leave its mark in three different areas:

- on the political level;
- in relation to long-term goals (eight or nine years after the conference);
- with regard to short- to medium-term goals.

A. The political level

After fifty years' existence, the Courts we now needs to have its future looked at. Among other things, the relationship between the Court and the national authorities has to be defined with maximum clarity. It is necessary as this exercise is carried out to identify and respect the roles that both the national authorities and the Court must play within the Convention system. States and the Court have the same objective, namely the securing of rights guaranteed under the Convention and its Protocols.

Interlaken should not be perceived merely as an opportunity to provide assistance to the Court unilaterally. It must also acknowledge the sharing of responsibility between the States and the Court.

At the Conference, the States will be expected to outline how they see the Convention machinery in 2020, with the amendments to the

Convention which that would require. They should also indicate what alterations should be made to the system in the short- to medium-term without amending the Convention.

The States should ask themselves the following questions: what sort of Court of Human Rights do they want for the future? What sort of machinery are they prepared to finance? What should it deal with? There can be no question of modifying the substantive rights and freedoms guaranteed by the Convention; the aim is to reaffirm the principle of the right of individual application, while being fully aware that the Court cannot deal with everything in the way that it deals with it today. Yet how can that basic principle be preserved while remaining effective, in other words so that the Court can process and adjudicate with sufficient speed well-founded and in particular serious allegations of human rights abuses? At the same time it is necessary to ensure that the Court maintains the quality and coherence of its case-law.

B. The aims of the Conference

B.1 Longer-term goals

1. Process

It will obviously not be possible to decide on the detail of such developments at Interlaken, in particular because they are complex and require sophisticated technical studies. However, at the conclusion of the Conference it would be possible:

(a) to initiate the necessary studies;

(b) to set a deadline for bringing changes into force, it being understood that they will almost certainly require a revision of the Convention; the deadline could be set as 2019 (the 60th anniversary of the Court, which began to function in 1959);

(c) to give terms of reference to the competent bodies, instructing them to engage in the process of amendment of the European Convention of Human Rights.

2. What Court for 2019?

The right of individual petition lies at the heart of the Convention mechanism and the Court is of the firm opinion that it must be preserved in principle. The first question to address is whether this right should be maintained in its current form, or whether certain modalities should be attached to its exercise.

A second set of issues relates to what is often called subsidiarity. It is perhaps more appropriate to refer to the sharing of responsibility for the protection of human rights between national authorities and the Court.

The basic principle is that it is for the States to guarantee the Convention rights at national level and for the Court to ensure, through the examination of individual applications (or exceptionally inter-State cases), that States do indeed respect their engagements. This means that it is in the first place for the national authorities and courts to prevent or, when they fail do so, examine and put right any violation of the Convention. It also means that States must comply with the Court's case-law and make sure that judgments of the Court are adequately executed, notably throught adoption of the appropriate general measures and the taking of remedial action in respect of cases which could give rise to similar issues. As regards the Court's role in this context, it must reject applications where the applicants have not properly exhausted domestic remedies, and it should apply Article 13 of the Convention so as to ensure that States establish adequate remedies. The Court must pursue a proactive interpretation of Article 13 so as to encourage the introduction of domestic remedies. The large number of repetitive applications before the Court is an indication that the subsidiarity principle does not operate adequately.

3. Long-term evolution

a) Developing the idea of filtering applications, as suggested in the Wise Persons' Report

No matter how much progress is made on subsidiarity, the proportion of inadmissible or manifestly ill-founded applications is unlikely to decrease. It could even increase if action to prevent violations becomes more effective and the States themselves remedy any violations found, in accordance with well-established case-law.

It is possible, therefore, that the single-judge system will not be sufficiently effective, and that it will be necessary to set up special sections, an applications division (whose role and impact would have to be studied), or another filtering body, all within the Court and under its control, the Court-proper ruling only on those cases found admissible. In this respect, one choice that has to be made concerns whether all types of cases should be examined judicially, or whether the decision in certain types of case can be delegated to legal secretaries (référendaires).

b) Drawing inspiration from the Court of Justice of the European Communities

This would be a different approach to filtering, based more on a distribution of competence.

In the European Union, the Court of First Instance was added to the Court of Justice (more recently the Civil Service Tribunal has taken over some of the areas of competence of the Court of First Instance). By analogy, one could imagine a Human Rights Tribunal subordinate to the Court. For instance it could be envisaged that – without of course reverting to the pre-1998 system with the Commission and the Committee of Ministers – the Tribunal would deal with admissibility and the Court would rule on the merits.

Since reference has been made to the European Union, it should be recalled that the Union's accession to the European Convention on Human Rights may have far-reaching consequences.

c) Reinforcing cooperation between national courts and the Strasbourg Court

There is nothing to preclude studying a preliminary reference mechanism, or possibly an extension of the Court's advisory competence ([which is] currently very limited). This could enhance the Court's constitutional role, without restricting the right of individual application.

These are just some avenues. It is expected that preparations for the Conference could throw up others.

B.2 Short-term goals

1. Measures that can be taken immediately without amending the Convention

What is crucial in this context is that the States acquire ownership of the Convention for the benefit of the persons within their jurisdiction. The Convention is now part of the domestic law of the States. Citizens must be able to assert their Convention rights before the national authorities. Beyond the need to establish effective remedies, which must be introduced where they do not exist, States must, with the help of the Council of Europe, take initiatives in the fields of training, the translation of Strasbourg judgments, preventive action etc.

Many [of the] problems will be resolved if the States take the necessary preventive and corrective measures at national level

(appropriate legislation, domestic remedies, execution of national judgments, solutions for the excessive length of proceedings, reopening of proceedings following Strasbourg judgments), and if they execute the Court's judgments promptly. The Court can and must help them by:

- providing human-rights training, including by institutions that may be attached to the Court;
- ensuring better dissemination of the Court's case-law;
- adopting a judicial policy giving more extensive effect to Article 13 which is one of the key elements of subsidiarity and in respect of which Article 35 (the obligation to exhaust domestic remedies before bringing a case to Strasbourg) is the opposite side of the coin.

States should be encouraged to participate in certain methods or procedures initiated by the Court:

- friendly settlements and unilateral declarations;
- pilot judgments and the "freezing" of cases of the same type pending a general solution.

More effective implementation at national level and application by the national courts not only have the potential to reduce the case-load, but also make it easier for the Court to maintain an appropriate distance from national proceedings, in full compliance with the principle of subsidiarity.

At the conference, in addition to defining the relationship with States, it will be necessary to take steps to ensure that the Court is able to enjoy autonomy with regard to administrative and budgetary management. Steps must also be taken to meet the Court's resource needs.

It is moreover clear that other protagonists have a legitimate role to play in protecting human rights and preventing violations, including Bar associations, NGOs, academia and the media.

2. Other medium-term changes

The Report of the Group of Wise Persons to the Committee of Ministers in 2006 recommended a Statute for the Court which would extract certain provisions from the Convention and could itself be amended by a "simplified" procedure. That idea could perhaps be taken up again and given further thought. The Statute should also include provisions strengthening the independence of the judges, including their social protection. It would also be desirable to reflect upon the processes for the selection of candidates for the post of judge and for their election by the Parliamentary Assembly.

In addition, consensus could make it possible to give binding effect to the Court's judgments in respect of their interpretation of the Convention. This would strengthen the States' obligation to prevent Convention violations. It is no longer acceptable that States fail to need as early as possible the consequences of a judgment finding a violation by another State when the same problem exists in their own legal system. The binding effect of interpretation by the Court goes beyond *res judicata* in the strict sense. Such a development would go hand in hand with the possibility for citizens to invoke the Convention directly in domestic law ("direct effect") and the notion of ownership of the Convention by the States. It will constitute a new step in the evolution of Convention law, whose effectiveness and positive consequences for all concerned should not be underestimated.

3. New ideas which can be explored immediately

(a) regarding "Class actions" or collective applications, the Court will study the way in which such applications could operate, and their possible impact.

(d) The possibility of referral by the Court to the Committee of Ministers and/or the States concerned of purely repetitive cases where these can be dealt with on the basis of well-established case-law. This is one application of the principle of a better sharing of responsibility between the Court and the States.

IV. Conclusions of the Conference

The Conference could conclude:

- with a political Declaration of commitment to the Convention system expressing a willingness to give it its second wind; this Declaration would stress the need for States to acquire the necessary ownership of the Convention (notably by establishing effective remedies, executing the Court's judgments and recognising their interpretative authority);
- with a Recommendation to the Committee of Ministers that they instruct the competent intergovernmental bodies to carry out within a time-frame of one year to eighteen months a study on the long term (8-9 year) modification of the protection machinery (see chapter III, B.1. above);
- with a Recommendation to the Committee of Ministers on budgetary and administrative issues.

Overall, the conference would in this way lay down a clear roadmap for both the immediate and the more distant future. This goal is both indispensable and achievable.

Welcoming address

Professor Artur Nowak-Far,
National School of Public Administration in Warsaw

It is almost trivial to state that human rights and the system in place for their enforcement have an inherent evolving nature. This is not to say that there are no basic legal norms and axiological reasoning thereto which provide a significantly stable basis for the development of human rights law. Rather, my statement about the inherently evolving nature of human rights and their enforcement is to bring your attention to a volatile context of their application and theoretical nurturing. The ever-changing international arena in which new conflicts of a new nature, and even new actors arise, does not make the lives of either human rights practitioners' or theorists' easy. On the other hand, they greatly increase the intellectual excitement with which these rights can be investigated theoretically and, secondly practised in various real courtroom settings.

Being more of a specialist in European Union law than in human rights, I am fully aware that international or, if you wish, supranational systems of legal norms have one token in common: namely, they have the ambition to be more or less uniformly applied; yet much of the achievement of this uniformity depends on the procedural aspect of their enforcement. The latter, procedural, element of their application, in fact, determines in a fundamental way the effectiveness and efficacy of these legal systems. Disappointingly, this element too often fails to provide the uniformity so much desired and so frequently and solemnly declared.

Having said that I am extremely satisfied to be a host of on international conference which addresses so important a problem of the application of human rights law. Having you all here in the National School of Public Administration, I am confident that this conference will be prolific in generating new ideas about human rights application in real procedural settings. Because of the qualities of the conference and its participants, it will likely break new paths in the understanding and theoretical encapsulation of human rights, as well as it contributing to their effective enforcement. My confidence is strong and my expectations are high: the topic of the conference (selected by its initiators, most notably Ambassador Jakub Wołąsiewicz) is of the utmost importance, the speakers are outstanding, and I hope – the venue will grave inspiring to all of you.

PART ONE

PILOT JUDGMENTS

CHAPTER 1:

PRESENTATIONS

(moderated by Philip Leach)

Tackling systemic human rights violations – the role of Pilot Judgments

Professor Philip Leach,
London Metropolitan University

Almost five years on from the delivery of the first 'pilot judgment' delivered by the European Court of Human Rights in the case of *Broniowski v Poland*, it is still difficult to evaluate the extent of the contribution that pilot judgments have made, and will make in the future, to the resolution of systemic human rights violations in Europe. Pilot judgments are here to stay – the Court has recently signalled its intention to use the procedure more frequently.[1] Many fundamental questions remain unanswered. Do we all agree about how to define a pilot judgment, in what circumstances pilot judgments should be issued, or what they are intended to achieve?[2] How does this procedural innovation affect the respective responsibilities of the Respondent State, the Court and the Committee of Ministers? Reflecting the increasing 'constitutionalisation' of the Court, is there a danger of applicants being left out in the cold?

In order to try to address some of these questions, the Human Rights and Social Justice Research Institute at London Metropolitan University is currently carrying out a research project, funded by the Leverhulme Trust and entitled: *Responding to Systemic Human Rights*

[1] The Pilot Judgment Procedure – Memorandum prepared by the Registry of the Court, DH-S-GDR(2009)010, 24 February 2009.

[2] See, for example, the UK's recent position paper: *Pilot judgments: categorisation of cases*, DH-S-GDR(2009)009.

Violations: an Analysis of 'Pilot Judgments' of the European Court of Human Rights and their impact within national systems.[3] There are further details on the Institute's website: http://www.londonmet.ac.uk/research-units/hrsj/research-rojects/pilot-judgments.cfm

In March, we carried out a series of interviews in Strasbourg with Court Judges and Registry officials, with Government representatives and with officials from other Council of Europe entities, including the Department for the Execution of Judgments and the Office of the Commissioner of Human Rights. Key themes discussed included: how the way in which the Council of Europe has liaised with state bodies; the perceived benefits of the pilot judgment process; the problems encountered and ways in which they have been overcome; the most effective levers for change; the possibility that a common methodology is emerging and the current key concerns as regards the process.

But at the heart of our research will be three country studies, which will involve visits to Slovenia and Italy, as well as Poland this week.[4] In each country, we will be carrying out interviews and group discussions with those who have been involved in the national response to pilot judgments (or 'quasi-pilot' – including 'Article 46 judgments'), including: Government officials; members of parliament; the judiciary; practising lawyers; national human rights institutions and civil society.

The primary aims of these interviews and discussions will be: to establish what steps have been taken; to find out what problems have arisen; and to assess the adequacy and sufficiency of the measures taken. The goal will be to ascertain the key obstacles to implementation in each country (in terms, *inter alia*, of the legislation, administrative and budgetary constraints, and the complexity of the issues addressed by the pilot judgments).

The interviews and discussions will also consider the broader political contexts in each country. Accordingly, they will seek to investigate: the attitudes of the political elite to the role of the European Court; the nature and extent of the tensions and sensitivities which arise (including perceptions of national sovereignty); and the ways in which the role and

[3] The inter-disciplinary research team comprises: Dr. Svetlana Stephenson (Senior Lecturer in Sociology, London Metropolitan University), Dr. Brad Blitz (Reader in Political Geography, Oxford Brookes University), Dr Helen Hardman (Research Assistant, London Metropolitan University) and myself.

[4] We will also seek to assess the situation in respect of Albania (re the *Driza and Ramadhi* case) and the Russian Federation (re the *Burdov No. 2* case), though we will not be conducting country visits in either case.

functions of the Court (and the other Council of Europe bodies) could be developed to ensure optimum national engagement and co-operation.

For the purposes of the research we have commissioned an Expert Advisory Group comprising representatives from Government, the Council of Europe, civil society and the academe.[5]

Our report will be published early next year.

1. Assessing states' responses to pilot judgments

If we accept that pilot judgments could contribute significantly to the amelioration of systemic, or widespread, human rights violations, then the greatest challenge we face is to ensure that states respond sufficiently. This means an onus on both the Court and the Committee of Ministers to *ensure* that the State takes the requisite steps to resolve the systemic issue and provide adequate redress. In September 2008, the Court formally closed the pilot judgment procedure with regard to the *Broniowski* case, on the basis that the applicants (and other victims) could utilize a new domestic compensation scheme established in Poland.[6] In its earlier decisions in *Wolkenberg and Others* and *Witkowska-Toboła*,[7] the Court decided that the scheme provided the applicants (and the other claimants) with relief at the domestic level "which made its further examination of their applications and of other similar applications no longer justified". In order to make such a decision, the Court had had to carry out an evaluation of the implementation of the scheme *in practice*. The Court for example took note of the total number of claimants, the number of decisions made by the authorities confirming entitlement to compensation, the number of persons whose files had been referred to the State Economy Bank in order for payments to be made, and the number of payments actually made.

So an effective evaluation of the implementation *in practice* of a new system purportedly providing redress at the national level is critical for the productive development of the pilot judgment procedure. Such an evaluation

[5] Its members are: Constantin Cojocariu (Interights); Andrew Drzemczewski (Head of Secretariat, Committee on Legal Affairs & Human Rights, Parliamentary Assembly of the Council of Europe); Catharina Harby (AIRE Centre); Jill Heine, Amnesty International; Rob Linham, Human Rights Policy Advisor, Ministry of Justice (UK); and Linos-Alexander Sicilianos (Associate Professor of Law, National and Kapodistrian University of Athens).

[6] See: *E.G v Poland No. 50425/99 and 175 other Bug River applications*, 23.9.08 (the 176 cases were struck out).

[7] *Wolkenberg and others v Poland*, No. 50003/99, dec. 4.12.07 & *Witkowska-Tobola v Poland*, No. 11208/02, dec. 4.12.07.

ought to consider the time taken to provide redress,[8] but this is not always so. For example, following the Court's judgment in *Lukenda v Slovenia*, concerning the excessive length of legal proceedings in domestic courts in that country, the Court only evaluated the respondent Government's compliance by reviewing the text of new legislation enacted to solve the problem. Thus in *Korenjak v Slovenia*,[9] the Court found that the new domestic scheme was *effective in the sense that the remedies are* ***in principle*** *capable of both preventing the continuation of the alleged violation of the right to a hearing without undue delay and of providing adequate redress for any violation that has already occurred* (emphasis added). Furthermore, following the Court's judgment in *Hutten-Czapska v Poland*[10] (concerning the inadequacies of housing legislation), the Court was prepared to give its seal of approval to a subsequent settlement of the case on the basis that *the Government have demonstrated an active commitment to take measures aimed at resolving the systemic problem identified in the principal judgment and will rely on their actual and promised remedial action...*[11]

A number of questions arise here. How far is it the case that adequate assessment of remedial action following pilot judgments is more difficult for certain violations than others (compare, for example, systemic problems leading to length of proceedings cases with a case such as *Broniowski*)? To what extent do we need to be wary of friendly settlements being agreed with individual applicants in terms which fail to get to grips with the systemic problem at hand? Commentators have on occasion alluded to a problem of states 'buying-off' applicants in particular cases.

Concerns about the Court's evaluation were expressed by Judges Zagrebelsky and Jaeger in their separate opinion in *Hutten-Czapska* (2008):

> *The Court is not competent (and does not have the necessary knowledge) to express a view in the abstract and in advance on the consequences of the reforms already introduced in Poland and to give a vague positive assessment of a legislative development whose practical application might subsequently be challenged by new applicants...*

As is evident from her concurring opinion in *Hutten-Czapska*, Judge Ziemele was also troubled: *In my view the Court has to be very careful and it has to base its reasoning on the compliance of such an approach with the underlying principle of individual justice in the European Convention system...*

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8 See: *E.G v Poland No. 50425/99 and 175 other Bug River applications*, 23.9.08, para. 28.
9 No. 463/03, 15 May 2007.
10 *Hutten-Czapska v Poland*, No. 35014/97, 19.6.06.
11 *Hutten-Czapska v Poland*, No. 35014/97, 28.4.08, para. 43.

Concerns have also been expressed over the lack of clarity in the respective roles of the Court and the Committee of Ministers as regards the evaluation of compliance with pilot judgments at the national level. Do we need clearer rules and procedures to be adopted, so that there is much greater clarity as to their respective roles, and so that, as a result of their combined efforts, effective evaluations are carried out?

At the Stockholm Colloquy in June 2008, Erik Fribergh, the Court Registrar, placed important emphasis on the need for a strengthening of the enforcement process as regards pilot judgments.[12] He said: *enforcement issues are becoming more and more judicial, and it would seem to me that in the future reform work, one issue that could be taken up is whether the enforcement issues should not be entrusted to a more quasi-judicial organ. This could be a separate body, or one operating under the auspices of the CM. I think a lot could be achieved to solve many enforcement issues if for instance a Panel of five to seven legal/judicial experts were entrusted with that duty.* Is there support for such a proposal?

The timeliness of a state's response is certainly critical. There is an undeniable obligation on states to move quickly, not least because the delivery of a pilot judgment will always follow several years of litigation. It can be seen coming over the horizon from a considerable way off. The Court's practice now, at the stage of the communication of the case to the respondent Government, is to flag up the fact that it is minded to follow the pilot judgment procedure. It is, I would suggest, welcome that in its most recent pilot judgment – *Burdov v Russia (No. 2)*[13] – the Court has laid down a specific timetable for the implementation of various steps by the respondent state, including:

- a period of six months (from the date on which the judgment becomes final) to establish an effective domestic remedy (or combination of remedies) which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments, in line with the Convention principles; and
- a period of one year (from the date on which the judgment becomes final) to grant redress to all victims of non-payment (or unreasonably delayed payment) by State authorities of a judgment debt in their favour (who lodged their applications with the Court before the delivery of the *Burdov*

[12] E. Fribergh, *Pilot Judgments from the Court's perspective*, Stockholm Colloquy, 9-10 June 2008.

[13] No. 33509/04, 15.1.09.

No. 2 judgment and whose applications were communicated to the Government).

So we now await with anticipation the response of the Russian Federation to *Burdov No. 2* (in the course of this research we have been told that Russia welcomes the implementation of this procedure), and if there should be any difficulties, it will be crucial that both the Committee of Ministers and the Court take adequate steps to enforce such deadlines. The Court may well apply this procedure to tackle similar problems in Moldova and Ukraine.[14]

It also remains to be seen what steps will or should, be taken by the Committee of Ministers under its priority supervision of pilot judgments.[15]

There are a number of important questions that remain unresolved, and which are focused in particular on the nature of the state's response. By sharing our experiences in the course of this seminar, including as regards examples of 'best practice', and by discussing some of the difficulties which have obstructed reform, we may be able to grapple with some of the following questions:

- Within the domestic arena, what are the most common obstacles that may hamper effective implementation, and how can they be overcome?
- What are the factors most critical to ensuring successful reform in responding to a pilot judgment?
- How significant is the position of the domestic courts?[16] For example, Sadurski has recently alluded to the importance of a *de facto* judicial alliance between the European Court and the national courts (as happened in the Polish cases of *Broniowski* and *Hutten-Czapska*) – arguing that such a situation lends the European Court greater legitimacy in issuing pilot judgments.[17]

[14] The Pilot Judgment Procedure – Memorandum prepared by the Registry of the Court, DH-S-GDR(2009)010, 24 February 2009.

[15] Rule 4 of the Rules of the Committee of Ministers for the supervision of the execution of Judgments and the Terms of Friendly Settlements, adopted on 10 May 2006.

[16] "It is noteworthy that in the three full pilot cases the Court's analysis was in line with that of the national constitutional court" – The Pilot Judgment Procedure – Memorandum prepared by the Registry of the Court, DH-S-GDR(2009)010, 24 February 2009, p. 5.

[17] Wojciech Sadurski, *Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, EUI Working Papers, Law 2008/33, European University Institute, 2008.

- Is it clear, who within the domestic polity, has responsibility for the various aspects of a state's response to a pilot judgment: devising the state's plan of action; leading it; managing it?
- How effective are the channels of communication between the government agent and the relevant Ministres? Are government agents sufficiently empowered?
- How can national authorities establish monitoring systems capable of ascertaining whether or not legislative and other reforms are adequate and effective in practice?
- How should Parliament and civil society be involved in the process of debating any reforms required?

And at the European level:

- What measures can be taken by the Committee of Ministers to encourage or facilitate implementation of pilot judgments?
- What assistance can be provided by other Council of Europe bodies, such as the Commissioner for Human Rights[18] and the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE)?
- What are the appropriate time limits for implementing pilot judgments?

[18] The Commissioner has said: "I believe that, with the assistance of NHRSs, the Commissioner could assist the Court in identifying cases that should give rise to a pilot judgment, in defining the domestic measures required by the execution of a judgment in such a pilot case and in understanding the difficulties preventing the national authorities from taking such measures. The Commissioner and his partners could help the Court to formulate realistic, inventive and precise prescriptions of the measures expected from the States concerned, not only the States party to the proceedings but also third States concerned by the substance of the judgment" – Thomas Hammerberg, *Council of Europe Colloquy*, San Marino, March 2007.

CHAPTER 1:

PRESENTATIONS

(moderated by Philip Leach)

Pilot judgments from the perspective of the Polish Government Agent and a proposal of provisions related to the existing pilot judgments procedure and so-called simplified pilot judgment procedure

Mr. Jakub Wołąsiewicz,
Polish Government Agent

First of all, I would like to express my gratitude to all Distinguished Guests and Institutions involved in the organisation of our Seminar. Despite the financial crisis, flu pandemic, difficult work and negotiations before the meeting of the Committee of Ministers of the Council of Europe in Madrid, we have managed to convene the seminar in Warsaw successfully. This is our third meeting of this type. The first one took place on 28th April 2005 and was devoted to the improvement of domestic remedies, with particular emphasis on the problem of unreasonable length of proceedings. The second one was held on 23rd–24th June 2006 and concerned the introductory discussion about the result of works by the Group of Wise Persons and the Report of Lord Woolf. This time we meet in Warsaw to analyse our views and experiences concerning the pilot judgments.

The pilot judgment is indeed a fact, though this for we have not managed to formulate a universally acceptable definition of this type of judgment, nor to describe the rules or procedural norms related to it.

Nonetheless, this does not mean that the elements for creating such a definition and such a procedure do not exist.

In 2003 the European Court of Human Rights described the pilot judgment procedure as *a procedural tool for dealing with repetitive well-founded applications. (It) would involve empowering the Court to decline to examine cases (...) where the Court has identified the existence of a structural or systemic violation in a pilot judgment. Such a judgment would trigger an accelerated execution process before the Committee of Ministers which would entail not just obligation to eliminate for the future the causes of the violation, but also the obligation to introduce a remedy with retroactive effect within the domestic system to redress the prejudice sustained by other victims of the same structural or systemic violation. Whilst awaiting the accelerated execution of the pilot judgment, the Court would suspend the treatment of pending application raising the same grievance against respondent state, in anticipation of that grievance being covered by the retroactive domestic remedy. It was stressed in the Court's discussions that, in the event of the respondent state's failing to take appropriate measures within a reasonable time, it should be possible for the Court to re-open the adjourned applications.*

The abovementioned elements of the pilot judgments procedure were used for the first time in the case of *Broniowski v. Poland*, and next in the case of *Hutten-Czapska v. Poland*. From the Government's point of view, the pilot judgments procedure did not raise concerns. However, several judges from the Court, as well as some representatives of the non-governmental organizations, had doubts concerning two issues. First of all, they claimed that the Convention did not provide a legal basis for pilot judgments. Second, they pointed out that the situation of applicants whose proceedings were suspended was against both the letter of the law and the spirit of the rights to which they were entitled.

The first objection is obvious. There is indeed no provision in the Convention which expressly refers to the pilot judgments procedure. However, basing on existing stipulations, and especially Article 46 of the Convention, it is possible to derive an interpretation justifying such procedure. Of course, it would be better if the rules related to pilot judgments procedure were codified and incorporated into the Convention and perhaps during our Seminar, we will manage to formulate some of them. Nonetheless, for as long as they do not exist, we have to follow the interpretation of the Convention provided by the Court.

The Second objection is directly linked with the first, and is seen by many as a specification thereof. However, I personally do not share this opinion. Having regard to the Polish experience in pilot judgments, I

perceive a tendency to misinterpret the status of applicants whose complaints were registered in the Court, and whose proceedings were suspended until the final judgment of the "original" case. While examining the main case, the Court analyses the facts and law in accordance with the Convention. It also examines whether the applicant is a victim in the meaning of the Convention. In the cases of *Broniowski* and *Hutten-Czapska*, the Court found, that at the moment these judgments were delivered the applicants had been victims of a violation. However, the status of victim only concerns cases at hand, that is – only Mr Broniowski and Ms Hutten-Czapska. In theer judgments, the Court did not express its opinion on the status of applicants in clone cases. However, in both judgments there was a clause to the effect that the established violation night potentially concern thousands of other applicants.

The wording "may concern" is not the same as "shall concern". At the moment of delivering its leading judgment, the Court cannot and does not rule on the status of applicants in clone cases. The proceedings in their cases are suspended.

The next step is the negotiating and signing of a friendly settlement between the applicant in the leading case and the Government concerning general and individual measures. According to the definition of a pilot judgment provided by the Court, the aim of the general measure is an *obligation to introduce a remedy with retroactive effect within the domestic system to redress the prejudice sustained by other victims of the same structural or systemic violation*. Afterwards, the settlement is examined by the Court and is approved if it meets the standards provided for in the Convention. The proceedings in clone cases are still suspended. After the approval of the settlement the executive phase takes place. The applicant receives just satisfaction in accordance with the conditions of the settlement and the Government introduces a remedy with retroactive effect.

When this phase is finished, the Court re-opens the proceedings in the clone cases. Theoretically, it has two solutions. The first one would require the examination of all clone cases, in other words, a repeat of the whole proceedings as in the leading case. This would be very time-consuming, and indeed contrary to the idea of the pilot judgment, so the Court uses the second possibility and encourages the applicants in clone cases to use *a remedy*. If they don't use the indicated domestic remedy, their complaint will be struck from the Court's list.

Here we reach the most important moment in the procedure. In the wake of the judgment in the leading case, the Government has introduced *a remedy with retroactive effect*. Due to the fact that clone cases were

suspended, the introduction of *a remedy* leads to a situation in which the violation loses its continuity and the applicants lose the status of victim. Whether they can be treated as victims or not depends on whether they used the *domestic remedy with retroactive effect* or not. The effective use of a domestic measure need not necessarily mean that they have to obtain a proper redress. So when they use the domestic *remedy with retroactive effect* they automatically loose the status of victim. Retroactivity of the measure is a *sine qua non* condition to be regarded as effective in respect of applicants in clone cases or potential applicants. If the measure is effective, the Court strikes the complaints out from the Court's list.

To facilitate the Court's task following the introduction of a remedy for Bug River applicants, the Polish Government announced that particular applicants night use the remedy on the basis of priority rules, due to their age or difficult personal situation. This was a successful and effective approach which Poland also plans to use with respect to applicants in a similar situation to Ms Hutten-Czapska. This method allows the Court to verify whether a particular remedy is effective or not.

Of course, it may happen that some applicants in clone cases do not receive redress. In these situations the Government has to explain what the reasons for the denial of redress were. It should be underlined in this respect that the obligation to introduce a remedy is one of conduct and not result.

I would like to discuss one more issue. I have heard some critical comments concerning the pilot judgment procedure, which assumed that while negotiating friendly settlement, the Government can "corrupt" the applicant by offering him a high amount of just satisfaction in order to achieve a lower standard of general measures required with respect to that case.

During the negotiations I was involved in, I was always trying to draw the attention of the applicants and mediators from the Court Registry to that issue. The aim was to equalize the amount of just satisfaction and the amount of redress if the applicant used the domestic measure. Of course, the applicant in the leading case receives some additional benefits deriving from the fact that in the proceedings before the Court he or she was an active actor.

The cases of *Broniowski v. Poland* and *Hutten-Czapska v. Poland* resulted in formal pilot judgments. However, I have an impression that in cases against Poland the Court also delivers *quasi*-pilot judgments. To be honest, the Polish Government not only has nothing against such practice, but even welcomes it.

I personally find the judgment in the case of *Kudła v. Poland* of 2000 inspiring and believe we should perceive the origins of the concept of pilot judgments there. The *Kudła* judgment concerned the right to an effective remedy in cases of unreasonable length of proceedings. I believe this problem will be discussed today by Minister Igor Dzialuk, and tomorrow by Judge Katarzyna Kowalska.

In 2004, Poland passed a law introducing a new remedy. A few years later, the Government of Poland and the Commissioner for Human Rights of the Council of Europe noted that, although the law was good in itself, some of its elements were being applied in a wrong way. Specially organized training and seminars did not help to solve this problem, as judges examining cases of unreasonable length of proceedings were awarding just satisfaction at levels amounts significantly lower than those being awarded in cases against Poland before the Court.

Moreover, some worrying tendencies had started to appear in other groups of cases, like those concerning conditions in prisons or the excessive length of pre-trial detention.

Due to the fact that the average time for examining applications by the Court is still long in cases against Poland, I expected that sooner or later the Court would deal with those cases, and issue a pilot judgment, as happened with the case *Scordino v. Italy*. However, the Government was aware of the need to adopt a rapid solution to this problem. Of course, it could have solved it by itself, but then it would never be sure whether the solution satisfied the Court. That is why, at the beginning of last year, I kindly asked the President of the European Court of Human Rights to organize consultations between the Court Registry and the Polish Government. As these were first consultations of the kind, it took a while for then to be scheduled.

During the consultations, the Government introduced a number of problems and suggested ways of solving them – a specific action plan. I have heard some positive opinions concerning the outcome of these consultations, both from representatives of the Court and from the Commissioner. A few months after the Warsaw meeting, the Court gave its judgment in the case of *Kauczor v. Poland*, which dealt with the excessive length of pre-trial detention and of judicial proceedings in criminal cases.

The *Kauczor* judgment, though formally not pilot, seems very similar to one. In the near future, we also expect a ruling of the Court on another very delicate issue, that is detention conditions in Polish penitentiary facilities, which might be very similar in its operative part to the *Kauczor* judgment. I would call the *Kauczor* judgment and the anticipated

prison conditions ruling historic, but not due to their rank but due to their subject matter. The Government was warned by the Commissioner for Human Rights on time, it took appropriate steps and in the near future will give rise to a normalization of the situation. Because the judgment in the second case is not known yet, I refer only to the case of Mr. Kauczor. The Court, while deciding the case, treated the past situation as closed in time and ordered the Committee of Ministers to monitor the implementation of an action plan prepared by the Government before the judgment. I am of the opinion that, on the basis of the experience from these two cases, we could try to consider whether it's not better in some particular cases to come back to the concept of "legal peace".

This concept derives directly from a functional doctrine of law which I am particularly attached to. My recently deceased mentor, Professor Andrzej Stelmachowski, used to say that the most important thing in applying law is logic and achieving the goal, not the procedure. Pilot judgments are a perfect example of such a philosophy. The goal is to solve the problem of a large group of applicants. The Court can only reach this goal through a dialogue with the Respondent State. Professor Stelmachowski used to say: *why do we need wonderful and precise laws and procedures if, when applying then, we can't solve any problem?*

When together with Phillip Leach we were discussing the program for today's Seminar, it appeared that it would be possible to present some proposals of provisions related to the existing pilot judgments procedure and be so-called simplified pilot judgment procedure (a concept presented by me during the Stockholm Colloquy). That was also supposed to be a subject of my presentation. However, I changed my mind in the meantime as I came to the conclusion that it was too early to formulate specific proposals. The situation is very dynamic and we deal today with a few variants of the pilot judgment procedures. One thing is certain, the concept of the pilot judgment procedure is still alive, and is being developed by the Court.

CHAPTER 1:

PRESENTATIONS

(moderated by Philip Leach)

Pilot judgments from the perspective of the Court and possible elements of the pilot judgment procedure which could be drafted

John Darcy,
Registry of the European Court of Human Rights

I will begin this afternoon with a word of thanks to the organisers of this informal seminar that brings together many persons directly involved in the realisation and protection of human rights. I am sure that in these splendid facilities of the National School of Public Administration our discussions today and tomorrow will be informal, stimulating and fruitful.

Speaking time this afternoon has been carefully rationed out and so I will get straight to the substance of what I have to say on the issue of the pilot judgment procedure. It is not too much to say that Poland is the homeland of the pilot judgment procedure, which will forever be linked to the case of Mr Broniowski and the fate of the many Poles who were forced to move westwards at the end of the Second World War. Those who were involved in the proceedings before the Court can justifiably be called the pilot judgment pioneers. Their success in reaching a friendly settlement that addressed the systemic dysfunction at the root of these cases was a crucial step in the procedure.

What is the perspective of the European Court of Human Rights on this phenomenon?

I should first refer to the context of the Court, which is a very difficult one. As many of you will know, the Convention mechanism is under

immense stress. Just over 10 years ago, the new Court was born and it was hoped that, as a full-time organ, it would have the capacity to deal with a workload that had been too much to handle for its predecessors. But these hopes proved to be misplaced. The situation of the Court after a full decade of activity, and a doubling of the size of its Registry, is very serious. The relief promised by Protocol No. 14 has been delayed for some years now, although some of that relief should be felt very soon given the temporary solutions that were announced this week by the Ministerial Conference in Madrid.

More than 100,000 case files are awaiting judicial examination in Strasbourg. More than one-third of these appear to be well-founded claims and so should, in principle, proceed to judgment (even if only purely repetitive ones). The Court's annual output, in terms of judging well-founded applications, might reach 2,000 this year. And there is no reason to anticipate any easing off in the number of new cases reaching the Court. It is falling further and further behind all the time. Even with more resources, i.e. more lawyers preparing files for judicial examination, the number of judges is fixed, and those now in office are really at saturation point.

So the pilot-judgment procedure can be seen as a working example of the proverb "necessity is the mother of invention".

The procedure is inventive in a number of ways. It marks a departure by the Court from its habitual way of dealing with individual applications. The default mode, if I can put it that way, is to judge each and every admissible case on its facts, without reference to the bigger picture and without mention of the difficulties created for the Court by numerous clone applications.

Another entrenched habit of the Court is to leave it entirely to the Respondent State, under the supervision of the Committee of Ministers, to draw the necessary consequences from a ruling that Convention rights have been violated.

The PJP signals an important change of attitude on the Court's part. Taking a leaf from the book of the Committee of Ministers, the Court's legal analysis looks at the underlying problem through the optic of the pilot case – this is the diagnosis stage. The key word here is "systemic", which can by now be said to have acquired a special meaning in the Strasbourg case law. Its use in a judgment signals very clearly to all the grand scale of the problem it describes. The most recent pilot judgment, *Burdov No. 2*, varies the terminology a little, speaking of a "persistent structural dysfunction".

Next comes the prognosis, where the Court draws the consequences for the State of the violation. This is a second leaf taken from the book of the Committee of Ministers, as the Court explicitly recognises in *Burdov No. 2*. The tone adopted by the Court is firm – the State must act, must achieve the desired result. But it is not prescriptive – the action to be taken is typically described in quite general terms, and the Court is aware of where the limits to its function lie (*Burdov No. 2*).

You will be aware of how the Bug River procedure came to a successful close. First, the Court examined the operation of the Act of July 2005 and found it to be satisfactory in the light of the Convention (the *Witkowska-Tobola* decisions in December 2007). Then it drew the consequences for the continued application of the procedure; the Court's task (under Article 19 of the Convention) had been fulfilled, and this justified the closure of the procedure.

In light of the experience gained thus far with the pilot-judgment procedure, the view from the Court would include the following points:

- For all the fanfare, the procedure is essentially a means that goes to the same end as all proceedings under the Convention, i.e. to ensure effective observance of human rights by the Contracting Parties to the Convention. It is not a radical departure by the European Court of Human Rights, but more a change of judicial tone and of case management technique in pursuit of that end;
- While the procedure has been founded on Article 46 of the Convention (Binding force and execution of judgments), it is in harmony with several other key "systemic" provisions:
  - Article 1, by which the Contracting Parties conferred on themselves the primary obligation of protection; the role of the international machinery is subsidiary to that of the national authorities;
  - Article 19, which confers on the Court the task of ensuring the observance of the engagements taken on by States. Is it not more effective to induce a State to take the necessary corrective measures than to issue numerous repetitive judgments over a period of years?
  - Article 41, and more particularly its lesser importance in the scheme of the Convention. With repetitive cases, the function of the Court is reduced to calculating the compensation due to each individual applicant in light of

the loss and harm they have sustained. This is quite some distance away from what the Court is there for.

- For all the focus on the "macro" aspects of the case, the situation of the individual with a well-founded human rights claim is not disregarded. The pilot-judgment procedure aims to reconcile three distinct and legitimate interests – the interest of the State in dealing with the systemic problem, the interest of the Court in being able to re-direct the group of cases to the domestic level, and, no less important, the interest of each applicant in that group. In its explanation of the rationale of the procedure, the Court has spoken of *securing to the persons concerned* [their] (...) *offering them more rapid redress*. It has stressed to the (Polish) Government that the measures introduced on foot of the pilot judgment must be "at all times effective and expeditious". Furthermore, there is a general proviso right up to the end of the procedure, and beyond, that applicants may return to the Court once again should the measures of redress prove ineffective or inadequate.
- The major problem facing applicants before the European Court is delay. It can take up to 5 years – and even longer – for a case to be taken to judgment. The passage of time is very damaging to the legal position and interests of applicants. There is no guarantee that the pilot judgment procedure will see their claim satisfied much more quickly than by simply waiting in the long queue at Strasbourg. And if their complaint concerns delay in the national legal system, a long adjournment could be seen as an aggravation. The Court is sensitive to this, as *Burdov No. 2* shows. Moreover, it is understood within the Court that the adjournment of the processing of the other cases while the pilot case goes forward is not absolutely essential. The balance between the three interests mentioned earlier could conceivably exclude it. One thinks of the more urgent type of case, for example, where there is a real and continuing threat to the life, safety, freedom or dignity of the persons affected.
- A related point is the rank given to pilot judgments in the Court's recently adopted internal policy on the order in which it will deal with cases henceforth. Justice and common sense both require that certain types of case should have first call on the resources of the Court. The Court has established broad criteria to guide the 5 Sections, so that a uniform approach will

be taken. In this scheme, pilot judgments are accorded the second highest rank, on a par with cases raising legal questions of general importance for Convention States and inter-State cases. Where the procedure is launched, the pilot case will therefore receive priority attention from the judges examining it. The other cases in the group rank much lower. Thus, given the weight of the Court's docket, their best hope will lie in the success of the procedure.

- The Court has developed the procedure at a careful pace, with just a handful of examples over the past 5 years. More examples of the procedure are on the cards – the Court has, for example, asked the Ukrainian Government to comment on the possibility of a pilot approach to the problem of non-execution of court judgments in that country. In a very different context altogether, it has also asked the Georgian Government whether the applications lodged last year by residents of South Ossetia disclose a systemic situation.
- It can be said that the pilot-judgment procedure has increased the procedural options of the Court for dealing with systemic or structural problems. One feature of the procedure, the giving of guidance to the Government under Article 46, appears in a growing number of judgments that are clearly not pilot judgments in the way that *Broniowski* was. This shows a flexible, pragmatic approach by the Court, which is adapting procedures to the problems brought before it by applicants.

In the time remaining, I would like to briefly address the suggestion of drafting rules for the procedure. Late last year the judges of the Court held a series of discussions on the procedure: the lessons to be drawn from its operation so far; and the directions it might take in future. One of the aspects discussed was whether it was justified at this stage to attempt to incorporate the procedure in the Rules of Court. The arguments in favour were recognised – transparency, clarity, predictability. However, they did not prevail for the moment. The objectives listed above could be achieved by continuing to explain clearly the procedure in each judgment and decision given as part of it, and of ensuring that each time it is applied the whole group of applicants is kept informed of each stage and its implications.

That is not to say that the PJP will forever be a creature of the case law. But as it is still seen by the Court as a work in progress, the time for crystallising it in written rules is still some way off.

CHAPTER 1:

PRESENTATIONS

(moderated by Philip Leach)

Pilot judgments and systemic human rights violations – the need to establish on effective remedy in the domestic system – the Slovenian Experience

Overview of the contents of the Act on the Protection of the Right to a Trial without Undue Delay of the Republic of Slovenia of (2006) and follow-up to the Lukenda v Slovenia judgment

Peter Pavlin, Slovenian Ministry of Justice

1. The Introduction of provisions on the right to a trial without undue delay and trial within a reasonable time as human rights

The first paragraph of Article 23 of the Constitution of the Republic of Slovenia[1] (right to judicial protection) dated 23 December 1991 deter- mines:

> *Everyone shall have the right to have his rights, duties and any charges brought against him decided upon* ***without undue delay*** *by an independent, impartial court established by statute.*

[1] Official Gazette RS, Nos. 33/91-I, 42/97, 66/00, 24/03, 69/04 and 68/06.

Since 28 June 1994, the Republic of Slovenia has also been bound by the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms of the Council of Europe[2] (hereinafter: the European Convention on Human Rights), which specifies in the first sentence of the first paragraph of Article 6 (right to a fair trial):

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing* ***within a reasonable time*** *by an independent and impartial tribunal established by law.*

The expression "without undue delay" (*brez nepotrebnega odlašanja* in the Slovene language) from the first paragraph of Article 23 of the Constitution of the Republic of Slovenia[3] derives from point c of the third paragraph of Article 14 of the International Covenant on Civil and Political Rights[4], which in the context of the (original) Covenant applies only to criminal proceedings, while in the context of the Constitution of the Republic of Slovenia it applies to all types of judicial proceedings. The expression "undue delay" from the first paragraph of Article 23 of the Constitution of the Republic of Slovenia is perhaps broader than the expression "within a reasonable time" of the first paragraph of Article 6 of the European Convention on Human Rights; or at least that was the opinion of Slovenian Author Hinko Jenull in 2003.[5] One could perhaps advocate the view that the expression "undue delay" means a heavier burden of proof on the part of the courts (from the point of view of proving that the delay was necessary) than the expression "reasonable time". For the moment that is only a theoretical issue[6], and in practice there is (still) no particular marked difference.

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[2] Convention on the Protection of Human Rights and Fundamental Freedoms, amended by Protocol No. 11 and additional protocols and protocols 4, 6, 7 and protocols 13 and 14, published in: Official Gazette RS, No. 33/94 – International Treaties, No. 7/94; Protocol No. 13 – Official Gazette RS, No. 102/03 – International Treaties, No. 22/03; Protocol No. 14 – Official Gazette RS, No. 49/05 – International Treaties, No. 7/05, Protocol No. 14 bis – Official Gazette RS, No. 48/09 – International Treaties, No. 12/09.

[3] Also in the provisions of the second paragraph of Article 48 of the Constitution of the Slovak Republic of 1992, the expression "undue delay" ("bez zbytočných priet'ahov" in the Slovak language) is chosen for defining the constitutional right to trial without undue delay.

[4] Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 7/71, and Official Gazette of the Republic of Slovenia, No. 35/92 – International Treaties, No. 9/92 – act on the Notification of Succession [of the Treaty].

[5] Hinko Jenull, *Zagotavljanje sojenja v razumnem roku de lege lata* in *de lege ferenda* [Guaranteeing the right to a trial within a reasonable time de lege lata and de lege ferenda], *Pravna praksa*, No. 13/2003 – Annex, pp. I–X, mainly pp. I–II.

[6] Manfred Nowak in the leading Commentary on the International Covenant on Civil and Political Rights opines that the term a "trial without undue delay" referred to in point c of

2. Context and history in relation to the adoption of the Protection of the Right to a Trial without Undue Delay Act

The legal order of the Republic of Slovenia has known the traditional remedy for protection of the right of a party to a court proceeding to a trial without undue delay since 1896. It is and still is the judicial administrative remedy of a supervisory appeal, which was first introduced into the Slovene legal system in 1896 by Article 78 of the Organisation of Courts Act[7] of Austria (the territory of Slovenia was at that time a part of the Austro-Hungarian Empire). In the basic text of this Act of 1896, it was determined that appeals of "participants" against courts, representatives of courts or judges because of refusal (refusing) of justice or being tardy in justice (delaying the resolution of cases) must be filed to the president of the immediately superior court. All appeals that are not clearly unfounded would be sent to the court or judge criticized, which, within a specific time limit, had to satisfy the appeal and prepare a report on the constraints that prevent this. Such a summons, which would be sent to the court or judge, could also contain a threat that disciplinary measures would be initiated. Appeals against courts of higher instance and the Court of Cassation had to be filed with these courts, and appeals against the president of courts to the Ministry of Justice.

A supervisory appeal thus traditionally[8] (also in relation to traditional provisions on supervisory appeal referred to in Article 72 of the

the third paragraph of Article 14 of the International Covenant on Civil and Political Rights and the term a "trial within a reasonable time" from the first paragraph of Article 6 of the European Convention on Human Rights are actually synonymous (Manfred Nowak: *U.N. Covenant on Civil and Political Rights*, CCPR Commentary, 2nd revised edition, N. P. Engel, Publisher, Kehl, Strasbourg, Arlington, 2005, pp. 333–334). However, for **a contrary view** from the field of consular assistance (!) see: Luke T. Lee, John Quigley: *Consular Law and Practice*, Third Edition, Oxford University Press, 2008, Oxford, pp. 152–153 and also 144–146 – the debate on the issue of distinction(s) with respect to terms "without undue delay" and "without delay" concerning Article 36, paragraph 1, subparagraph (b) of the Vienna Convention on Consular Relations of 1963. The abstract of the drafting debate (p. 153) concerning this provision would be that the word "undue" in the provision might leave a possibility open to a receiving State to **fabricate reasons to delay** (position of the United Kingdom at the time of drafting of this provision). Accordingly, the term "without delay" was adopted.

[7] State Law Gazette for the Kingdom and Provinces Represented in the National Assembly [of Austria], year LXXXI, No. 217, 1896.

[8] In relation to the interpretation of the institution of supervisory appeal according to the legal circumstances in 2001, the then case law in relation to supervisory appeal and the history of this institution see: Peter Pavlin, *Nadzorstvena pritožba kot učinkovito pravno sredstvo zoper zavlačevanje sodnega postopka* [Supervisory appeal as an effective legal remedy

Courts Act[9], which was applicable until 1 January 2007) means **an appeal by a party** or **his drawing to the attention** of the supervisory authority (president of the same or a superior state body) that he should take measures under the right of supervision against the activity or inactivity of his/her subordinates or a subordinate or lower state body. It was thus an internal administrative remedy which was only minimally formalised, meaning hierarchical supervision of the president of the body (not necessarily only a court) of the timely and also proper work of her/his subordinates. A supervisory appeal was thus explained in the case law of the administrative judiciary of Slovenia prior to the Second World War from the viewpoint of whether it was a proper legal remedy:

> *Anyone who files a supervisory appeal has no right whatsoever that the administrative authority appealed to should reinvestigate the administrative decree and change or annul it in the requested direction.* ***Supervisory appeal is then only in the nature of a drawing it the attention of the supervisory authority. It is not in any sense legal remedy. Entirely by free discretion and not because of the benefit of the individual but only as a protector of important public benefits does supervisory authority exercise its power of supervision.***[10]

From the point of view of legal history and the associated legal systems point of view, it must be borne in mind that the judiciary in "old Austria" was still fairly hierarchical in internal organisational terms, or authoritatively organised, and the presidents of courts had considerably greater management powers over otherwise independent judges. A specific part of this tradition still exists today in the court management legislation of the Republic of Austria, and to a lesser extent of the Republic of Slovenia, and a majority of countries in Central Europe. It could perhaps be summarised that a traditional supervisory appeal was the operation of the judiciary from the aspect of "internal" administrative law.

From the point of view of "legislative history", it is possible to state additionally that the Ministry of Justice of the Republic of Slovenia prepared

against procrastination of court proceedings], *Pravna praksa*, No. 11/2001 – Annex, pp. I–XIV.

[9] The data on the Courts Act of the Republic of Slovenia of 1994 as applied until 1 January 2007: Official Gazette RS, No. 100/05 – Officially Consolidated Text No. 2 and 49/06 – ZVPSBNO.

[10] See Ruling of the Administrative Court of the Dravska banovina in Celje (of the former Kingdom of Yugoslavia), Ref. No. A 57/34, 30.10.1934; published in: *Odločbe v upravnih stvareh* [Decisions in Administrative Cases], *Priloga Slovenskega pravnika*, I. knjiga, Ljubljana, 1938–1939, pp. 9–10. All emphases in the cited Ruling of the Administrative Court are the Author's.

a Draft Amending Act to the Courts Act as of 22 July 2003, in relation to the question of effective legal remedy in connection with protection of the right to trial without undue delay. The proposal contained a newly articulated supervisory appeal (then denoted as "a supervisory motion") and specific legal remedy against an unsuitable decision by the president of a court on a supervisory motion (then denoted "a supervisory appeal"). The Ministry of Justice could not continue to legislate with this proposal in 2003, because of the position of the professional public and external advisors, on the grounds that the proposed legal remedies were unnecessary, and also too complicated from a procedural viewpoint. A specific deficiency of this draft was also perhaps that it did not regulate (take a position on) the question of damages/compensation in relation to violation of the right to trial without undue delay.

There were new discussions within the legal community[11] on the idea that it was perhaps necessary to adopt a suitable statutory arrangement (amending Act to the Courts Act or special statute) of the procedure for the protection of the right to trial without undue delay, in 2004 and 2005, and it again became topical in the Ministry of Justice in the first half of 2005, though the real 'reason' for its realisation was of course the precedential judgment concerning the Republic of Slovenia in relation to the right to trial within a reasonable time and effective legal remedy in the October 2005 case of *Lukenda v. Slovenia*[12]. In the judgment in the cited case, the European Court of Human Rights in Strasbourg decided:

> *64. Therefore,* ***like an action in the administrative courts and a tort claim, a request for supervision*** *[supervisory appeal]*[13] ***cannot be regarded as an effective remedy within the meaning of the Convention****. [65. ...] In the "Belinger" case the Court found that the efficiency of the constitutional appeal was already problematic in view of the probable length of the combined proceedings. Since the Government have not submitted any new materials concerning* ***the constitutional appeal,***

[11] See, e.g.: Dr Aleš Galič, *Ustavno civilno procesno pravo* [Constitutional Civil Procedure Law], GV Založba, Ljubljana, 2004, mainly p. 339–386, within the framework of which mainly p. 367–387; work from note No. 5 (Jenull); mag. Marija Remic, *Pravica do sojenja v razumnem roku: Ali imamo v slovenskem pravnem redu zadosti učinkovito jamstvo za zaščito te pravice* [Right to a trial within a reasonable time: Do we have a sufficiently efficient guarantee for the protection of this right in the Slovene legal order?], *Pravna praksa*, No. 22/2004 – Annex p. I–XII, and Maja Smrkolj, *Vloga sodišč pri kršitvi pravice do sojenja v razumnem roku* [Role of courts when the right to trial within a reasonable time is violated] – undergraduate thesis, Faculty of Law of the University of Ljubljana, January 2005, Ljubljana, mainly pp. 7–20 and pp. 43–47.

[12] Judgment of the ECHR, Appl. No. 23032/02, 6. 10. 2005.

[13] Added by the Author.

> ***the Court considers that, at present, it cannot be regarded as an effective remedy*** [...] *and* [87. ...] ***the Government have failed to establish that an administrative action, a tort claim, a request for supervision or a constitutional appeal can be regarded as effective remedies*** *(see paragraphs 47 to 65 above). For example, when an individual lodges an administrative action alleging a violation of his or her right to a trial within a reasonable time while the proceedings in question are still pending, he or she can reasonably expect the administrative court to deal with the substance of the complaint. However, if the main proceedings end before it has had time to do so, it will dismiss the action. Finally, the Court also concluded that the* ***aggregate of legal remedies[14] in the circumstances of these cases is not an effective remedy*** *(see paragraphs 69 to 71 above).*

The European Court of Human Rights also decided that, in the cited case of *Lukenda v. Slovenia*, the **first paragraph of Article 6 (right to a fair trial – provisions on the right to a trial within a reasonable time) and Article 13 (right to effective legal remedy)** of the European Convention on Human Rights have been violated. It also awarded compensation for non-pecuniary damage under the heading of an equitable basis, at a level of 3200 Euros for "court delay" in relation to the court proceedings that lasted five years, three months and nine days, of which the procedure at first instance lasted a whole four years and one day.

As is known, this pilot judgment of the European Court of Human Rights was followed by a series of judgments of the aforementioned Court against the Republic of Slovenia because of violation of the right to trial within a reasonable time. Also, in September 2005, before this judgment of the European Court of Human Rights was issued, the Constitutional Court of the Republic of Slovenia adopted a similar Decision[15] in which it decided that the **Administrative Dispute Act** of the Republic of Slovenia of 1997 is unconstitutional (contrary to Article 23, paragraph 1 of the Constitution) in respect of some of its provisions, which do not contain an effective legal remedy against violations of the right to a trial within a reasonable time also in cases in which a violation has already ceased and

[14] As an aggregate of legal remedies in relation to protection of the right to trial within a reasonable time, the following were considered in the case of *Lukenda v. Slovenia*: supervisory appeal, civil law damages (compensation) proceedings, suit (action) in an administrative dispute and constitutional complaint before the Constitutional Court of the Republic of Slovenia.

[15] Decision of the Constitutional Court, No. U-I-65/05, 22. 9. 2005; published in: Official Gazette RS, No. 92/05 as of 18 October 2005.

also do not contain special provisions adjusted to the nature of the right to a trial within a reasonable time that would enable the claimant to claim just satisfaction (in pecuniary terms) in the event that a violation of the right to a trial within a reasonable time has already ceased and that remedying of these unconstitutional situations requires more complex legislative regulation, which the Constitutional Court cannot provide in its Decision. The operative part and reasoning of this Decision of the Constitutional Court were also among the basic reasons for the adoption of the Protection of the Right to Trial without Undue Delay Act of 2006. The Decision was "promulgated" and published in the Official Gazette of the Republic of Slovenia after the Judgment of the European Court of Human Rights in the case of *Lukenda v. Slovenia* was already known and widely publicised.

a) A sort of an "Afterword" to the Lukenda judgment – its inclusion in the Short Guide to the European Convention on Human Rights

And as a sort of afterword statement concerning the *Lukenda v. Slovenia* judgment, the Ministry of Justice published on 12 May 2009, on the date when the Republic of Slovenia officially started its Chairmanship of the Council of Europe, the new (Second) Edition in Slovenian of the **Short Guide to the European Convention on Human Rights, updated up to April 2009**[16]. The permission for translation into the Slovene language of the 2005 Edition (with the status of case law as of December 2003) of this book was acquired from the Council of Europe Publishing Division, as well as from the Author, Ms Donna Gomien, as well as the permission for its updating the text (case law) by the independent experts. The book was published by the Ministry of Justice of the Republic of Slovenia and its Center for the Training in the Justice System and all judges, judges of the Constitutional Court, state attorneys, assistant state attorneys, state prosecutors, assistant state prosecutors, attorneys (lawyers), chiefs of police departments, crime police officers, military police, officials in the intelligence and security services (civilian as well as military), Members of Parliament, Ministers of the Government, etc. have received it free of charge. And of course, the case of Lukenda v. Slovenia is adequately presented in this Short Guide, on page 129.

[16] Kratek vodič po Evropski konvenciji o človekovih pravicah, Donna Gomien, druga izdaja, Ministrstvo za pravosodje, Center za izobraževanje v pravosodju, z dovoljenjem Council of Europe Publishing, Ljubljana, 2009.

3. Adoption of the Protection of the Right to a Trial without Undue Delay Act

Within a relatively short time of the the judgment of the European Court of Human Rights in the case of *Lukenda v. Slovenia* being iussed a Draft Protection of the Right to a Trial without Undue Delay Act (*Predlog Zakona o varstvu opravice do sojenja brez nepotrebnega odlašanja*; hereinafter: ZVPSBNO) was prepared. It was the work of the Ministry of Justice of the Republic of Slovenia, with participation at the later stage of representatives of certain local[17] and district[18] courts, which had expressed interest in this from the point of view of specific burdens that the draft Act would impose bring upon their court(s). The Supreme Court of the Republic of Slovenia and representatives of the State Attorneys` Service, and from the Government of the Republic of Slovenia also the Government Service for Legislation, participated in the very speedy completion of the Draft Act before it was presented to the Government of the Republic of Slovenia. The Draft Act was sent to all courts of the Republic of Slovenia, and slightly under half of them made comments. The majority of these related to the question of additional burdening of the courts, some of the comments were in the sphere of fairly detailed proposals for improving the Draft Act, while only a minority of the courts had no comments to the Draft Act. During the procedure creating the Draft Act, the Ministry of Justice stated that its purpose was not in any sense a reduction in court backlogs, and in particular that the Ministry was aware that without additional staff and spatial reinforcement of certain courts, which will be most burdened in implementing the Act, there will be no positive effect, with the Act even Capable of causing a new "series" or "type" of court backlog. The financial impact of the Draft Act had been coordinated with the Ministry of Finance and assessed to be sum additional to the then **813 million Slovene Tolars**[19] – (SIT) for the budgetary year 2007.

The legislative "model" for the ZVPSBNO cannot exactly be specified. During the preparation of the Draft Act, certain influences were undoubtedly expressed, above all those stemming from Article 91 of the Organisation of Courts Act of the Republic of Austria, the Italian "legge Pinto" of 2001[20]. The Act is also fairly similar to the Polish Act of 2004 and

[17] Lower courts of first instance (courts of general jurisdiction).

[18] Superior courts of first instance (courts of general jurisdiction).

[19] 3,392,588.88 Euros.

[20] Act of 24 March 2001, No. 89 – Providing just satisfaction in the case of violation of the right to trial within a reasonable time and amendments to Article 375 of the Civil Procedure Code (Legge 24 marzo 2001, n. 89, Previsione di equa riparazione in caso di violazione del termine ragionevole del processo e modifica dell'articolo 375 del codice di

amendments to the Czech Courts and Judges Act of 2004 (notably Article 174.a); not just because of hypothetically "transcribed" provisions or legislative solutions from the cited Polish or Czech statutes, but also because of the similar legislative tradition and similar judicial organisation of the circle of Central European countries. It can be stated that there was no transcribing of other countries solutions as such, just a reassessing of their legislative solutions and a following of similar paths. At the end, it would be easiest to state that the ZVPSBNO is a Central European type of statute,[21] which regulates protection of the right to a trial without undue delay (right to a trial within a reasonable time).

It would be an exaggeration to claim that the judicial branch entirely agreed with the Draft ZVPSBNO. On the one hand, it recognised the need for legislative action, since this derived from the judgment of the European Court of Human Rights and the Decision of the Constitutional Court of the Republic of Slovenia, but, on the other hand, it believed that the proposed Act would cause an additional burden for the courts, which could also create new court backlogs. It was also proposed as an alternative that the institution of the existing supervisory appeal under Article 72 of the Courts Act be strengthened (supplemented).

The aforementioned critical opinion of the judicial branch of power to the Draft Act at that time can be understood, since it was certainly not without serious arguments. However, it is impossible not to take into account the fact that, because of the cited decisions of the European Court of Human Rights and the Constitutional Court of the Republic of Slovenia, it was necessary to adopt this Act. It is also a fact that the Republic of Slovenia is not the only country to have done this. Because of judgments of the European Court of Human Rights, the Italian Republic, the Republic of Croatia, the Republic of Poland and the Czech Republic have adopted complex legislative arrangements, while such a decision still awaits the Federal Republic of Germany (see the case of *Sürmeli v. Germany*[22] as of 8 June 2006). The argument that it would be better to substantially strengthen the existing institute of supervisory appeal referred to in Article 72 of the Courts Act was undoubtedly fairly weighty, but even such an additional arrangement would not help. To wit, in relation to the applicable arrangement of supervisory appeal of the Republic of Slovenia, Slovenia

procedura civile), Official Gazette No. 78, 3 April 2001, General Part.

[21] For the incorrect opinion that the ZVPSBNO is modelled mainly on the legislative arrangements of the Czech Republic and Republic of Poland, see: Dolores Modic, *Scordino in mi* [Scordino and us], *Pravna praksa*, No. 22/2006 – Annex, p. VII–VIII, mainly its footnote No. 5.

[22] Judgment of the ECHR, appl. No. 75529/01, 8. 6. 2006.

has never succeeded in showing before the European Court of Human Rights that this is an effective legal remedy in any specific case, since there were not clearly – specified duties of operation of the courts under it (issue of effective legal remedy) and since its actual was impact "positive". As has already been stated, the case law of the European Court of Human Rights is setting ever greater demands from the point of view of effective national legal remedies for protection of the right to trial in a reasonable time, and it can be even argued that, if the possible arrangement of potential "strengthened supervisory appeal" under Article 72 of the Courts Act could have been acceptable to the European Court of Human Rights in the past, e.g., in 2000, it was simply no longer so in 2006 (or 2009). The European Court of Human Rights now requires a specific, somewhat more complex, formalised and fast procedure for deciding on the right to trial in a reasonable time (right to trial without undue delay), and analyses national case law under such internal legislation very precisely. Even a single supposedly "erroneous" judgment of a national court can cause a problem in relation to the question of effective legal remedy for protection of the right to trial in a reasonable time, while even a single "correct" judgment of a national court (in the sense of a precedent in case law) can resolve this problem. That the case law of the European Court of Human Rights has a fairly strict position in relation to the internal legal arrangement of protection of the right to trial in a reasonable time is also shown by the precedent – setting judgment of the Grand Chamber of the European Court of Human Rights of 29 March 2006 in the case of *Scordino v. Italy* (no. 1)[23], in connection with the Italian "legge Pinto" of 2001[24]. In this judgment, the Court put significant stress on, or expressed some sort of acknowledgement of the fact that, individual countries such as **Austria, Croatia, Spain, Poland and Slovakia had perfectly understood the situation in relation to protection of the right to trial in a reasonable time and had chosen (legislated for) a combination of two types of legal remedy: one that is specified for acceleration of court proceedings and the other which is specified for awarding damages** (paragraph 186 of the judgment)[25].

Finally, account must be taken of the fact that protection of the right to trial without undue delay is protection of the right of a party in court proceedings on which their "financial survival", social status, reputation, employment and so on may all depend.

[23] Judgment of the ECHR, appl. no 36813/97, 29. 3. 2006.

[24] Act of 24 March 2001, No. 89 – Providing just satisfaction in the case of violation of the right to trial within a reasonable time and amendments to Article 375 of the Civil Procedure Code.

[25] All emphases in the summary of part of the judgment of the Grand Chamber of the European Court of Human Rights are the Author's.

During adoption of the Draft ZVPSBNO, the Ministry of Justice and "the Legislator" (the National Assembly of the Republic of Slovenia), were aware of all the potential administrative, personnel related and financial difficulties that could arise with the application of the Act in practice. In 2006, therefore (and also in 2007), it was not only the process of ensuring necessary funds for applying the Act that took place, but also (during the preparation of the Act), a search for the best possible solutions from the point of view of procedures under the ZVPSBNO being formalised, insofar as this was possible, with a view to the decision-making of presidents of courts being facilitated and, in addition, proceedings being simplified as far as possible. For example, the contents of a supervisory appeal and a motion for a deadline are fairly formalised, and the same applies to the probably exaggerated detailed description of the procedure before the State Attorneys` Service, a certain solution existing for the simplification of the procedure in relation to informing parties to the procedure of a supervisory appeal (fourth paragraph of Article 6 of the ZVPSBNO), etc. Similarly, the provisions of Article 4 (supreme binding criteria for deciding under the provisions of the ZVPSBNO) allow a court a certain field, not of free judgment, but of facilitated decision-making in terms of the specific circumstances of a particular case.

It is of course necessary to be aware that the ZVPSBNO is not, and cannot be, a perfect statute, since no statute is ever so. It is very probable that certain systemic or practical difficulties will appear in its application. If these are suitably demonstrated and argued, attempts will be made (and are being made in 2009) to find additional possibilities for the Act's suitable amendment, just as in terms of the comparative amending statute that was adopted in the Republic of Poland for the year 2009, in relation to certain amendments to the 2004 Act on complaints against violation of a party's right to trial without undue delay.[26] Irrespective of the aforesaid, effective and conscientious application of this Act is a commitment of the Republic of Slovenia, above all the judiciary and State Attorneys` Service. However, this is not a commitment only to the European Court of Human Rights or the European Convention on Human Rights, but also (mainly) to the Constitution of the Republic of Slovenia itself, and to parties in judicial proceedings, for whom **the right is of little or no benefit if it is delayed**.

[26] Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki; published in: Dziennik Ustaw of 2004 r., nr 179, poz. 1843.

4. A general review of the essential provisions of the ZVPSBNO, or "How to read the ZVPSBNO?"

a) The party to a court proceeding as the most important subject of the ZVPSBNO

Because the right to a trial or a decision without undue delay is ascribed to a party to court proceedings (under the first paragraph of Article 23 of the Constitution of the Republic of Slovenia this is "everyone"), it was necessary for the ZVPSBNO to also define the term part, as the most important term or subject of the Act. Article 2 ZVPSBNO thus defines the term party fairly widely, namely as a party to a court proceedings[27], a participant under the Non-Contentious Procedure Act and an injured party in a criminal proceedings (under the Criminal Procedure Act). The term party in relation to its fairly wide definition, e.g., also includes the State Prosecutor's Office (Article 144 of the Criminal Procedure Act, Article 36 of the Marriage and Family Relations Act, etc.), the State Attorneys` Service (Article 9 of the State Attorneys` Service Act, Article 100 of the Non-Contentious Procedure Act, etc.), the Securities Market Agency (Article 289 of the Securities Act), etc.

b) The validity of the ZVPSBNO for all courts of general jurisdiction and specialised courts in the Republic of Slovenia

The ZVPSBNO nowhere defines the term court, but does make frequent mention of it (second paragraph of Articles 1, 2, 5 and others, ZVPSBNO). The provisions of Articles 97 and 98 of the Courts Act[28] are important for defining the institution or expression "court", according to which courts constituted by statute (first paragraph of Article 23 of the Constitution of the Republic of Slovenia) are the following: courts of general jurisdiction and specialised courts, which means that the concept "court" includes only the cited courts! From that point of view, it does not apply to the Constitutional Court of the Republic of Slovenia, since the Constitutional Court is not a court in the sense of the provisions of the ZVPSBNO, with minor (indirect) exceptions in terms of Article 13 ZVPSBNO (see

[27] From the point of view of civil proceedings see the discussion on the expression party to a civil proceeding and commentary to Article 76 of the Civil Procedure Act by Dr Aleš Galič in: *Pravdni postopek, zakon s komentarjem* [Civil Procedure – Act with Commentary], Book I, ed.: Dr Lojze Ude and Dr Aleš Galič, Official Gazette RS, GV Založba, Ljubljana, 2005, pp. 313–329.

[28] Official Gazette RS, No. 94/07 – Officially Consolidated Text No.4 and 48/08.

point IV.12 of this presentation), namely, jurisdiction for deciding on a constitutional complaint under the Constitution of the Republic of Slovenia and Constitutional Court Act.

c) General binding criteria for decision-making under the ZVPSBNO

Article 4 of the ZVPSBNO contains general binding criteria for decision-making thereunder, in procedures of supervisory appeal, motions for a deadline and just satisfaction. The aforementioned standards, which are very detailed, but still open (*taking account of the circumstances of an individual case, in particular* [...]) therefore also apply to decision-making on pecuniary damage in connection with violation of a party's right to trial without undue delay, although this type of damage is not mentioned in Article 4, since the provision on pecuniary damage referred to in Article 21 ZVPSBNO is mainly of an indicative nature (except as it refers to standards under Article 4 of the Act). The cited standards are summarised mainly from those from the established case law of the European Court of Human Rights,[29] the more recent judgment of the aforementioned Court in the case *Frydlender v. France*[30] (paragraph 43 of the judgment) of 2000 very primarily important, including as it does the statement that:

> [The Court] *reiterates that the "reasonableness" of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see, among other authorities, Comingersoll S.A. v. Portugal [GC], no. 35382/97, § 19, ECHR 2000-IV).*

The standards referred to in Article 4 ZVPSBNO are to a certain extent adaptable, since they are used in relation to the circumstances of a specific case. Similar, though slightly narrower standards are also determined in the second paragraph of the applicable Article 13.a of the Courts Act[31]:

> *When determining the set order of hearing other cases, a judge may also take into consideration the category, nature and*

[29] See, e.g.: Marc-André Eissen, *The Length of Civil and Criminal Proceedings in the Case-Law of the European Court of Human Rights*, Strasbourg, Council of Europe Publishing, 1996. And also Donna Gomien, *Short Guide to the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, Third Edition, May 2005, mainly pp. 58–59.

[30] Judgment of the ECHR, Appl. No. 30979/96, 27. 6. 2000.

[31] Official Gazette RS, No. 94/07 – Officially Consolidated Text No.4 and 48/08.

> *meaning of the case, in addition to the date of filing this case at the court.*

As a possible example of the use of such standards in specific decision-making, the reasoning of the decision of the Constitutional Court of the Republic of Slovenia from June 2003 is important, the the Constitutional Court then deciding in connection with a case which had been heard by the Supreme Court of the Republic of Slovenia as of July 2002[32], that:

> [6. ...] *In view of the fact that the appeal was filed in July 2002, that the Supreme Court certainly took into account the importance of this matter to the applicant in deciding the set order of hearing it, and that the case will be resolved in the next four months, the Constitutional Court finds that in the case in question there has clearly been no violation of the applicant's right to trial without undue delay. It did not therefore accept the constitutional complaint for hearing.*

d) The expressions "supervisory appeal" and "motion for a deadline"

Because of legal tradition, and in view of the fact that supervisory appeal under Article 6 of the ZVPSBNO is still a part of the operations of court management, the expression "supervisory appeal" (*nadzorstvena pritožba*) has been retained[33]. The expression "motion for a deadline" (Article 8 of the ZVPSBNO – *rokovni predlog*) is a new one ("neologism"), created under the influence of Article 91 of the Act on the Organisation of the Courts of the Republic of Austria, in which since 1989 a new procedural institution has been defined – the motion for specifying a deadline (*Fristsetzungsantrag*).

e) "Formalisation" of "supervisory appeal" and "motion for a deadline"

It is also possible to pose a question regarding of alleged exaggerated "formalisation" of the content and procedure for a "supervisory appeal" and "motion for a deadline". The contents of a supervisory appeal filed under the second paragraph of Article 5 and the motion for a deadline under the second paragraph of Article 8 of ZVPSBNO are indeed fairly formalised. The intention of this formalisation is to assist the parties of

[32] Decision of the Constitutional Court, No. Up-119/03, 13. 6. 2003; published in: Official Gazette RS, No. 63/03.

[33] See also the slightly updated traditional institution of the same term supervisory appeal in Article 68 of the State Prosecutor's Office Act (Official Gazette RS, No. 94/07 – Officially Consolidated Text No. 5) as "means" for speeding up the "state prosecutor's procedure".

court proceedings, so that it is absolutely clear to them what they should submit with both legal remedies and, at the same time, also to facilitate operations of court management. In addition, it is necessary to take account of the fact that remedies, irrespective of their statutory definition, are at least to some extent associated with a special administrative procedure, this of course mainly goes for supervisory appeal.

From the practical point of view, the formalisation of the two legal remedies also means that parties to court proceedings may no longer submit to the courts or to the Ministry of Justice (Article 14 ZVPSBNO) a mass of copies of the content of their applications to courts, evidence, for court proceedings, cite other reasons for filing a supervisory appeal (e.g., suspected improper decision by a judge, suspected partiality of a judge, suspected corruption of a judge, suspected violation of the presumption of innocence in court proceedings, etc.), send copies of newspaper articles, tapes, videos etc.

f) The first accelerating legal remedy: supervisory appeal

A supervisory appeal under Articles 5 and 6 of ZVPSBNO is actually a legal remedy of a party to court proceedings against the "silence of the court management" in the wider sense. It is not of course a legal remedy against the "silence of a president of a court" that engage in matters of court management, but against the judge or panel of judges that "manages" a specific case file – it is alleged, namely, that the judge or panel of judges is not deciding without undue delay. The president of the court or other judge authorised for this by the annual schedule of allocation (eighth paragraph of Article 6 ZVPSBNO; this will normally be the vice-president of the court), will decide on a supervisory appeal filed as a matter of court management. That the proper procedural rules stem from rules on managing matters of court management derives from the provisions of the first and second lines of the third paragraph of Article 6 ZVPSBNO, namely: *within the framework of the excersise of court management competencies under the statute regulating the courts.* This is a so called "dual instructive norm", it says that the decision-making of the president of the court or other authorised judge on a supervisory matter is a matter of court management (the same derives also from the second paragraph of Article 1 ZVPSBNO – "engoging in a matter of court management"), after which the user of the Act is first directed to the Courts Act, which in the first paragraph of Article 60 defines the expression "court management", and then under the provisions of the third paragraph of Article 60 of the Courts

Act is for the second time directed to the **mutatis mutandis application of the provisions of the General Administrative Procedure Act**[34] in relation to engagement in matters of court management. From the provisions of the third paragraph of Article 60 of the Courts Act it also follows that, whenever it is necessary in a matter of court management to decide on the rights, obligations or legal benefits of a person, in the procedure of decision-making, the provisions of the General Administrative Procedures Act are *mutatis mutandis* applied... This means that the Courts Act already to some extent, with the use of the neutral expression "person" traditionally (since 1994) leaves open space for wider performance of the competencies of court management, not only in relation to the position of judges and court personnel, but also for the wider circle of "persons".

From the point of view of how case law defines the expression "court management" systemically, the precedent and leading judgment of the Supreme Court of the Republic of Slovenia of 1997 is most important, in which it is stated:[35]

> ***The concept of court management is wide both in relation to the subjects that engage in it*** *(presidents of courts – first paragraph of Article 61 of the Courts Act (ZS), Judicial Council – Articles 28 and 95 ZS, personnel council – Article 30,69 and 71 ZS) and* ***in relation to its objects (which often concern the position or rights of judges****). There can therefore be no doubt that the rights of judges as persons are also decided in cases of court management (as is clearly confirmed by the content of the third paragraph of Article 60 ZS, which also refers to the Judicial Service Act, the subjects of which are judges). Because deciding on judges' rights is considered an administrative matter, in the decisionmaking procedure,* ***the provisions of the General Administrative Procedure Act (ZUP) are applied mutatis mutandis****, insofar as it is not determined otherwise in the ZS or ZSS (third paragraph of Article 60 ZS).* ***An act by which the president of a court decides on a judge's rights****, which includes the right to redundancy pay,* ***in view of everything that has been said, is an administrative act****.*[36]

A party files a supervisory appeal with the court that is trying (resolving or deciding on) the party's case (first paragraph of Article 5 ZVPSBNO), or **secondarily** with the Ministry of Justice, which refers it to

[34] Official Gazette RS, No. 24/06 – UPB2, 105/06 – ZUS-1, 126/07 and 65/08.

[35] Ruling of the Civil Department of the Supreme Court of the Republic of Slovenia, Ref. No. II Ips 612/95, 3. 4. 1997.

[36] All emphases in the extracts of the decision of the Supreme Court are the Author's.

the president of the court of proper jurisdiction (first paragraph of Article 14 ZVPSBNO). If a supervisory appeal is filed with another court or another body lacking jurisdiction (another court, the Human Rights Ombudsman, the Commission for Petitions and Human Rights and Equal Opportunities of the National Assembly of the Republic of Slovenia, the President of the Republic, the Prime Minister of the Republic, etc.) this body is obliged, on the basis of the fourth paragraph of Article 65 of the General Administrative Procedure Act, to refer the appeal without delay to the court hearing the party's case.

From the point of view of the entire legal text, it is also specified in the third paragraph of Article 6 ZVPSBNO that the word "judge" means a judge or president of a panel of judges.

From the practical point of view, a certain "facility" is prescribed for the decision-making of the president of a court, that under the first paragraph of Article 6 he may **by ruling reject** a supervisory appeal as clearly unfounded, if in view of the party's own statement of the duration of the process of resolving a case it is shown that there has been no violation of the right to trial without undue delay. The president of the court in such a case may decide fairly quickly, without obtaining the party's case file, since the time course for resolving the case (e.g., a claim for damages had been filed two months ago) derives from the party's statements. In addition, **this is a ruling on a clearly unfounded supervisory appeal**, which is possible in view of the "nature of the matter" to decide only in relation to the question of the time course of the case. Legal remedy is also specified against an inappropriate ruling by a president of a court under the first paragraph of Article 6 ZVPSBNO, to wit it is possible to file a motion for a deadline under Article 8 ZVPSBNO.

Under the second paragraph of Article 6, the president of a court may **dimiss by ruling** a supervisory appeal that does not contain the compulsory elements provided for in the second paragraph of Article 5 ZVPSBNO. The president of a court does not therefore call on a party to complete the application in compliance with the provisions of the General Administrative Procedures Act! Dismissing a supervisory appeal by ruling does not signify preclusion for a party, since immediately after receipt of the ruling he may file a new, contextually complete supervisory appeal. It is explicitly determined that appeal is not allowed against a ruling on dismissal, but an action in on administrative dispute (before the Administrative Court of the Republic of Slovenia) is certainly possible, although a party that used this remedy instead of filing a new supervisory appeal would actually perhaps want to prove a certain passivity in his case (the general compulsory standard referred to in Article 4 ZVPSBNO). The purpose

of this standard is, of course, to ensure the economy and effectiveness of the procedure of supervisory appeal, in such a way that a party to a court proceeding must be absolutely familiar with his own personal data or data on his court case, and the measure cannot thus be considered excessive.

The president of a court may not only dismiss a supervisory appeal, but also make use of other possibilities under the statute or Court Rules – to grant the party's claim in another way, e.g., by drawing the judge's attention to the fact that, from the point of view of the order of hearing cases, he may also take account of special circumstances referred to in the second paragraph of Article 13a (on the basis of the first paragraph of Article 60 of the Courts Act). However, this is not a statutory obligation in connection with ZVPSBNO, nerely a possibility from the point of view of discharging the responsibility of court management to ensure the regular exercise of judicial authority.

The third paragraph of Article 6 ZVPSBNO is the most **"content--rich provision" in relation to a supervisory appeal**. From the point of view of a party to court proceedings, measures according with the cited provision are most important in the protection of the right to trial without undue delay. If the president of a court, on the basis of a supervisory appeal filed by a party, finds that there is unnecessary delay in the court deciding in the case, he first orders that a report be submitted to the judge or president of a panel of judges on the reasons for the duration of the procedure in the case, not later than 15 days after receipt of the supervisory appeal. The judge may similarly as necessary also examine the case record if this is necessary for producing his report. This will probably be so in almost all supervisory appeals. The president of the court may also request than the judge submit the party's case file for examination even before he/she receives the report of the judge, if he/she considers it must be inspected in relation to the content of the party's statements in the supervisory appeal.

Decisionmaking in a case of the fourth paragraph of Article 6 ZVPSBNO, when the president of the court resolves the party's case with information, is less formalised, since the president of the court does not issue a ruling but only informs the party in writing that, on the basis of information from the written notice to the judge, certain procedural acts will be performed or a judgment issued, in no more than four months. In the event of the procedural acts not being performed within the time limits from the note of the president of the court, the party has available a legal remedy or judicial protection in the form of a motion for a deadline (first paragraph of Article 8 of ZVPSBNO).

Under the fifth paragraph of Article 6 of ZVPSBNO, if after all acts under Article 6 ZPSSBNO have been performed, the president of a court finds that, in relation to the general compulsory standards referred to in Article 4 of ZVPSBNO, the court is not unnecessarily delaying decision-making in the case, he issues a ruling by which he rejects the supervisory appeal.

In accordance with the sixth paragraph of Article 6 ZVPSBNO, if after receiving and studying the report of a judge or also after inspection of the party's case file the president of a court finds that the court is unnecessarily delaying deciding, depending on the state and nature of the case, he orders by ruling a deadline for performing specific procedural acts, and may also, depending on the specific circumstances of the case, in particular if the matter is urgent, order its priority resolution. If the president orders a judge to perform relevant procedural acts, he also specifies a time limit for performing them, which may not be shorter than fifteen days and not longer than six months, and depending on the nature and state of the case also specifies a suitable time limit within which the judge must report on the acts performed (e.g., five or ten days after the procedural act has been performed).

The measure under the seventh paragraph of Article 6 ZVPSBNO is rather less important, concerning the question of reassigning a case or cases to another judge as a result of an assessment of the situation in a procedure of supervisory appeal, thus more of a "pure matter of court management". The aforementioned measure, which is to the advantage of parties in a court proceedings, is probably not questionable from the point of view of the constitutional right to the natural (lawfully appointed) judge referred to in the second paragraph of Article 23 of the Constitution of the Republic of Slovenia, of course if in reassigning cases the Court Rules on assigning cases are respected (Article 162 of Court Rules[37]).

g) The second accelerating legal remedy: motion for a deadline

Article 8 ZVPSBNO defines the initial part of a proceeding according to a motion for a deadline. The first paragraph, specifies when a party may file a motion for a deadline, conditions for filing it being bound to a prior (procedural presumption) ruling or inappropriate ruling on a supervisory appeal. The reasons for filing a motion for a deadline are for the most part the same as for filing a supervisory appeal. The second paragraph

[37] Official Gazette RS, Nos. 17/95, 35/98, 91/98, 45/99 – decision of the Constitutional Court, 22/00, 113/00, 62/01, 88/01, 102/01, 22/02, 3/03 – Decision of the Constitutional Court, 15/03, 75/04, 138/04, 74/05, 5/07, 82/07, 16/08, 93/08, 110/08 and 117/08.

specifies that a motion for a deadline must contain the same elements as a supervisory appeal (referral to the second paragraph of Article 5 ZVPSBNO). The third paragraph specifies that a party may file a motion for a deadline only within 15 days of receipt of the ruling or the expiration of time limits referred to in the first paragraph of Article 8 ZVPSBNO.

A motion for a deadline is a devolutionary legal remedy, since competent courts or judges for deciding on motions for a deadline are specified in Article 9 ZVPSBNO. For deciding on motions for a deadline in relation to the cases of parties being heard in local or district courts and other courts of first instance, jurisdiction is with the president of the higher (appellate) court of the court district to which the court of first instance belongs. For deciding on motions for a deadline in relation to cases of parties being heard by a higher court or court with the position of a higher court (e.g., the Administrative Court of the Republic of Slovenia), the President of the Supreme Court of the Republic of Slovenia has jurisdiction. For deciding on motions for a deadline in relation to cases of parties being heard by the Supreme Court of the Republic of Slovenia, the President of the Supreme Court of the Republic of Slovenia has jurisdiction; in a case in which the President of the Supreme Court of the Republic of Slovenia is himself deciding in a case as a member of a panel or as a specialised individual judge (first paragraph of Article 24 and Article 24.c of the Slovenian Intelligence and Security Agency Act[38]), a judge of the Supreme Court determined by the annual schedule of allocation will decide (fourth paragraph of Article 9 ZVPSBNO). All the aforementioned presidents of courts may authorise another judge or judges from their courts to decide on motions for a deadline on the basis of the annual schedule of allocation – annual schedule of allocation of legal fields to judges or annual schedule of designation of judges within departments of courts.[39] The aforementioned arrangement of some sort of "devolution of decision-making" to superior (higher by instance of decision-making) courts is comparable with decision-making under the first paragraph of Article 91 of the Organisation of Courts Act of the Republic of Austria, since under the cited provisions superior courts similarly decide on a party's motion for specifying a deadline. This arrangement is comparable with the arrangement of deciding on parties' complaints because of violations of the right to a trial without undue delay in the Republic of Poland, since also in the Republic

[38] Official Gazette RS, No. 81/06 – Officially Consolidated Text No. 2.

[39] This explanation, took into account the fact that the Amending Act to the Courts Act of 2006 (Official Gazette RS, No. 127/06) Article 6, which amends Article 71 of the Courts Act), determines that the annual schedule for the allocation of judges to specific legal fields is decided by the president of the court.

of Poland, on the basis of Article 4 of the Act, immediately superior courts decide on complaints of violation of a party's right to trial without undue delay. From the point of view of the court system (organisation of the courts) in the Republic of Slovenia, the arrangement by which superior courts decide on motions for a deadline is the best solution and is also comparable with those in the aforementioned countries with similar judicial systems and partially also similar legal traditions.

Article 10 ZVPSBNO specifies the obligation of a court of first instance that has received a motion for a deadline from a party, to submit it without delay, together with the case file and the file of the supervisory appeal to the president of the court of higher instance with jurisdiction to decide on motions for a deadline.

Articles 11 and 12 ZVPSBNO are the most important Articles from the point of view of the content of decision-making and the procedure for a motion for a deadline.

The first, second and third paragraphs of Article 11 ZVPSBNO are essentially almost literal "transcriptions" of the provisions on supervisory appeal from the first, second and fifth paragraphs of Article 6 ZVPSBNO, with the minor exception of the second paragraph of Article 11 ZVPSBNO, wherein the issue of a ruling dismissing the motion for a deadline if it was not filed within 15 days of receipt of the ruling of the president of the court on the supervisory appeal, or the expiry of time limits referred to in the first paragraph of Article 8 of ZVPSBNO, is determined.

In the fourth paragraph of Article 11 ZVPSBNO, from the point of view of the effectiveness of the legal remedy, the content of the ruling that the president of a superior court (of higher instance) may adopt is specified. The ruling in the fourth paragraph of the aforementioned article is comparable in terms of content with the ruling of a president of a court in relation to a supervisory appeal under the sixth paragraph of Article 6 ZVPSBNO. The president of the court or the judge specified in the annual staff disposition, may *mutatis mutandis* order the same measures to accelerate the resolution of a case as is determined for the supervisory appeal, with the essential "added value" that the party's motion for accelerating resolution of a case is no longer resolved by the court in which the case is being heard (allegedly too slowly).

The fifth paragraph of the stated Article determines that the president of a court must decide on a motion for a deadline within 15 days of its receipt.

A motion for a deadline is thus a legal remedy that simultaneously contains elements of judicial protection and elements of legal remedy

(taking into account the procedural provisions referred to in Article 12 ZVPSBNO). Bearing in mind that a higher court than those in which cases are being heard decides on motions for a deadline, the provision of the fourth paragraph of Article 11 ZVPSBNO on the possible ordering of the priority hearing of a case is also fairly important. The cited provision is primarily relevant to higher courts, which will be able to decide from the point of view of a court of second instance whether it is necessary for the court of first instance (local or district court) to hear the case as priority. To wit, certain cases are already heard by a court of first instance as a priority under the statute (e.g., Article 60 of the Enforcement and Securing of Civil Claims Act) or on the basis of Court Rules (third paragraph of Article 230), so, because of the priority hearing of the cited cases, "ordinary" cases are lost among them, or reach the head of the line only very slowly. Since higher courts by their nature (jurisdiction for appellate decision-making) are somewhat "removed" from courts of first instance, also from other points of view (monitoring the movement of cases in relation to which on appeal is filed), like presidents of courts of first instance in the procedure of supervisory appeal they can judge whether it is necessary to hear a case as a priority.

h) Questions of the mutatis mutandis use of the provisions of the Civil Procedure Act by motion for a deadline

Article 12 ZVPSBNO determines that, in a procedure deciding on a motion for a deadline by a president of a superior court or judge specified by the president of this court in the annual schedule of allocation that was explained above, use shall be made mutatis mutandis of the provisions of the Civil Procedure Act[40], which regulates the determination of a deadline by a court and a ruling and appeal against a ruling. Procedural rules in relation to decision-making on motions for deadlines are therefore in outline the following: the president of a superior court or judge from his court, on the basis of the mutatis mutandis use of the provisions of the Civil Procedure Act (first paragraph of Article 110), decides on specifying a deadline for a court in relation to the circumstances of the case, and, in relation to an appeal against a ruling of the president of a court of lower instance on a supervisory appeal, applies **mutatis mutandis** the provisions of Article 366 of the Civil Procedures Act, under which **there has been no (!) response to the appeal (thus in this case to the motion for a deadline)**

[40] Official Gazette RS, Nos. 36/04 – Officially Consolidated Text No. 2, 69/05 – Decision of the Constitutional Court, 90/05 – Decision of the Constitutional Court, 43/06 – Decision of the Constitutional Court, 52/07, 45/08, 45/08 – ZArbit and 111/08 – Decision of the Constitutional Court.

or a hearing before a court of second instance (thus before the president of the court of jurisdiction).

Why the special stress that there was no response to the appeal? Because a Decision of the Constitutional Court of the Republic of Slovenia in connection with Article 366 was published on **21 April 2006**,[41] when the procedure adopting the ZVPSBNO at the National Assembly of the Republic of Slovenia was practically completed and it was not possible, perhaps with a suitable amendment, to take a position in relation to the provisions of Article 366 of the Civil Procedures Act (to decide in view of the nature of the matter a different arrangement than that which derives from the Decision of the Constitutional Court). Pursuant to the Decision of the Constitutional Court, namely, in a procedure of appeal against a ruling, the existing provision of Article 366 of the Civil Procedures Act on the exclusion of the use of the provisions in relation to serving an appeal on an opposing party and the possibility of answer to an appeal, is annulled.

The cited Decision of the Constitutional Court of the Republic of Slovenia, from the point of view of deciding on a motion for a deadline, together with respect for the phrase »shall mutatis mutandis use« referred to in Article 12 of ZVPSBNO, must probably be interpreted thus:

In relation to the ***mutatis mutandis* application** of the provisions of Article 366 of the Civil Procedure Act under Article 12 of ZVPSBNO, **the president of a court will not order the a motion for a deadline received to be served on the opposing party in court proceedings and prior to a final ruling on the motion for a deadline will not wait to receive an answer from the opposing side in the judicial proceedings**. Why not? Because already by the nature of the matter this is not a case of an opposition between two "classical parties" in civil proceedings, who have equal rights therein (the principle of equality of arms), but the relation between (generally) one party of court proceedings and the court (the court management) and thus Article 366 of the Civil Procedure Act is applied in the described *mutatis mutandis* manner. A motion for a deadline need not therefore be served on the opposing party to the court proceedings.

i) The "Hybrid nature" of legal remedies (between administrative and civil procedures)

In relation to the presentation given of procedures of supervisory appeal and motion for a deadline under ZVPSBNO it is possible to state

[41] Decision of the Constitutional Court, No. U-I-55/04, 6. 4. 2006; published in: Official Gazette RS, No. 43/06.

that from the point of view of effective legal remedy for protection of the right to trial without undue delay, it is some kind of "leap" between judicial administrative legal remedy (supervisory appeal – *mutatis mutandis* application of the provisions of the General Administrative Procedure Act) and "legal judicial remedy" – (motion for a deadline – *mutatis mutandis* application of the provisions of the Civil Procedure Act).

j) Aggregate of legal remedies

In relation to the legally specified effect of the provisions of ZVPSBNO on a motion for a deadline, together with supervisory appeal and with just satisfaction under Articles 15 to 21 ZVPSBNO, supervisory appeal, motion for a deadline and forms of just satisfaction thus signify an aggregate of legal remedies in the sense of Article 25 of the Constitution of the Republic of Slovenia and Article 13 of the European Convention of Human Rights.

From the point of view of Article 13 of the European Convention on Human Rights, in connection with the aggregate of legal remedies, the statement of the European Court of Human Rights in the pilot case of *Lukenda v. Slovenia* is important, that legal remedies to date of supervisory appeal, administrative dispute, civil law damages claims or constitutional appeals cannot be considered effective legal remedies, and nor is an aggregate of these legal remedies in relation to the circumstances of cases in question an effective legal remedy (stated in particular in paragraph 87 of the judgment). In addition, from the point of view of effective legal remedy, some type of *obiter dicta* statement arises from the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Scordino v. Italy (no. 1)* of 29 March 2006, in which it is stated that certain state signatories to the European Convention on Human Rights excellently understand the situation in relation to protection of the right to judgment in a reasonable time and have chosen (legislated) a combination of two types of legal remedy; to wit, one which is specified for speeding up a court proceeding and the other which is specified for awarding damages (paragraph 186 of the judgment). It was speculated in 2006 that it is possible to expect that the European Court of Human Rights, in the first judgment on the Protection of the Right to Trial without Undue Delay Act of the Republic of Slovenia in relation to the question of whether the Republic of Slovenia has effective legal remedy for protection of the right to trial in a reasonable time, will decide from the aspect of the positions taken in the two cited cases in relation to an aggregate of legal remedies or combination of two types of legal remedy, together of course with the simultaneous study of the situation of case law of the courts of the Republic

of Slovenia on supervisory appeals, motions for a deadline and just satisfaction according to the provisions of ZVPSBNO, which the State Attorneys` Service of the Republic of Slovenia acting as an Agent of the Republic of Slovenia before the European Court of Human Rights will submit to the Court. As a result of this "academic speculation" see the case of *Grzinčič v. Slovenia*[42], described under XIII. of this text.

The Constitutional Court of the Republic of Slovenia will also probably have to decide at some time in the future on the question of whether the provisions of ZVPSBNO on motions for a deadline, supervisory appeals and just satisfaction signify effective legal remedy under the terms of Article 25 of the Constitution of the Republic of Slovenia. Precedent constitutional case law of the Constitutional Court of the Republic of Slovenia in relation to effective legal remedy referred to in Article 25 of the Constitution of the Republic of Slovenia is mainly the following:

- Decision of the Constitutional Court No. U-I-98/91, 10.12.1992[43],
- and a more recent Decision of the Constitutional Court, No. Up-527/03, 9. 12. 2004[44] – in this Decision, the Court referred to the cited decision of the Constitutional Court of 1992, and in connection with Article 25 of the Constitution of the Republic of Slovenia it was repeated that [10. ...] *the sense of this constitutional guarantee is not only in that it guarantees an individual the right to file legal remedy, but above all that by the filing of legal remedy he can* ***effectively defend and protect his own legal interest***.

It is possible to assume that the Constitutional Court of the Republic of Slovenia, in relation to the question of whether the aforementioned "aggregate of legal remedies" is effective legal remedy in the sense of Article 25 of the Constitution of the Republic of Slovenia, will take into account, not only its own cited settled constitutional case law but also the case law of courts of general jurisdiction and specialised courts, in relation to supervisory appeal and motion for a deadline (the argument of the actual effect of ZVPSBNO in practice). Alongside this question, there will probably also be another, as to whether the presented legal "hybrid" between administrative and civil procedures, in view of the provisions of Article 25 and the first paragraph of Article 23 of the Constitution of the Republic of Slovenia, is suitable from the point of view of the right to judicial protection

[42] Judgment of the ECHR, Appl. No. 26867/02, 3. 05. 2007.
[43] Official Gazette RS, No. 61/92 and OdlUS I, 101.
[44] Official Gazette RS, No. 138/04.

under the first paragraph of Article 23 of the Constitution of the Republic of Slovenia.

k) Restrictions on filing supervisory appeals and motions for a deadline

Article 7 ZVPSBNO specifies restrictions in relation to the repetitive filing of supervisory appeals and motions for a deadline. This provision reflects issues of "court management or procedural economy" and a party's abuse of procedural rights. The first paragraph of the cited Article specifies that, if the president of the court acts in compliance with the fourth or sixth paragraphs of Article 6 ZVPSBNO, that is to say that he informs he party that certain procedural acts will be carried out or a ruling issued within four months (fourth paragraph of Article 6 ZVPSBNO), and if he ordered the judge or president of the panel to perform a particular procedural act within a time limit, or hear the case as priority (sixth paragraph of Article 6 ZVPSBNO), then the party may not file a new supervisory appeal nor a motion for a deadline in the same case before the expiry of deadlines from the notices or ruling of the president of the court. In view of the argument of "the nature of the matter", this provision explicitly does not apply in a case in which detention or a tempo- rary injunction has been ordered. Under the second paragraph of Article 7 ZVPSBNO, however, in a case in which the president of the court has issued a ruling in compliance with the first or fifth paragraphs of Article 6 ZVPSBNO (a ruling on rejection if the supervisory appeal is manifestly unfounded or if the court is not unnecessarily delaying a decision in the case) a party may only file a new supervisory appeal after six months have passed since receiving the ruling. This provision similarly does not apply to cases in which detention or a temporary injunction have been proposed.

l) The issue of constitutional complaint

It is undoubtedly also possible to question whether a constitutional complaint (before the Constitutional Court of the Republic of Slovenia) may be filed against a ruling of rejection by the president of a court on a motion for a deadline. The answer is probably in the affirmative. For Article 13 ZVPSBNO specifies that appeal may not be filed against a ruling of a president of a court on a motion for a deadline under Article 11 ZVPSBNO. However, the cited provision does not exclude the possibility of a party filing a constitutional complaint with the Constitutional Court of the Republic of Slovenia, since a constitutional complaint is neither a regular nor a extraordinary legal remedy. In addition, the Constitution of the Republic of Slovenia "constitutionalises" constitutional complaint in

the sixth indent of the first paragraph of Article 160, as a special legal remedy which may be filed because of a violation of human rights and fundamental freedoms by individual acts. A ruling on a motion for a deadline is undoubtedly a final judicial decision, and the right to trial without undue delay referred to in the first paragraph of Article 23 of the Constitution also belongs among human rights (therefore not just a constitutional right, but also be intentiallu a statutory right or right under international treaty). The third paragraph of Article 160 of the Constitution specifies that the Constitutional Court decides on a constitutional complaint for the most part (!) only if legal remedies have been exhausted. From the point of view of effective legal remedy for protection of the right to trial without undue delay, legal protection has undoubtedly already been exhausted with the issue of a ruling on a motion for a deadline, so a constitutional complaint to the Constitutional Court of the Republic of Slovenia can very probably be filed.

5. Competences of the Ministry of Justice under the ZVPSBNO

The competences of the Ministry of Justice of the Republic of Slovenia are specified in Article 14 and the second paragraph of Article 26 ZVPSBNO. Article 14 in particular specifies the systemic competences of the Ministry of Justice in relation to supervisory appeals and motions for a deadline. The first paragraph first regulates the competences of the Ministry of Justice (more precisely, the Minister of Justice) in relation to supervisory appeals filed directly therewith. The procedure for hearing them is the same as under the provisions of the present fifth paragraph of Article 72 of the Courts Act. Namely, the Minister of Justice refers (transfers) supervisory appeals to the president of the competent court and requests that he be informed of the findings from the procedure of supervisory appeal and the ruling of the president of the court. The second paragraph of Article 14 specifies the behaviour (procedure) of the Minister of Justice with an incomplete supervisory appeal. Since the intention of the first and second paragraphs of Article 14 of the Act is the assistance of parties in suitably exercising their rights in relation to protection of the right to trial without undue delay, in a case of a supervisory appeal being incomplete (not containing the compulsory elements under the second paragraph of Article 5 of the Act), the Minister of Justice calls on the party to supplement it (with missing elements) within eight days. If within the stated time limit the party augments the supervisory appeal with the missing compulsory elements, it is dealt with as a complete supervisory appeal. If

the party does not complete it, the Minister of Justice dismisses it by means of a ruling, and appeal is not allowed against a ruling of dismissal. Action in an administrative dispute, however, may be filed against a ruling of dismissal (judicial protection before the Administrative Court of the Republic of Slovenia), but it is possible to suggest that an administrative dispute would almost always be unsuccessful, since the provisions on when the Minister of Justice may for formal reasons (incomplete compulsory elements) dismiss an incomplete supervisory appeal by a ruling are fairly clear. In addition, a party may file a new (complete) supervisory appeal immediately after the ruling on dismissal and so it is not possible to imagine very many such disputes. Therefore, from the point of view of the question of completing an incomplete supervisory appeal the procedure of hearing a supervisory appeal under the second paragraph of Article 14 ZVPSBNO differs considerably from the provision of the second paragraph of Article 6 ZVPSBNO. To wit, it is assistance that the executive branch offers, which does not (!) decide on the right to a trial without undue delay, since it is not the judicial branch of power and is therefore entitled to come up with active offers of advice to parties unlearned in law some advice.

It must be stressed that systemic legislation in the sphere of state administration enables the Minister of Justice to be replaced in some deciding or administering cases by a State Secretary at the Ministry. This general rule also applies to the procedure of referring supervisory appeals to the competent court. On the basis of the first sentence of the third paragraph of Article 17 of the State Administration Act[45], namely, the **Minister may authorise in writing the State Secretary (Deputy Minister) to replace him or her during his or her absence or when he or she is temporarily prevented from functioning, for leading and representing the Ministry** and proposing material for governmental consideration. When the Minister of Justice is absent or temporarily prevented from functioning, therefore, the State Secretary may also sign the referral of a supervisory appeal to the president of the competent court, or make a proposal for review of business to the president of the higher court of jurisdiction.

The third and fourth paragraphs of Article 14 ZVPSBNO determine the authority of the Minister of Justice in relation to the obtainment and use of data and information from the courts in relation to supervisory appeals. The cited competences are in compliance with the constitutional principle of the separations of powers (Article 3, paragraph 2 of the Constitution of the Republic of Slovenia) or, more specifically, with the principle

[45] Official Gazette RS, Nos. 113/05 – Officially Consolidated Text No. 4, 126/07 – ZUP-E and 48/09.

of checks and balances. This is to say that, in relation to his competences, the Minister of Justice has certain instruments available with which he can obtain and then use specific data or information created in the couse of the work of the judicial branch. The cited provision **does not encroach on the material or procedural independence as regards decision-making by judges** (Article 125 of the Constitution of the Republic of Slovenia). From the point of view of the first and second paragraphs of Article 38 of the Constitution (protection of personal data), the purpose of the collection and use of such personal data that a court will submit to the Minister of Justice is also specified (point 1 in connection with point 2 of Article 6 of the Protection of Personal Data Act[46]). Specifically (under paragraph 4 of Article 14 ZVPSBNO):

> ***The Ministry may use and process personal and other data and information*** *from the documents referred to in paragraph three of this Article* ***for the purpose*** *of implementing or proposing measures or proceedings under the provisions of the statute regulating judicial service, particularly with regard to the assessment of judicial service, proceedings for establishing disciplinary responsibility of a judge, for the implementation or for proposing measures or proceedings based on other statutory powers or obligations of the Ministry, particularly for assessing the state prosecutor's service or proceedings for establishing disciplinary responsibility of a state prosecutor, for the purpose of statistical and scientific research or for the purpose of preparing draft statutes law and other regulations within the competence of the Ministry.*

Thus, among other things, the provision of the fourth paragraph of Article 14 ZVPSBNO enables the Ministry of Justice, should it find certain deficiencies in the work of a judge or judges, while monitoring supervisory appeals and motions for a deadline to propose the introduction of disciplinary procedure against a judge, or that the cited decisions are taken into account in the assessment of judicial service, the consequences whereif i.a. including dismissal of a judge. The same also applies *mutatis mutandis* to proceedings conducted by a state prosecutor.

The fifth paragraph of Article 14 ZVPSBNO lays down time limits for archiving used personal data.

The competences of the Ministry of Justice under Article 14 ZVPSBNO signify the classical performance of competences of regarding judicial administration under the Courts Act (Article 74). From the point

[46] Official Gazette RS, No. 94/07 – Officially Consolidated Text No. 1.

of view of the constitutional principle of the separation of powers (into legislative, executive and judicial branches) (second sentence of the second paragraph of Article 3 of the Constitution of the Republic of Slovenia) this signifies practical embodiment of the principle of checks and balances, which derives from the cited constitutional principle. The Ministry of Justice does not decide whether the right to trial without undue delay has been violated in a case whereby a party has filed a supervisory appeal, or within what kind of time limit, or how the cited case should be resolved, since such measures would signify violation of the second paragraph of Articles 3 and 125 of the Constitution of the Republic of Slovenia (the latler on independence of judges). Thus the Ministry only assigns supervisory appeals of parties to the president of the court of jurisdiction and obtains return information on decisions of the courts on supervisory appeals and motions for deadlines, which it can use for purposes specified in the fourth paragraph of the ZVPSBNO.

It is important to highlight that there is no provision in the ZVPSBNO for a case in which a party to judicial proceedings files a motion for a deadline with the Ministry of Justice. In the latler case, the Ministry of Justice will have to cede the motion to the court of jurisdiction without delay, making direct use of the fourth paragraph of Article 65 of the General Administrative Procedure Act.

The second paragraph of Article 26 ZVPSBNO (by which the first paragraph of the Courts Act is amended in relation to a review of business) is, on the one hand, connected with the deleted Article 72 of the Courts Act, to which the first paragraph of Article 73 of the Courts Act refers *mutatis mutandis* and, on the other hand, specifies more precisely the procedure and purposes of the classical institution of **review of business operations** which were somewhat substandardly regulated upon in the first paragraph of the present Article 73 of the Courts Act. The competences of the Ministry of Justice in relation to the use of the results of reviews of business are only prescribed slightly more precisely. With the use of provisions of applicable legislation they were already much the same prior to these changes. The cited changes have been applied as of 1 January 2007.

6. The Question of independent decisionmaking by judges

It is also possible to raise a question as to whether perhaps measures taken by presidents of courts in a procedure deciding on a supervisory appeal or motion for a deadline encroach upon the independent

decision-making of judges and members of a panel of judges (Article 125 of the Constitution of the Republic of Slovenia and first sentence of the first paragraph of Article 6 of the European Convention on Human Rights) The answer to this question is negative, since it is **a special "judicial method" of protecting the rights of parties to a court proceedings to trial without undue delay (a right under the first paragraph of Article 23 of the Constitution of the Republic of Slovenia), such that the president of the court does not encroach on the independent decision-making of a judge**. A judge is still primarily responsible and competent to judge when a case is "ripe" for judgment. The president of a court or judge who is authorised to decide on a supervisory appeal or motion for a deadline by the annual staff disposition ("authorised judge") is a specialised judge who decides under a special procedure under the ZVPSBNO as an independent judge of the court, such that the conditions of Article 125 of the Constitution of the Republic of Slovenia are fulfilled. The president of a court will not therefore be able to decide in place of a judge whether all the conditions for the handing down of a judgment or decision are met. He/she may only decide on speeding up the steps to that "moment", when the party's right to trial without undue delay is violated (e.g. order that a hearing be called within a specified time if it follows from the judge's report or data from the record of the case that it is necessary to examine further specific witnesses), but he cannot by his decision replace the judge's internal conviction or certainty (*intime conviction*)[47], that the case is ripe for a final judgment (issue of a judgment or decision by which the matter is completed). After a judgment has been handed down, the president of the court or authorised judge may of course order that a (written) judgment be produced within a time limit, if such has not been produced within the time limit prescribed legally (e.g., under the first paragraph of Article 323 of the Civil Procedure Act), and this is also no encroachment on the independent decision-making of a judge.

In terms of comparative law, the Republic of Poland for example took an explicit position in law as regards the question of the protection of the independence of a judge when a superior court, on the basis of a complaint from a party to court proceeding, orders a judge to speed up the solution of a party's case (provision of the second sentence of the third paragraph of Article 12 of the Complaints of Violation of Parties' Right to Trial without Undue Delay Act[48] 2004):

[47] For the origin, definition and discussion of the term "intime conviction" see e.g., *European Criminal Procedures*, ed.: Mireille Delmas-Marty and J. R. Spencer, Cambridge University Press, Cambridge, 2002, pp. 601–602.

[48] Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu

The court's order shall not encroach on the assessment of facts and legal grounds of the case examined in the delayed proceedings.

7. Conditions for just satisfaction and the level of monetary compensation for non-pecuniary damage

a) Conditions for just satisfaction

The first paragraph of Article 15 ZVPSBNO specifies the rather unclear rule that **if the supervisory appeal filed by a party is granted or a motion for a deadline filed, that party may claim just satisfaction under the ZVPSBNO**.

An interpretation of the aforementioned provision, which is also itself complicated to some extent, could be the following:

Two basic purposes of statute derive from the ZVPSBNO. The first of these is that parties be able to file accelerating remedies for the protection of the right to a trial without undue delay. The Act determines, therefore, that parties to court proceedings have a duty to file them if they wish to exercise any kind of rights under this Act in relation to just satisfaction (mainly monetary compensation). The other basic purpose of the Act is to provide just satisfaction to parties to court proceedings in which unnecessary delay has occurred in the trial of their case.

The filing for of on "accelerating" legal remedy (supervisory appeal or motion for a deadline) is therefore a procedural precondition for a decision on just satisfaction, though a court may also decide erroneously with supervisory appeal and motion for a deadline. If a court decides erroneously in a supervisory appeal, the party still has the right of appeal in the form of a motion for a deadline, but if a court decides erroneously in the case of a motion for a deadline, there is no longer any regular or extraordinary legal remedy available (except a possible constitutional complaint as a special legal remedy), and it is thus essential that the motion for a deadline be filed. The state attorney and civil court are not bound by the ruling on a supervisory appeal or motion for a deadline and may decide that there has been no violation (even if this derives otherwise from a ruling on a supervisory appeal or motion for a deadline), or that there has been (even if a ruling on a supervisory appeal or a motion for a deadline dictates otherwise). Such a solution is in principle to the advantage of a party to

sądowym bez nieuzasadnionej zwłoki.

a court proceedings, or his just satisfaction, this being one of two basic intentions of this Act.

b) Level of monetary compensation for non-pecuniary damage

Limits to monetary compensation for non-pecuniary damage (as one form of just satisfaction) are specified in the second paragraph of Article 16 ZVPSBNO, from a minimum of **300 Euros (EUR) to a maximum of 5000 Euros (EUR)**. The essential reason for specifying limits to compensation, or for the decision regarding their introduction, is the standpoint that the purpose of the constitutional right under the first paragraph of Article 23 of the Constitution of the Republic of Slovenia is primarily to ensure rapid judicial proceedings (from the point of view of parties) and to determine legal remedies that should ensure this, and not monetary compensation for non-pecuniary damage. **Monetary compensation from the point of view of the value protected by Article 23, paragraph 1 of the Constitution of the Republic of Slovenia, or other types of compensation for possible violation of this right can only be secondary to the purpose of protection of the right from this constitutional provision**. Limits prescribed in the second paragraph of Article 16 ZVPSBNO allow greater space for the free judgment of the court so that, in relation to the circumstances of particular cases, they develop suitable case law. In relation to the maximum possible prescribed monetary compensation, the case law of courts of general jurisdiction is *mutatis mutandis* taken into account, namely in relation to compensation for non-pecuniary damage. The economic position of the Republic of Slovenia is similarly taken into account in relation to the amount of maximum compensation. For comparison, the pecuniary maximum prescribed in the provisions of the original fourth paragraph of Article 12 of the Complaints of Violation against a Party's Right to Trial without Undue Delay Act of the Republic of Poland of 2004 is 10,000 Polish zloty's (PLN) which is approximately 2621 Euros (EUR). However, when a party believes that the cited damages are too small, it is possible to file a claim for the excess sum of compensation under the provisions of the Civil Code of the Republic of Poland. In comparison with this arrangement in the Republic of Poland, it is also possible to highlight that the ZVPSBNO limits the amount of monetary compensation for non-pecuniary damage, but that the level of possible monetary compensation for pecuniary damage is not limited (Article 21 ZVPSBNO).

From the point of view of the possible constitutional disputability of the limitation on the (highest possible) damages for non-material damage, it must be stressed that the so-called "accelerating elements" of ZVPSBNO

(Articles 5–13), in terms of the obligations of the courts and the rights of parties to judicial proceedings, are strengthened or specified, that they are weighed against possible disproportion of the limitation of the "compensation element" under the second paragraph of Article of ZVPSBNO. In addition, it must be said that compensation for non-pecuniary damage as an individual right (in the form primarily of monetary compensation) in relation to violation of the right to trial without undue delay is with this Act guaranteed in the legal order of the Republic of Slovenia for the first time.

It is also possible to refer to rules from the precedent judgment of the Grand Chamber of the European Court of Human Rights of 29 March 2006 in the case of *Scordino v. Italy (no. 1)*[49], in connection with the Italian "legge Pinto" of 2001 regarding protection of the right to trial without undue delay, it was decided there that:

> *206. The Court can also perfectly well accept that a State which has introduced a number of remedies, one of which is designed to expedite proceedings and one to afford compensation, will award amounts which – while being lower than those awarded by the Court – are not unreasonable, on condition that the relevant decisions, which must be consonant with the legal tradition and the standard of living in the country concerned, are speedy, reasoned and executed very quickly (see Dubjakova v. Slovakia (dec.), no. 67299/01, 10 October 2004).*
> *However, where the domestic remedy has not met all the foregoing requirements, it is possible that the threshold in respect of which the amount will still allow a litigant to claim to be a "victim" will be higher.*

It is possible to conclude from the citations above that a lower level of prescribed monetary compensation under the second paragraph of Article 16 ZVPSBNO is also in accordance with the case law of the European Court of Human Rights; especially because, in relation to the judgment in the aforementioned case of *Scordino*, it is possible to conclude that compensations for non-pecuniary damage through violation of the right to a trial within a reasonable time, which are awarded by a court or other state body of a state signatory of the European Convention on Human Rights, may be 40% or 50% lower than compensations for non-pecuniary damage awarded by the European Court of Human Rights in similar cases.

It is also necessary to highlight how payment of monetary compensation for non-pecuniary damage under the second paragraph of Article 16 ZVPSBNO is not always necessary in cases of the actual finding

[49] Judgment of the ECHR, Appl. No. 36813/97, 29. 3. 2006.

of violation of the right to a trial without undue delay, although the lowest possible (nominal) is at a level of 300 Euros. In view of the general binding criteria from Article 4 ZVPSBNO, it is possible from the point of view of the right to just satisfaction, to make a written statement of the state attorneys` service (if, e.g., the party predominantly contributed to delay in court proceedings in his case) under the first paragraph of Article 17 ZVPSBNO, or to publish the judgment under the first paragraph of Article 18 ZVPSBNO, thus without awarding monetary compensation to the party to the court proceedings.

8. Issue of liability for damages

From the point of view of the Ministry of Justice as drafter of the Draft of the ZVPSBNO, it must be stressed that provisions on individual types of non-material injury referred to in Article 16 ZVPSBNO and the strict liability ("objective liability") of the state under Articles 16 and 21 ZVPSBNO signify a special method of (statutory) implementation of Article 26 of the Constitution of the Republic of Slovenia. The essential question is certainly why was the **strict liability of the state** chosen as the type of liability.

If the systemic rules of the Obligations Code of the Republic of Slovenia of 2001[50] are followed, the legal order of the Republic of Slovenia recognises only two forms of liability for damages, to wit, culpable liability for damages, i.e., that in which culpability is one of the presumptions of this liability, and strict liability for damages, in which culpability is not a presumption. Culpable liability under Article 135 of the Obligations Code, therefore, in view of the "nature of the matter" was not possible, since two clusters of conditions must be given in connection with the person who caused the damage: first that the perpetrator behaved with intention or negligently, and second that the perpetrator is capable of being *ex delicto* liable. Taking into account court backlogs (objective circumstances within the judicial system), the cited circumstances from the point of view of the right to a trial without undue delay were the basis for the statutory determination of the strict liability of the state.

Strict liability as a special institute is also stated explicitly (determined) in other "sectoral statutes" of the Republic of Slovenia, but not from the point of view of the strict liability of the state, e.g., in the provisions of the first paragraph of Article 33 of the Dematerialised Securities

[50] Official Gazette RS, No. 97/07 – Officially Consolidated Text No. 1.

Act[51] (for members of clearing houses) and in the provisions of the first paragraph of Article 24 of the Payment Transactions Act[52] (for payment transactions operators).

9. Tax exemption in relation to payment of monetary compensation for non-pecuniary damage

Article 27 ZVPSBNO regulates tax exemption in relation to payment of monetary compensation for non-pecuniary damage, until such time as adequate amendments to the Income Tax Act are adopted, the intention being to regulate this question within the tax system. In view of the fact that the Act prescribes new forms of non-pecuniary damage (second paragraph of Article 15 and Article 16 ZVPSBNO), that it involves strict liability of **the state and that the state caused to the party** who will receive compensation under this Act by final judgment or out of court settlement, **a violation of one of the fundamental constitutional rights referred to in the first paragraph of Article 23 of the Constitution of the Republic of Slovenia** (a fundamental right because exercise of this right is effectively the first condition for exercising almost all other constitutional rights and freedoms), such a provision is legitimately inserted in the legal system of the Republic of Slovenia. In addition, similar "exemption" provisions as stated are also determined in points 1–7 of Article 27 of the Income Tax Act[53], mainly from the point of view of account being taken of the individual personal circumstances of the beneficiary which lead to payment of compensation for non-pecuniary damage. For payment of monetary compensation for non-pecuniary damage under the ZVPSBNO cannot be considered income of a natural or legal person, but rather compensation for injury to the personality of a natural person (see e.g. first paragraph of Article 179 of the Obligations Code), or compensation for the violation of the business reputation or good name of a legal person (Article 183 of the Obligations Code), since a natural person in particular is "not complete" and this because of the liability of the state, because it has not allowed him/her to exercise this fundamental right to legal protection, whose use represents the only means by which he/she may protect other of his/her constitutional and statutory rights.

[51] Official Gazette RS, Nos. 23/99 and 75/02 – ZIZ-A.
[52] Official Gazette RS, No. 110/06 – Officially Consolidated Text No. 3.
[53] Official Gazette RS, Nos. 117/06, 10/08, 78/08, 92/08, 125/08 and 20/09.

10. Use of amounts in Euros

Bearing in mind that the Republic of Slovenia was at thet time intendeing to adopt the Euro on 1 January 2007 as a legal tender, and that this event did occur on the specified date, amounts of compensation in the second paragraph of Article 16 ZVPSBNO are as specified in Euros, since ZVPSBNO has been applied since 1 January 2007.

11. Dates of publication, entry into force and application of the ZVPSBNO

Under the provisions of the ZVPSBNO, the Act was to enter into force fifteen days after publication in the **Official Gazette of the Republic of Slovenia, No. 49/06, of 12 May 2006**, so it did accordingly enter into force on 27 May 2006. It has been applied from 1 January 2007, as is stated in Article 28 of the Act. The cited provisions on an extended time limit for commencement of application of the Act take into be fact account that certain preparations were necessary in the personnel, financial and training spheres for the effective application of the Act, in order for the Act to be applied in practice to the advantage of parties to court proceedings, which is its main guide or purpose.

12. Additional information on reasons for and interpretations of legislative solutions under the ZVPSBNO

Additional information on the content of the Protection of the Right to Trial without Undue Delay Act, mainly from the point of view of the intention of "the Legislator" and reasons in relation to the content of individual provisions of the Act and the case law of other countries according to their national legislation, can be obtained from the **Report of the National Assembly of the Republic of Slovenia (Poročevalec Državnega zbora Republike Slovenije), No. 40/06, of 12 April 2006**, in which the Draft Protection of the Right to Trial without Undue Delay Act was published.

13. Reactions of the European Court of Human Rights to the ZVPSBNO

On 3 May 2007, the European Court of Human Rights adopted the first "test" judgment concerning Slovenia's Act on the Protection of the

Right to a Trial without Undue Delay of 2006 – in the case of *Grzinčič v. Slovenia*[54]. In this first, sort of "academic/test case" the Court states that the Republic of Slovenia now has efficient legal remedies for the protection of the right to trial within a reasonable time (following the aforementioned Act of 2006), that legal remedies have to be exhausted within Slovenia, and that parties to judicial proceedings, claiming a violation of the right to a trial within a reasonable time may not apply directly to the European Court of Human Rights (see: *paras.* 85–111. of the Judgment in connection with *paras.* 38–48 and also the final determination that the Republic of Slovenia has efficient legal remedies – *paras.* 98, 110 and 111 of the Judgment).

This decision was confirmed by the Decision of the European Court of Human Rights in the case of *Korenjak v. Slovenia* as of 15 May 2007[55] and some other cases that followed it in 2007, 2008 and 2009.

The situation in the area of the right to an effective remedy before a national authority in respect of the unreasonable duration of proceedings therefore changed considerably in 2007 as regards the Republic of Slovenia, as is acknowledged so far by the European Court of Human Rights.

14. Post-Lukenda: The 2009 Draft Act of Changes and Amendments to the ZVPSBNO

The Ministry of Justice of the Republic of Slovenia began to preparetions for a revision of the ZVPSBNO at the end of 2007, in cooperation with the Supreme Court of the Republic of Slovenia and the State Attorneys` Office. It has to be stated that it was already expected during the time of adoption of the ZVPSBNO in 2006 that some practical developments would require amendments to the ZVPSBNO in the future, so the decision to start the review of the practical application only one year after the start of application was not problematic.

The analysis of proposals for changes to the ZVSPBNO shows that there have been particular problems concerning its application. Some proposals were rejected outright, like the idea of some attorneys that the upper limit for compensation in cases of just satisfaction (5000 Euros) should be abolished.

[54] Judgment of the ECHR, Appl. No. 26867/02, 3. 05. 2007.
[55] Decision of the ECHR, Appl. No. 463/03, 15. 05. 2007.

However, there were some important proposals (from the Ministry of Justice, the Supreme Court, and the State Attorneys` Office) which were taken into account. As a result, the Draft Act on Changes and Amendments to the ZVPSBNO was proposed to the Government of the Republic of Slovenia on 21 April 2009, to be adopted in shortened proceedings (no systemic changes to the Act). It was adopted by the Government on 14 May 2009, and submitted to the National Assembly of the Republic of Slovenia (the Parliament) for adoption[56]. The second reading of the Draft Act was performed successfully on 30 June 2006 (unanimous support at the Committee Stage), and the Act was expected to be adopted around 15 July 2009, of course having first been adopted by the Deputies of the National Assembly.

Some important changes in the **Draft Act on Changes and Amendments to the ZVPSBNO** are:

- more emphasis given to the "original case" of the party to court proceedings, since there were some possibilities of different interpretations which could have influence on the fulfilment of criteria concerning just satisfaction[57];
- (in relation to the previous item) the addition of some **anti-fragmentation provisions** (Article 4 ZVPSBNO), so that courts should now take explicit account of the process whereby other courts or jurisdictions handled the case before (although this solution should already have been developed from the applicable Article 4 of ZVPSBNO, some courts[58] did develop it, but not all courts);
- the strengthening of provisions on decision-making of the presidents of courts when applying acceleratory remedies (supervisory appeal, motion for a deadline) – they have to decide (explain) in a more detailed fashion whether proposed or adopted measures for acceleration of court proceedings are

[56] Information on the Draft Act on Changes and Amendments to the ZVPSBNO in the Slovene language, as quoted by the National Assembly of the Republic of Slovenia: Predlog Zakona o spremembah in dopolnitvah zakona o varstvu pravice do sojenja brez nepotrebnega odlašanja, št.: 700-01/09-9; EPA 380-V, published in: Reporter of the National Assembly of the Republic of Slovenia, No. 64/09 (Poročevalec Državnega zbora, št. 64/09), text accessed on 4 July 2009 at: http://www.dz-rs.si/typo3conf/ext/acts/pi1/acts/getfile.php?cat=rt&id=24499905.

[57] Apparently no such case occurred in practice – there was no "damage" to parties to court proceedings.

[58] Like the Administrative Court of the Republic of Slovenia.

really "capable" of guaranteeing the resolution of a specific (concrete) case;

- conditions for filing claims for just satisfaction shall in future not depend surely on the date of the served final judgments (the "original case" from item 1 above), but shall also take account of the decisions (judgments and rulings) of the Supreme Court of the Republic of Slovenia when applying extraordinary legal remedies; and
- reporting provisions of courts to the State Attorneys` Office for the purposes of proceedings of just satisfaction have been enhanced – each phase of the proceedings has to be explained (intems a actiontaken/activities taken), not just simply generally described in general (by reference to dates and phases).

It is to be expected that these additional changes shall reinforce the effective application of the ZVPSBNO in practice – in favour of parties to judicial proceedings who do possess the constitutional right to protection of the right to a trial without undue delay, and the Convention's right to trial within a reasonable time.

CHAPTER 1:

PRESENTATIONS

(moderated by Philip Leach)

Polish experience of the pilot procedure and implementation of the judgment in the case of *Hutten-Czapska against Poland* – an example of specific non-compensatory redress

Piotr Styczeń,
Deputy Polish Minister of Infrastructure

Many thanks to the organizers for inviting me to take part in the Seminar. I am not in a position to respond to all the questions formulated by Professor Philip Leach, as the experience of the Ministry of Infrastructure is connected exclusively with the case of *Hutten-Czapska against Poland*. However in the further part of my speech I will try to do my best to answer them. As you realize, most of the problems connected with pilot judgments are rooted in past facts and events. That was true in the case of *Broniowski against Poland* and also in the case of *Hutten-Czapska*. The genesis of the problem in the latter case is connected with systemic issues in Poland after World War II and with the country's war-time destruction. Today Warsaw is a beautiful city, but immediately after World War II ended it was in total ruin. The situation in many other cities was similar. In other words – there were people who had survived the hostilities and not enough houses or flats in which they could live. So the political decision was taken to put up tenants in privately-owned buildings, setting the rents at a minimum level. Had the communist authorities decided at that time to fully nationalize privately-owned housing, the Court would have never considered the case, due to temporal restrictions. However, that did not happen and private

owners of tenements survived the communist period as owners, though with unwanted tenants, who were paying low "controlled rent" that did not cover renovation costs, not to mention any profit. Even at the beginning of the systemic transformations in 1989, the authorities started considering ways of restoring a proper balance between the rights of owners and the rights of tenants, in a situation in which each group had contradictory interests. It was decided that the ultimate goal consisted in a restoring of full rights to building owners, including the right to set market rents. However, due to social considerations, the period of attaining market rents was stretched out over ten years, with the rights of the owners gradually extended each year through relevant changes in "controlled rent". The system of "controlled rent" and other restrictions imposed on the owners were supposed to disappear from Polish law effective from January 1 2005. Thus, we were dealing with a typical temporary restriction of the right of ownership, justified in terms of the public interest. Had those restrictions been removed effective from January 1 2005, the European Court of Human Rights would probably not have criticized the actions of the Polish State in its judgment in the case of *Hutten-Czapska against Poland*. As it happened, the restrictions did not disappear with the prescribed time-limit and the Court, in its judgment of 22 February 2005, found that the Republic of Poland had not fulfilled its promise and in fact had extended the application of "controlled rent". The Polish State quickly ameliorated its mistake, but that had no bearing on the Court's finding that a violation of Article 1 of Protocol 1 (the right to enjoy possessions) to the Convention had occurred, due to the fact that the applicant was unable to enjoy her possession and collect proper rent; that position was confirmed in a judgment of the Grand Chamber dated 19 June 2006. The Court's judgment was stern but just. Through a misconceived political decision to extend the system of "controlled rent", Poland was found liable not only for the effects of that move following 1 January 2005, but also for the preceding 10-year period of application of the system of "controlled rent", which had been treated by the authorities as permitted interference of the state in the right of ownership.

The role of the then Ministry of the Building Industry in the *Hutten-Czapska against Poland* case basically began at the moment of implementing the Judgment of the Grand Chamber of 19 June 2006. The Grand Chamber had found that the violation was part of a systemic problem, i.e. faulty housing legislation, and called on Poland to find a national remedy that would allow owners to obtain profits from their property, while at the same time satisfying the housing needs of persons with low

incomes. As regards individual and general measures, an agreement was to be concluded between the Government and the applicant.

Since agreement could not be reached, the Government Agent asked for the assistance of the Court Registry, as had happened during the agreement proceedings in the case of *Broniowski against Poland*. The Court responded favorably and dispatched a two-man delegation to Poland. I feel that the involvement of the Registry representatives was decisive in attaining agreement. They played a mediating role and explained to the parties the scope of possible negotiations. The Registry representatives did not propose their own solutions but encouraged the parties to move closer together, with due reference to the Court's case law.

Ultimately, a compromise solution was found. On 28 April 2008 the European Court of Human Rights endorsed the agreement. At the same time, the Court decided unanimously to strike down the application, keeping in mind the individual measures contained in the agreement (just satisfaction and relocation of tenants) and general measures designed to resolve fundamental problems in Polish housing legislation, potentially affecting some 100,000 real estate owners.

In implementing the judgment, the Government took a number of legislative moves to resolve some fundamental problems in the Polish legal system. These moves included:

- the introduction of a financial mechanism of state support for social housing, social dwelling units and protected flats;
- amendment of the law on the protection of tenants' rights of December 2006, allowing owners to raise rents in order to ensure proper maintenance of the buildings, obtainment of a return on capital investments and a "fair profit";
- allowing owners of dwelling units to claim compensation from local authorities by virtue of Article 417 of the Civil Code, in line with the judgments of the Constitutional Tribunal of 23 May and 11 September 2006);
- partial reimbursement of credits obtained by owners for renovation and/or thermal modernization of residential tenement buildings.

Solutions concerning the latter issue are contained in the Act of 21 November 2008 on Support Thermal Modernization and Renovation (Journal of Laws No. 223, item 1459). This entered into force on 19 March 2009, incorporating solutions designed to support thermal modernization

and renovation projects, and introducing support for owners of tenements previously affected by the system of "controlled rent".

In each instance, support is granted in the form of a bonus, i. e. partial repayment of a credit obtained to finance the project. The relevant resources are provided by the Thermal Modernization and Renovation Fund, operated by Bank Gospodarstwa Krajowego, and financed out of the state budget.

Support for owners of tenements, which in the past were affected by the system of "controlled rent", is called a compensatory bonus. It is awarded regardless of support received on general grounds (i.e. a thermal modernization bonus and a renovation bonus, available to all owners, not only those affected by the system of "controlled rent"). Nevertheless, it is awarded only jointly with a renovation bonus, as it is used for partial repayment of a credit obtained for the implementation of renovation project supported on general grounds. This means that the owner of a single-family residential building who obtains credit for its renovation and thermal modernization will gain the right to both a compensatory bonus and a thermal modernization bonus. An owner of a multi-family residential building who obtains credits for thermal modernization and renovation, is entitled to the compensatory bonus, the renovation bonus and the thermal modernization bonus.

The compensatory bonus may be awarded only once with respect to a single building, to a natural person who on 25 April 2005 was the owner or heir of a residential building, or who after that date became the heir of an owner of such a residential building, in which where was at least one municipal dwelling unit.

The size of the compensatory bonus is determined on the basis of the usable area of the municipal unit, the number of municipal units in the building, the period of time during which the person entitled to receive support owned the residential building in question and the periods of time over which he/she was eligible for support with regard to the respective municipal units, and also on the basis of the conversion indicator for the cost of replacement of 1 square meter of usable area of a residential building, as laid down in the Act of 21 June 2001 on the Protection of Tenants' Rights and Communal Housing Stock, and on the Amendment of the Civil Code. The choice of that particular indicator stems from the assumption that the size of the compensatory bonus should be determined on the basis of an indicator which constitutes a point of reference for restrictions binding upon a building's owner during the occurrences that constitute the basis of his/her eligibility for the bonus.

For each year of application of the system of "controlled rent" between 12 November 1994 and 25 April 2005, the compensatory bonus, depending on the scale of the renovation project relative to the cost of replacement of the given building, amounts to between 1% and 1.4% of the cost of replacement of 1 square meter of the usable area of residential building. This means that, in the case of an investor entitled to a compensatory bonus calculated on the basis of all flats in a given building (if the building is composed exclusively of municipal units), and for the entire period between 12 November 1994 till 25 April 2005, the compensatory bonus, in relation to 1 square meter of a municipal unit, will amount to at least 10.5% but be not more than 14.7% of the conversion indicator of the cost of replacing 1 square meter of usable area of a residential building.

Since, under the 21 November 2008 Act, the compensatory bonus is used to repay part of a credit obtained for financing a project supported on general grounds, an owner of a multi-family building shall submit an application for a compensatory bonus together with an application for a renovation bonus. In the case of renovation projects financed entirely on credit whose cost does not exceed 12.4 % of the replacement cost of the building, the whole credit will be repaid with the compensatory and renovation bonus. What is important, unlike the two other types of bonus, which are released after a given project is completed, the compensation bonus is paid out as soon as the credit is used, to the amount of the awarded compensatory bonus.

With the aim of securing the *Hutten-Czapska* judgment and the judgment of the Constitutional Tribunal of 29 June 2005 (ref. no. 5 1/05), the Government introduced a rent-monitoring mechanism designed to ensure transparency of rent increases and to facilitate the elaboration of rents and payments in specific buildings in a given locality, for use in individual rental agreements defining so-called initial rent. Another goal is to equip the courts with an additional instrument for controlling rents and assessing the justifiability of a rise therein.

The mechanism for monitoring rents was introduced through an amendment to the Act of 21 August 1997 on Real Estate Management, which introduced a "rent mirror". For that purpose, real estate administrators were obliged, effective from 1 January 2008, to provide a municipality's authorities with data on rent paid for privately-owned flats. Such data may also be obtained from other sources.

A listing of data concerning rents in private housing is published by municipalities each year, by the end of the first quarter of the next year,

in the official journal of the voivodship (province). The data may also be published on the Internet.

The Government are also conducting work on amendments to the Act on the Protection of Tenant Rights, Communal Housing Stock and Amendment of the Civil Code. This is connected with the current increased demand for housing: the objective is to remove barriers encountered by natural persons who want to rent out their flats and obtain corresponding revenue.

As part of this work, the Ministry of Infrastructure has prepared and submitted for consideration to the Committee of the Council of Ministers draft amendments to the Act, entailing in the introduction of incidental rental. Under the proposed regulation, a flat subject to an incidental rental would be excluded from most of the provisions of the Act on the Protection of Tenant Rights, with its lease based on the Civil Code.

In the draft an incidental rental would apply to flats whose owners are natural persons who are not conducting rental as an economic activity.

Incidental rental would be based on an agreement concluded for a specified period of time, not exceeding 10 years.

The following elements of the agreement would be mandatory:

- the tenant should be instructed on the eviction procedures from a flat rented under an incidental rental agreement,
- the tenant should submit a notarized statement declaring readiness to vacate premises rented under an incidental rental agreement,
- the tenant would be obliged to point to a flat into which the eviction could be effected.

The notarized statement declaring readiness to vacate the premises would be treated as an execution title after its endorsement by a court.

The draft provides that any rise in rent would be introduced strictly in accordance with the agreement.

Upon termination of the agreement, the tenant and any other persons he/she is residing with would be obligated to vacate the premises. In the event of a refusal to vacate the premise voluntarily, the owner would serve the tenant with a demand in writing to vacate the premises; the document would bear the owner's officially certified signature. In case of a futile lapse of the deadline set by an owner, he would be entitled to ask a court for an execution order on the tenant's notarized undertaking to vacate the premises.

That regulation, combined with the proposed amendment to the Code of Civil Proceedings that excludes persons who have lost legal title to premises rented on the basis of an incidental agreement, of the right to provisional quarters, would substantially improve the pursuant of evictions. The owner would not have to wait for a judgment ordering eviction. An execution order would be a sufficient basis for the court's executive officer actions.

The draft law is currently awaiting consideration by the Government, after which it will be sent to Parliament.

Realizing that local authorities face various housing-related problems, the Government is taking appropriate steps to assist them in fulfilling their duty to provide shelter for low-income families and persons threatened with homelessness.

State support in providing housing for low-income persons and those requiring assistance is extended on the basis of the *Act of 8 December 2006 on Financial Assistance for the Establishment of Social Flats, Protected Housing, Shelters and Homes for the Homeless (Journal of Laws No. 251, item 1844)*. It envisages the possibility of state financial support for entities whose statutory duties include provision of shelter or housing for persons in need.

Depending on the type of implemented project, an investor has the possibility of receiving support amounting to between 20 and 40 % of its cost. Assistance is provided by the Subsidy Fund of Bank Gospodarstwa Krajowego, whose task is to sign relevant agreements with selected investors, transfer funds to them and then verify related expenditures.

On February 12 2009, Parliament adopted the Government's draft of an Act amending the *Act on Financial Assistance for the Establishment of Social Flats, Protected Housing, Shelters and Homes for the Homeless and Certain other Forms of Support for Housing Construction*.

Under to the above-mentioned amendment, municipalities will be able to acquire – with state financial assistance – municipal units that do not enjoy a social housing status, and to raise the maximum amount of financial support to 30-50% of the total cost of a project. It will also be possible to purchase and refinance the cost of purchase of flats and whole residential buildings. In line with this amendment, municipalities will be able to obtain investment support exceeding the present level of support, by building (without Subsidy Fund financing) social flats whose area equals at least the anticipated effects of the supported investment. The amended Act entered into force on 1 April 2009.

The expected result is an increased quantity of social housing that will allow for the relocation tenants with court eviction orders from flats owned by natural persons.

The main cause of the violation of Article 1 Protocol 1 of the Convention in the case of the *Hutten-Czapska* case – namely the existence of the system of "controlled rent", was eradicated through the amendment of the Act on the Protection on Tenant Rights. It incorporated the principle that a landlord, when raising rent, could determine the following:

- an annual capital return of:
  - up to 1.5% on outlays incurred by on owner for the construction or purchase of a flat,
  - up to 10% of outlays ihcurred by a owner for a lasting improvement of an existing flat that improves its functional value – until full return of such outlays;
- *fair profit.*

Rises in rent and other payments for the use of a flat are considered justified where they do not exceed the price-growth indicator for consumer goods and services during the previous calendar year. The indicator for the previous year is published in the form of a report in the official journal "Monitor Polski" by the President of the Central Statistical Office.

There are a few court judgments interpreting the concept of "fair profit". In one such ruling, the District Court in Tarnów ascertained that "fair profit" was equivalent to interest earned on Treasury bonds, which at that time equaled 5%. The judgment was challenged on appeal and is not binding.

As to the meaning of basic rent – reference should be made to the December 2006 amendment of the Act on the Protection of Tenant Rights, Commune Housing Stock and Amendment of the Civil Code, which introduced a definition of expenditure covered by a rent and connected to the maintenance of a flat.

In accordance with the provisions added to the amended Act, such expenditures, determined proportionately to the usable area of a flat – relative to the total usable area in a given building – and covered by the owner, include perpetual usufruct and real estate taxes, and the cost of:

- the conservation, and maintenance in a proper technical condition, of a building, and its renovation;
- the administration of a building;

- the maintenance of common areas of a building, the elevator, collective TV antenna, the house phone and greenery;
- the insurance of the building,
- other costs, if elaborated in the agreement.

After almost 18 months in force for the above amendment, it is clear that the provisions of the Act on the Protection of Tenant Rights concerning the elaboration of rent components, with due provision for the rights of owners of buildings, have been received very favorably both by landlords and tenants.

In conclusion, I wish to underline that the pilot judgment procedure in the case of *Hutten-Czapska v. Poland* has been proven successful. The problem has been resolved and the law ameliorated. In fact, another crucial issue is also connected with the case – while approaching negotiations on the friendly settlement, the Government wondered what general measure would be appropriate in view of the declared violation. For many years the Court's case law held that compensation was the best way of *restitutio ad integrum* in cases involving violations of Article 1 Protocol 1 of the Convention. In this particular case that formula was not the best fit, primarily due to problems with calculating the compensation. That is why we rejected that concept in favor of a solution that rewards a pro-active attitude of potential applicants – and let me remind you that we are talking about 100,000 people. Instead of empty money for hard-to-calculate losses in the past, the applicants have received an instrument designed to implement their future investment goals. The Court's acceptance of such a formula attests to the wisdom of the Judges and their willingness to draw away from routine solutions.

CHAPTER 1:

PRESENTATIONS

(moderated by Philip Leach)

Pilot judgments from the perspective of the Romanian Government

Razvan-Horatiu Radu,
Government Agent of Romania

At the outset, I would like to express my appreciation to the organising institutions for supporting the initiative to hold this meeting, as a valuable opportunity for an exchange of views in respect of the future development of human rights' standards and procedures.

First of all, please allow me to present brief the reasons that have led the Court to hold that there are repeated a violations by the Romanian State of certain rights, such as the right to property or, closely related, the right to a fair trial. After the fall of the communist regime, a complex reform process has commenced in Romania as regards property rights. A system to restitute real estate land has been set out on one hand, as concerning land property, while on the other hand a mechanism has been put in place in respect of property abusively nationalized under the communist regime.

The provisions of the restitution laws have been contradictory, mainly generating contradictory administrative and judicial practices, not in line with the conventional exigencies. Since 1999, the Court has started to observe deficiencies in the Romanian system in respect of the property restitution mechanism (see *Brumărescu case*). The deficiencies as noted by the Court in the respective case have been amended, though repeatedly amendments have in practice give rise to other distinct short- comings.

Currently, the mechanism for property restitution or compensation, as regards real estate land or nationalized properties is very complex, complicated, and, according to the Court's case-law, inefficient.

Failing to comply with the criteria of restitution in kind, the Romanian State has taken steps to comply with its obligation to provide compensation to former owners, compensation equivalent to the market value of the respective property. As the market for real property has developed in Romania in recent years, the value of has increased dramatically, leading to price distortions on the market that generated an incapacity on the part of the Romanian State to comply with obligations towards the former owners. As noted in the memorandum prepared by the Registry of the Court for the 5th meeting of the DH-S-GDR, the judgments that include reasoning under Article 46 represent a lighter version of pilot judgments.

Secondly, please allow me to refer to some of the cases in which the Court's case-law has had regard to the provisions of Article 46 of the Convention in reference to Romania.

From December 2008 througt to January 2009, the European Court of Human Rights has referred to Article 46 in three distinct cases, all part of the larger group concerning cases related to property. Thus, the Court has identified three types of circumstances that may lead to an infringement of certain rights such as the right to property or, respectively, the right to a fair trial.

In the ***Viasu case***, the Court has held that there has been a violation by the Romanian state of Article 1 of Protocol no. 1 to the Convention as, relying on the provisions of the Land Law, the State had failed to return to the applicant a plot of land or to provide the applicant with appropriate compensation, in the case of a failure of the State to restore possession rights in favour of the claimant. Referring to Article 46 of the Convention, the Court observed that an infringement of the right to property in the given case has arisen out of a dysfunctionality of the legislative and administrative system at issue. The infringement in question is it a systemic nature, and may in future prejudice a large number of persons. The Court has recommended that the Romanian Government undertake general measures, either through restitution in kind, or by providing compensation in like with the principles of the Court, basically recommending the amending of the current restitution mechanism, by putting in place a system characterised by simplified and efficient procedures.

In the ***Katz case***, the Court held that there had been a violation of Article 1 of Protocol no. 1 to the Convention as regards the selling by the

State of a property to a third party acting in good faith. Thus, reiterating the arguments as observed in its previous case-law, the Court asserted that the selling by the State of a property to a third party acting in good faith, even if the act had been pursued before a final confirmation by the courts of the respective right to property, may amount to a deprivation of the respective possession. That deprivation, combined with a total lack of compensation, constitutes an infringement of the right to property, as provided for by Article 1 of Protocol no. 1 to the Convention. As regards the application of Article 46, the Court has reiterated the legislative dys- functionality as concerning the nationalised properties sold by the State to third parties acting in good faith. As the subsequent multiple amendments have not improved the current circumstances, the government should implement the necessary legislative, administrative and budgeting measures urgently.

In the ***Faimblat case***, the Court has noted how a deficiency of the administrative restitution system interfered with the right to a court. The Court's approach is very similar to that taken in the *Katz case*. This time the Court observed the system implemented by the laws concerning nationalised properties under the communist regime. The Court has held that there has been a violation of Article 6 of the Convention. Applying Article 46 thereof, the Court has again underlined the deficiency of the restitution laws as regards nationalised properties and, respectively, their implementation by the administrative authorities. Among otherthings, the Court has asserted that the multiple legislative amendments that have occurred recently have failed to provide a remedy to the current circumstances. The Court has further recommended that the State immediately take the necessary legislative, administrative and budgeting steps in order that restitution claims be finalised within reasonable time periods.

Please, lastly allow me to observe and underline that, following the Court's holdings of those systemic violations, consultations between the Court and the Romanian Government are imperative. We are hoping that, through these consultations, the best internal remedies to reduce the number of complaints before the European Court shall be identified. A counteract in the case of Romania should lead to a settling of the principles of the Court in the current financial and economic context. As regards the pilot cases, we are also considering that a series of distinct rules to regulate the procedure in question should be identified. An analysis should be allowed to Provide for a set of pilot proceedings being triggered, not solely when the Court holds through a pilot judgment that there has been a systemic problem, but also following a request in this respect on behalf of the relevant Government. The respective alternative might lead to faster remediation of those systemic breaches. In my opinion, no matter whether

a common pilot procedure or a light procedure shall apply, a stay of proceedings in cases pending before the Court would benefit the Court and also the Government, which will be able to develop a strategy by which to implement internal remedies in this regard.

At the end of my speech, allow me to conclude by reaffirming that, around the fiftieth anniversary of the European Court of Human Rights and the 15th anniversary Romania becoming party to the European Convention on Human Rights, a collaboration between the Romanian Government and the Court will result in successful identification of an optimal solution by which to strike off the Court's lists the numerous cases concerning alleged violations of the right to property.

CHAPTER 1:

PRESENTATIONS

(moderated by Philip Leach)

A Possible role for the Commissioner for Human Rights in the pilot judgment procedure

Irene Kitsou-Milonas,
Office of the Commissioner for Human Rights

1. Introduction

The use of the term "possible" in the title of this presentation corresponds to two realities.

First to the state of the pilot judgment procedure *which is still developing, moving from an experimental to an exploratory phase* if I am quoting correctly the words used by John Darcy when he presented at a meeting of the Reflection Group in March the memorandum on the pilot judgment procedure prepared by the Registry of the European Court of Human Rights ("the Court")[1].

Second, to the nature of the institution of Commissioner for Human Rights ("the Commissioner"), who has to operate within a very subtle equation.

That equation is between, on the one hand, the performing of functions other than those of the supervisory bodies set up under the European Convention on Human Rights ("the ECHR") whose competence the Commissioner has to respect, without taking up individual complaints. On the other hand there is the Commissioner's duty to identify human

[1] Doc. DH-S-GDR (2009) 010.

rights shortcomings in the law and the practice of member States concerning compliance with human rights as embodied in the instruments of the Council of Europe[2] and to contribute to the long-term effectiveness of the ECHR as sketched out *inter alia* by the Wise Persons' proposals.

Among the "instruments of the Council of Europe" the ECHR and the Court's procedures are of course privileged sources of reference for our work, which aims to support the ECHR's implementation at national level. Thus, we follow closely the developments in the pilot judgment procedure which allows the Court to resolve with a single judgment a large number of applications, as well as related proposals and discussions. And while there is a justified call for a codification of the procedure in the Rules of the Court, the Court is best placed to decide when this should take place.

Indeed there was mention in the Commissioner's comments to the interim[3], and then to the final, report of the Wise Persons, as well as in his speech in San Marino in 2007[4], of his possible role in the procedure at two different stages – before the European Court (I) and in the process of the execution of judgments (II).

2. A more active involvement of the Commissioner before the European Court of Human Rights?

Indeed in his reflections on the Group of Wise Persons' report, the Commissioner has offered to identify suitable cases for pilot judgments by availing of his contacts with ombudsmen and national human rights institutions.

Such an identification would be carried out in the format of an Article 36 §2 ECHR third-party intervention pending the possibility of a Commissioner-designed-intervention under Article 36 §3, once Protocol 14 entered into force.

However, the following parameters should be taken into account:

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[2] Article 3e of the Resolution (99)50 on the Council of Europe Commissioner for Human Rights.

[3] Comments by Mr. Thomas HAMMARBERG Commissioner for Human Rights, on the interim report of the Group of Wise Persons to the Committee of Ministers CommDH (2006)18 rev.

[4] Views on the Group of Wise Persons Report, CommDH(2007)16; Colloquy *The Future of the European Court of Human Rights in the light of the Wise Persons' report*, *Alternative or complementary means of resolving disputes and other issues broached in the Wise Persons Report*, Speech by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, San Marino, 22-23 March 2007, CommDH/Speech(2007)4 REV.

- The Commissioner's cautious approach to third-party interventions

Only if he saw clearly an added value of his intervention would the Commissioner be ready to go before the Court. Such added value can only lie in the widening of the case by providing contextual information. The idea is that the Commissioner draw the Court's attention to the wider (geographic or other) scope of an issue at hand. The value added to the system by such an intervention by the Commissioner will be his overview of the human rights situation throughout the Council of Europe membership, and his knowledge of legal trends that might endanger the protection of human rights if not properly addressed in a timely manner by the Court. As the Commissioner has stated, the Court when it prepares the research element for the proceedings can use [his] *knowledge about the countries which is already on public record*. There may be situations where I could give some further background information to the Court. There would very few cases where this would be relevant.

- The new work cycle of the Commissioner's Office

After the completion of the full cycle of assessment visits to the 47 member States started by his predecessor, the Commissioner intends to carry out more focused country visits and to concentrate on crisis situations and human rights in conflict areas, functioning increasingly as a rapid response mechanism. Our thematic work will focus on non-discrimination (in particular, Roma, LGBT people and persons with disabilities); migrants, refugees and asylum seekers; and juvenile justice). These issues will not necessarily be suitable for pilot judgments. This is for instance the case with minority – related cases which have not yet generated a large number of applications but which may potentially affect a large number of persons.

These two limitations will not prevent the Court from taking into account information coming from the Commissioner, as was the case in the recent Article 46 judgment in *Kauczor v. Poland* (no. 45219/06) of 3 February 2009 regarding the length of pretrial detention. The Commissioner's report on Poland not only served as a source of reference, but was also quoted in the operative part of the judgment:

> *57. It is to be noted that this issue has recently been considered by the Committee of Ministers in connection with the execution of judgments in cases against Poland where a violation of Article 5 § 3 of the Convention was found. In its 2007 Resolution the Committee of Ministers concluded that the great number of the Court's judgments finding Poland in violation of Article 5 § 3 of the Convention on account of the unreasonable*

length of pre-trial detention revealed a structural problem (see paragraph 34 above). Similarly, the Council of Europe Commissioner for Human Rights raised that issue in his Memorandum to the Polish Government of 20 June 2007 (see paragraph 35 above).

The recent interim report submitted to the Commissioner by the Polish Government[5] on the follow-up of his 2007 Recommendations could also serve as a source of reference to the Court and other key actors.

Two last remarks in this part of my presentation:

- The possibility of an identification of a possible case for a pilot judgment by ombudsmen and NHRIs has been mentioned. However, the same restrictive factors apply. The European Group of NHRIs (which has observer status in the CDDH) follows closely the communicated cases published on the Court's Website. It has set a number of thematic priorities which will not necessarily be appropriate for a pilot judgment procedure. The Group's first third party intervention was made last year in the case of *D.D. v. Lithuania* regarding the issue of the legal capacity of persons with mental disabilities.
- There were also discussions about a more direct involvement of the Commissioner in the pilot judgment proceedings: he might act as a mediator between the Court and the member State concerned to reach friendly settlement. But, given his own independence and that of the Court as well as the non-judicial role of the Commissioner, he believes that the Court should remain the sole master of the procedure at this initial stage.

3. What involvement for the Commissioner in the execution process?

Many commentators have stated that the Commissioner could play a useful role as regards the difficult enforcement state of pilot judgments.

Indeed, the importance assigned by the Commissioner to prevention and reparation at national level leads to an increased focus on the execution of the judgments of our Court. As the Commissioner explained last June in an exchange of views with the Ministers' Deputies at a DH meeting, while the execution of the Court's judgments falls within the sole competence of the Committee of Ministers, the process also leaves space

[5] CommDH (2009)18.

for synergy with, and contributions from other Council of Europe instances, including himself. He highlighted that the principle of subsidiarity, the prevention of violations and the belief in the added value of sharing good practices constitute key elements in the effective implementation of the Court's judgments. In this respect the Commissioner's role is twofold. He can address the need for general measures in his contacts with national authorities, highlighting the measures indicated by the Committee of Ministers. He can also broach the execution of the judgments in the context of his cooperation with National Human Rights Structures. Given their experience of constructive dialogue with their authorities at all levels, NHRSs can assist in finding adequate measures for transposing the Court's and the Committee of Ministers' prescriptions into domestic law and practice. The Recommendation (2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights is a key element in that respect.

The above remarks apply in particular to pilot judgments and to Article 46 judgments in light of the Resolution (2004)3 on judgments revealing an underlying systemic problem in accordance with the judgments are also communicated to the Commissioner. One could say that these judgments dovetail best into the Commissioner's work. This element was also emphasized by the European Group of NHRIs in their comments during the hearing held by the Reflection Group in March.

Finally, if the enforcement of the pilot judgments is a key element in the success of that procedure, one has to confess that the overlapping of the Court and the Committee of Ministers is not always self-evident to the observers that we represent. A development of the procedure that would bring about increased co-ordination between these two key actors could greatly enhance its effectiveness.

CHAPTER 1:

PRESENTATIONS

(moderated by Philip Leach)

The application of the "pilot judgments procedure" to the post-Loizidou cases – the case of Xenides-Arestis

Costas Paraskeva,
lawyer from Cyprus

1. The 'pilot judgment procedure' is a tool created by the European Court of Human Rights to deal with 'repetitive'[1] complaints that highlight the existence of structural or systemic problems in the domestic legal order of the relevant member state.

2. The Court in the case of *Hutten-Czapska v. Poland* noted that one of the implications of the "pilot-judgment procedure" was that its assessment of the situation complained of in a "pilot" case necessarily extended beyond the sole interests of the individual applicant and required it to examine that case from the perspective of the general measures needing to be taken in the interests of other people who might be affected.

3. The objective of the Court in designating a case for a "pilot-judgment procedure" is to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of the ECHR right in question in the national legal order.

[1] These are applications deriving from a structural or systemic situation in the respondent member state, which generates large numbers of well-founded cases (Position Paper of the European Court of Human Rights on Proposals for Reform of the European Convention on Human Rights and Other Measures as Set Out in the Report of the CDDH of 4 April 2003, 12 September 2003, CDDH-GDR(2003)024 at para. 8).

4. The "pilot judgment procedure" is predicated on the basis that once a judgment pointing to a structural or systemic problem has been delivered, and where numerous applications raising the same problem are pending or likely to be brought before the ECHR, the respondent state should ensure that applicants, actual or potential, have access to an effective remedy that will enable them to bring their case before a competent national authority.

5. Where national governments are unable to address the origins of their systemic problems themselves, the Court attempts by issuing a 'pilot' judgment, to direct them to proceed with a comprehensive resolution of such problems in compliance with Convention standards. 'Pilot' judgments are intrinsically connected to the obligation of member states to take general measures in order to eliminate the causes of the violation of the Convention and prevent its repetition. These measures must be such as to remedy the systemic defect underlying the Court's finding of a violation, so as not overburden the Convention system with large numbers of applications deriving from the same cause.

6. Despite its potential effect in reducing the ECHR's caseload, the "pilot judgment procedure" cannot serve as the antidote to all the systemic problems found in the different member states of the CoE. It is acknowledged that not every structural or systemic problem is suitable for the implementation of this procedure.[2] The appropriateness and suitability of a case should be considered an absolute requirement for the application of this process.

7. The respondent Government as a result of a 'pilot' judgment is under an obligation to take measures which will include two crucial elements of general remedial action:

- Measures to remove the source of the systemic problem for the future.
- The supply of adequate domestic remedies for prejudice suffered in the past by reason of that problem.

8. States may have to take general measures, such as legislative amendments, in order to prevent further violations of a similar nature. It would

[2] CDDH(2003)006 Addendum final, "Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights"–Addendum to the final report containing CDDH proposals (long version), 9 April 2003, at paras 8 and 9; Wildhaber, L., "Consequences for the ECtHR of Protocol No. 14 and the Resolution on Judgments Revealing an Underlying Systemic Problem- Practical Steps of Implementation and Challenges", *Applying and Supervising the European Convention on Human Rights-Reform of the European Human Rights System, Proceedings of the high-level seminar*, Oslo, 18 October 2004, p.28, available at: www.coe.int/T/E/Human_rights/prot14e.asp.

be insufficient and not in line with the aims and purpose of the Convention if a state, after having been found in violation in a specific case, took remedial action only in favour of the applicant, without removing the root cause.[3] Such an attitude might indeed lead to a repetition of similar violations, and to similar cases being brought before the Court repeatedly without any bringing of the law or practice at the heart of the violation into line with the Convention as interpreted by the Court.[4] It is quite clear that the obligation for a respondent State arising from a finding of a violation of the Convention is, *inter alia*, to eliminate the causes of the violation to prevent its repetition. In international law, it is this secondary obligation that is the natural and necessary follow-up for the primary obligation not to violate the Convention.[5] It is evident that the most important duty of the state is to bring violations to an immediate end. ***Therefore subsequent applications whose complaint arises from the same circumstances should be seen as a problem of execution***.[6]

9. In *Xenides-Arestis v. Turkey*[7] (a chamber judgment from the third Section, in December 2005, concerning one of the post-*Loizidou* cases involving the denial of access to property in the northern part of Cyprus), the Chamber held that Turkey must introduce a remedy which would secure genuinely effective redress, not only for an applicant, but also in respect of all similar applications pending before the Court. Such a remedy was to be available within three months of the date on which the judgment was delivered and the redress was to occur within three months of that. These directions were included in the operative part of the judgment.

10. Following this judgment, the authorities of the "Turkish Republic of Northern Cyprus" introduced the *Law for the Compensation, Exchange and Restitution of Immovable Properties*,[8] which entered into force on 22 December 2005, as well as the *By-Law made under Sections 8 (2) (A) and 22 of the Law for the Compensation, Exchange and Restitution of Immovable Properties which are within the scope of sub-paragraph (b) of paragraph 1 of Article 159 of the Constitution*, which entered into force on 20 March 2006.

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[3] Leuprecht, P., 'The Execution of Judgments and Decisions', in R. Macdonald, F. Matcher and H. Petzold (eds), The European System for the Protection of Human Rights (Dordrecht: Springer 1993), p.794.

[4] Ibidem.

[5] Tomuschat, C., "What is a 'Breach' of the European Convention on Human Rights?", in „The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers" 315, 320-326 Rick Lawson & Matthijs de Blois eds, 1994.

[6] Wildhaber, L., 'The European Court of Human Rights in Action', *Ritsumeikan Law Review*, No. 21, 2004, p.90.

[7] *Xenides-Arestis v Turkey*, No. 46347/99, 22/12/2005.

[8] "Law No. 67/2005".

11. Furthermore it established the "Immovable Property Commission" to consider applications for compensation. The Commission is composed of five to seven members, two of whom are foreign members, Mr Hans-Christian Krüger[9] and Mr Daniel Tarschys[10]. It has the competence to decide on restitution, exchange of properties or payment of compensation. A right of appeal lies with the "TRNC" High Administrative Court. If approved by the Court the implementation of the new Law would inevitably provide an admissibility hurdle for future applicants.

12. The Chamber reserved the question of the application of Article 41 and delivered the just satisfaction judgment in December 2006. In that judgment the Court welcomed *the steps taken by the Turkish Government in an effort to provide redress for the violations of the applicant's Convention rights as well as in respect of all similar applications pending before it.* The Court noted that *the new compensation and restitution mechanism, in principle, had taken care of the requirements of the decision of the Court on admissibility of 14 March 2005 and its judgment of 22 December 2005.*[11]

13. Subsequently, the Court selected 8 "test-cases"[12] to examine the effectiveness of the relevant compensation and restitution mechanism. Perhaps, in response to previous criticisms, that a judgment, the "pilot" one, may not entail global assessment of the underlying systemic problem, the Court here may be introducing an additional step to the "pilot judgment procedure". Though these cases have not been through this mechanism, the Court seems to consider that arguments advanced by the parties could be decisive in reaching a conclusion regarding the effectiveness of the proposed remedy.

14. The chamber in *Xenides-Arestis* identified the underlying systemic problem which is the source of the post-*Loizidou* cases. The Court found that *the violation of the applicant's rights guaranteed by Article 8 of the Convention and Article 1 of Protocol No. 1 originates in a widespread problem affecting large numbers of people, namely the unjustified hindrance of "respect for her home" and "peaceful enjoyment of her possessions" which is enforced as a matter of "TRNC" policy or practice (see Cyprus v. Turkey, §§ 174 and 185)*, *Xenides-Arestis v. Turkey*, No. 46347/99, 22/12/2005, para. 38.

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9 Former Deputy Secretary-General of the CoE.

10 Former Secretary-General of the CoE.

11 *Xenides-Arestis v. Turkey*, No. 46347/99 (just satisfaction), 07/12/2006, at para.37.

12 *Takis, Eleni and Elpida Demopoulos v. Turkey*, No.46113/99; *Evoulla Chrysostomi v. Turkey*, No. 3853/02; *Lordos and A. Lordou v. Turkey*, No.13751/02; *Eliadou and 3 Others v. Turkey*, No.13466/03; *Thoma Kilara-Sotoriou and Thoma Kilara-Moushoutta v. Turkey*, No.10200/04; *Stylas v. Turkey*, No. 14163/04; *Charalambou Onoufriou and 3 Others v. Turkey*, No.19993/04; *Chrysostomou (nee Savvopoulou) v. Turkey*, No. 21819/04.

15. Following the issuing of a "pilot" judgment by the Court in the case of *Xenides-Arestis*, the Turkish Government has an obligation by way of general measures to take action to remove for the future the systemic problem found by the Court, and secondly should make available rapidly adequate and appropriate remedies with retroactive effect, capable of offering redress for past damage sustained in similar cases.

16. It appears that Turkey has difficulty with affording individual relief to the "privileged"[13] "pilot" applicant, Mrs Xenides-Arestis.[14] It is important to note that in the "pilot judgment procedure" individuals who have lodged applications deriving from the same systemic source as the "privileged" one selected as the "pilot case" will not, if the procedure follows its planned course, receive any judicial examination of their grievance by the Court.

17. The Court in the just satisfaction judgment in the case of *Xenides-Arestis* pointed out *that the parties failed to reach an agreement on the issue of just satisfaction where, like in the case of Broniowski v. Poland (friendly settlement and just satisfaction) ([GC], no. 31443/96, ECHR 2005-...), it would have been possible for the Court to address all the relevant issues of the effectiveness of this remedy (i.e. "Law 67/2005") in detail.*[15] The friendly settlement could, as in *Broniowski*, have addressed both individual and general measures at national level. These measures should have been directed towards (a) eliminating the source of the violation for the future, so as to avoid continuing violations of the Convention grounded on the same grievance (b) making available a domestic remedy, with retroactive effect, capable of providing adequate redress for the prejudice caused to all persons affected adversely by the systemic defect in question.

18. In considering the effectiveness of the remedy, the state concerned and the Committee of Ministers should examine, not only whether the measures proposed afford just compensation, but also whether such measures effectively address the systemic problem.[16] It is worth mentioning that, particularly for the length of proceedings cases, the Court in the case of *Giuseppina and Orestina Procaccini v Italy*,[17] commended some States, namely Austria, Croatia, Spain, Poland and the Slovak Republic, for

[13] The "pilot" applicant in effect enjoys a privileged status relative to other complainants since the freezing of the remaining cases is certainly at the expense of the individuals.

[14] See Interim Resolution CM/ResDH(2008)99 Execution of the judgment of the European Court of Human Rights Xenides-Arestis against Turkey (judgment of 7 December 2006, final on 23 May 1997) (*Adopted by the Committee of Ministers on 4 December 2008, at the 1043rd meeting of the Ministers' Deputies*).

[15] *Xenides-Arestis v. Turkey*, No. 46347/99, 07/12/2006, para.37.

[16] Ibidem, p. 11.

[17] *Giuseppina and Orestina Procaccini v. Italy*, No 65075/01, 29.03.2006.

combining two types of remedies, one designed to expedite the proceedings and the other to afford compensation.[18]

19. The remedy proposed by the Respondent Government should fully redress the negation of the applicants' property rights and the Commission established must satisfy Article 6 standards. The case law of the Court should be taken into account:

- Demades v Turkey:
  The Court has taken note that part of the amount proposed as compensation by the Turkish Government represents the market value of the land. In this regard the Court reiterates its finding in *Loizidou (merits)* (§ 62), *Cyprus v. Turkey* (§§ 186--187) and *Xenides-Arestis v. Turkey* (no. 46347/99, § 28, 22 December 2005) that displaced Greek Cypriots, like the applicant, cannot be deemed to have lost title to their property and that the compensation to be awarded by this Court in such cases is confined to losses emanating from the denial of access and loss of control, use and enjoyment of property (see paragraph 21 above; see *Loizidou* (Article 50) § 31 and *Xenides--Arestis* (just satisfaction) cited above, § 38).
- Burdov v Russia (No.2):
  The level of compensation must not be unreasonable in comparison with the awards made by the Court in similar cases (*ibid*., §§ 202-206 and 213).

Applicants who have already lodged their cases with the Court:

- Burdov v Russia (No. 2):
  The Court decides, however, to follow a different course of action in respect of the applications lodged before the delivery of the judgment. In the Court's view, it would be unfair if the applicants in such cases, who have allegedly been suffering for years of continuing violations of their right to a court and sought relief in this Court, were compelled yet again to resubmit their grievances with the domestic authorities, be it on the grounds of a new remedy or otherwise.

20. In the absence of a state's willingness to comply with the judgments of the Court and to provide adequate solutions for problems of systemic nature, the application of the "pilot judgment procedure" may result in

[18] AS/Jur (2007) 35 rev 2, "The effectiveness of the ECHR at national level", Committee on Legal Affairs and Human Rights, Parliamentary Assembly, CoE, Working document, Rapporteur: Mrs Marie-Louise Bemelmans-Videc, Netherlands, EPP/CD, 26 July 2007, para. 34.

a failure to consider a large number of well-founded cases.[19] Hence, the attention of the Convention system should focus on how to convince governments to provide suitable solutions to their systemic problems. It should be remembered that reviewing and finding proper solutions requires that the state exercises political will in the appropriate direction consistently.

Final thoughts

21. The main aim of the Recommendation Rec(2004)6 is to prevent repetitive cases from being brought before the Court, and thereby to reduce the Court's considerable caseload. The application of the "pilot judgment procedure", as derived from this recommendation, has indicated that paradoxically states that suffer from systemic problems may not be the ideal candidates for this procedure as it stands. Systemic problems often arise as a result of systematic failure by a state to implement the Convention effectively and to comply with the judgments of the Court. The success of the "pilot judgments procedure" will depend on the state's declared will to move on from a habitual and contemptuous disregard for the Convention to a "Convention-centred" direction.

22. It should be noted that, with the adoption of Protocol No. 14 bis, the ECtHR has an additional tool to employ in dealing with repetitive or clone cases. Protocol 14 bis introduces just two procedural elements, taken from Protocol 14, i.e. the introduction of the single-judge formation and the extended competence of three-judge committees.

23. These new elements are designed to have the greatest and most immediate effect on the ECtHR's case-processing capacity: Under the new paragraph 4.b of Article 28, the three-judge committees will be able, in a joint decision, to declare individual applications admissible and decide on their merits, where the issues raised concerning the interpretation or application of the Convention have already been resolved and are part of the Court's well-established case law.

24. The Art.28 (4) (b) procedure will be the main measure available for the swift processing of repetitive cases. As under 28 (4) (b) many cases can be decided by three judges, instead of the seven currently required for a chamber decision or judgment, its implementation should enhance the ECtHR's decision-making capacity and effectiveness considerably.

25. It should be pointed out that the Art.28 (4) (b) procedure is one of the two measures targeting "repetitive" or "clone" cases. The other measure

[19] It should be noted that a classic feature of cases deriving from structural situations is that they are almost by definition well-founded.

is indeed the introduction of the "pilot judgment procedure" as discussed earlier on. At present it is far from clear under what circumstances these two measures will be applied. The main difference between the two procedures is that, under Art. 28(4) (b), the applicants will in the end have judgments of the ECtHR in their hands. However, in the "pilot judgment procedure" those individuals who have lodged the other applications deriving from the same systemic source as the one selected as the "pilot case" will not, if the procedure follows its course, receive a full, or indeed any, judicial examination of their grievance by the ECtHR, contrary to their expectations at the time of lodging their application. Clearly, from the applicants' point of view it is preferable if the ECtHR decides to apply Art. 28(4) (b) rather than the Pilot Judgment Procedure in their case.

26. It is suggested that the reformed Article 28 can be applied in a complementary fashion, to protect applicants' rights, where cases are frozen, in the event that the PJP fails to produce the required/ sought after results. In the alternative, the ECtHR might be able to combine the two processes. One way would be for the ECtHR to actually deliver a number of judgments, finding violations, against the respondent state as soon as the PJP is put into effect. In this way the ECtHR would benefit from a wider understanding of the prevailing systemic issues and of the measures required to rectify the situation, whilst allowing for additional time to properly assess the willingness of the member state to comply and resolve the underlying systemic problem.

CHAPTER 1:

PRESENTATIONS

(moderated by Philip Leach)

Quasi – pilot judgments – comments from the perspective of Poland (cases *Musiał* and *Kauczor*)

Igor Dzialuk,
Deputy Polish Minister of Justice

I was invited to give a speech on *Quasi – Pilot Judgments: comments from the Polish perspective (judgments in two cases Musiał and Kauczor)*. The former judgment is related to the conditions of detention for detainees who are in need of special care because of their state of health in the context of overcrowding in the Polish detention facilities while the latter concerns the problem of the excessive length of pre-trial detention.

I will present the cases briefly. Next I will compare these judgments with the outline of the pilot judgment in order to define the quasi pilot judgment. Finally I would like to present actions taken by the Polish Government in order to comply with the operative parts of the two aforementioned rulings of the Court.

In the case of ***Sławomir Musiał v. Poland*** the Court held that there had been a ***violation of Article 3*** prohibiting inhuman or degrading treatment. This violation resulted from a cumulative effect of not providing the appropriate medical care to the mentally ill detainee demanding permanent psychiatric care and adequate facility conditions during his overall pre-trial detention.

Furthermore, the Court recalled that, in line with Article 46 of the Convention, Poland had rapidly to take all necessary legislative and

administrative measures in order to secure appropriate conditions of detention, in particular for prisoners who need special medical care because of their state of health. The parties' statements concerning the state of health and the conditions of the applicant's detention were, to a large extent, contradictory. It seems however that most suggestive for the Court was the factor of overpopulation. The Government, not agreeing with the Court's argumentation, decided to request a referral to the Grand Chamber. Because of that, the judgment has not yet become final.

The Government is aware that the Court, in dealing with the individual case of *Musiał*, recalled the problem of overpopulation in Polish remand centres and prisons, and indicated that this problem affected a whole class of detainees who need special care because of their state of health. Moreover, the Court recommended that the Government take legislative and administrative measures to assure the appropriate detention conditions and medical, care for detainees in need of special medical attention. The Court forther recalled that, in accordance with the principle of subsidiarity, the choice of legal instrument to be applied in the domestic legal system to eliminate irregularities was made by the respondent state. As a result, the judgment includes components familiar to the pilot judgment. However, the Court did not decide on the general measures. For these reasons we define the judgment of *Musiał* as quasi pilot one. The same structure his also characteristic of the *Kauczor* judgement.

Being aware that there might be essentially identical applications pending, some are afraid that this quasi pilot judgment could be followed by a pilot judgment. In this context, I would like to stress that, under Articles 23 and 24 of the Polish Civil Code, and in line with the jurisprudence of the domestic courts, detainees suffering a violation of their personal interests because of overcrowding in prison or inappropriate conditions of imprisonment may bring a civil action for just satisfaction. I would like to draw your attention to the fact that Poland has well-grounded jurisprudence of domestic common courts as regards personal interest infringements with respect to detainees, and a large number of final judgments granting detainees compensation for detention conditions. Moreover, the domestic jurisprudence has evolved during the last 16 years of the Polish presence within the Convention system. In particular, I would like to emphasise that the recent jurisprudence of the Polish courts reveals an eagerness to react promptly. Courts are already granting just satisfaction to detainees placed in inappropriate conditions, in response to lawsuits take out against the Treasury. Moreover, as, under domestic provisions, a person whose personal rights have been put at risk by other people's actions might request that such action cease, it is only a matter of time

before a detainee not only applies for just satisfaction, but also requests that a domestic court arrange a relevant allocation, for example of a cell of due area. The judgment of the Wrocław Regional Court of 13 March 2008 reveals that the domestic courts have already recognized the possibility of making such an allocation. *The Electronic Supervision Act* adopted on September 7, 2007 will enter into force on September 1, 2009. It introduces a system which is an alternative to prison isolation, and is based on the principle that an indivi- dual sentenced to a penalty of deprivation of liberty can be released from prison and supervised electronically. Strict supervision of individuals is secured by relevant technical means and monitoring systems. It is estimated that the introducing of this system should reduce the demand for places in prisons by approximately 3 000–15 000 within 3 years.

Furthermore, on 22 April 2009 the draft amendment to the Code of Execution of Criminal Sentences was sent for interministerial consultations. This draft implements the Constitutional Tribunal's ruling of 26 May 2008 on be unconstitutionality of Article 248 § 1 of the afore-mentioned Code. This provision stipulates that, in particularly justified circumstances, by virtue of a decision issued by the governor of a penitentiary institution, detainees may be placed for an undetermined period of time in cells in which the living area is of less than 3 sq. metres per person.

The principles under which detainees are placed in smaller cells should be as defined explicitly and precisely. There should be no doubts as to the situations under which allocatio of detainees to smaller cells might occur, and, as to the maximum duration of such allocations. In the above mentioned draft, means of compensating for placement of a convict in a smaller cell are described. The convict's walk shall be thirty minutes longer and additional educational, leisure and sporting activities shall be offered. As for new investment, on February 26th 2006, the Council of Ministers accepted an action plan to establish new places for individuals in detention facilities are the 2006–2009 period. This plan contains a programme to create 17,000 new places in detention facilities, through the construction, renovation, adaptation and obtainment of some facilities from the Military Property Agency. As a result of these efforts, in 2008 done, some 4193 additional places have been created.

We thus observe a decrease in the level of overpopulation in Polish prisons. According to statistical data, overpopulation in prisons in 2006 was at the level of 118.5%, in 2007 110.9 %, in 2008 only at the level of 99.7%. We are aware that the current Polish penitentiary system requires further improvements and modifications. However, it must be stressed that the system cannot be modified in any short period of time. The aim of

the penitentiary system reform is not only to reduce the overpopulation in detention facilities, but also to improve the process of rehabilitation through social, cultural or educational activities.

Another significant case in the context of quasi pilot judgment is the case of ***Kauczor v. Poland***. In respect of this the Court held that there had been a ***violations of Articles 5 § 3*** of the Convention, on account of the excessive length of the applicant's pre-trial detention, and a ***violation of Article 6 § 1*** as regards the excessive length of the criminal proceedings.

As to the facts of the case, the applicant was arrested and detained on suspicion of murder and the illegal possession of weapons in June 2000. The first hearing in his case, scheduled for December 2000, was adjourned. Overall, during the next 7 years, the competent domestic court scheduled more than 110 hearings. Detention was extended by numerous court decisions issued between July 2003 and January 2007. In those decisions the authorities relied primarily on the serious nature of the offences with which the applicant had been charged. In December 2007, the applicant was released. When it came to merits of the *Kauczor* case, the Court stated that it observed in Poland the existence of the structural problem of the excessive length of pre-trial detention. Poland has taken various measures to return to compliance in this respect. First of all, the Council of Ministers adopted on 17 May 2007 the *Plan of Action of the Government for the implementaria of judgments of the European Court of Human Rights in respect of Poland*. By virtue of that document the Minister of Justice disseminated among judges and prosecutors information on the standards concerning the length of pre-trial detention stemming from the Convention and the Court's case-law in cases against Poland. Furthermore, in February 2008 the Ministry of Justice made a request to all the Presidents of the Courts of Appeal concerning the strict observance of convention standards when it same to the drawing up of grounds for decisions on detention. At the same time, the Ministry of Justice sent out to courts the Resolution of the Committee of Ministers of 6 June 2007 concerning the judgments of the European Court of Human Rights in 44 cases against Poland. Moreover, the obligation relating to the administrative supervision of prolonging criminal proceedings was introduced within the framework of *Guidelines on supervision of Polish common activitie in 2008* („Kierunki nadzoru nad działalnością sądów powszechnych w 2008 r."). These tasks are being carried out in 2009.

Now let me turn to legislative initiatives concerning the problem of the excessive length of pre-trial detentions. The Act of 24 October 2008 amendming the Code of Criminal Procedure Act, which came into force on 22 January 2009, contributed to the removal of *significant obstacles*

which were unbearable to eliminate as the factor justifying the extension for applying pre-trial detention up to the final 2-year time-limit. The Act also eliminated the prolonged preparation of psychiatric expert opinion and prolonged psychiatric observation of an accused resson by introducing an eight-week limit for the duration of psychiatric observation. Thanks to that amendment, a pre-trial detention period shall not exceed 12 months in preparatory proceedings and 2 years in court proceedings. Prolongation of pre-trial detention is only now possible under special, strictly defined circumstances. Following the recommendations of the Commissioner for Human Rights, Poland introduced an amendment to the Act of 17 June 2004 *on complaints over a breach of the right to a trial within a reasonable time*, offering a completely new legal instrument – a complaint regarding the excessive length of pre-trial proceedings.

The above-mentioned actions bring in a gradual reduction in the incidence of the most excessive detentions. According to the statistics, in 2008 there were 878 detainees whose period of detention was over 2 years, that is 11.85% fewer than in 2007 (996). In that time, prosecutors submitted to district courts, in the course of investigations, 27,441 motions for detention on remand, that is 24.7% fewer than in 2007 (36,408). The courts approved 24,145 motions, that is 22.8% less than in 2007 (31,271).

In its *Kauczor* judgment, the Court used the notion of the "structural problem". As you know, when the Court recognizes a "structural or systemic problem", its concerns are not limited to the individual case, and the execution of the judgment will be supervised as a matter of priority. So the expression "systemic or structural problem" has acquired a special connotation with the pilot judgment procedure. However, the Court invoking Article 46 of the Convention, recalled only the legal obligation of Poland to take further actions with a view to reducing the extension of a violation caused by the excessive length of pre-trail detention, but did not indicate general measures. It is clearly visible that, from the Court's point of view, the *Kauczor* judgment is a quasi pilot one. Nevertheless, from the Polish perspective the judgment passed in the Kauczor case refers to the past situation and should be treated as a historical judgment. The Court referred to the situation in 2007. At the present time, the problem of the excessive length of pre-trail detention appears in isolated cases that are exceptionally complex. However, they should not be treated as revealing the existence in Poland of a structural problem connected to the inappropriate application of pre-trial detention.

Both of *Kauczor* and the *Musiał* cases may indicate that the Court does not have to use the pilot judgment procedure recommending a general remedy to the respondent state. The possible solution for the solving

systemic or structural problems had already been identified by the respondent state itself, prior to the Courts' intervention. Most often various multifaced efforts taken by the respondent states are able to eliminate such problems. Nevertheless, the historic *Kauczor* judgment proves that the accuracy of the positive results of the state's actions can be confirmed over a long period of time. Thank you for your attention.

CHAPTER 1:

PRESENTATIONS

(moderated by Philip Leach)

Pilot judgments – possible role of the Committee of Ministers in the pilot judgments procedures

Geneviève Mayer,
Council of Europe, Head of the Department
for the execution of judgments
of the European Court of Human Rights

1. Introduction

I would like to echo previous speakers and express my thanks to the organisers of the Seminar for having invited me to participate in this event.

To start with, allow me to rephrase the title of my topic as follows: *Pilot judgments: the role of the Committee of Ministers*. Indeed, the Committee of Ministers is, under article 46 paragraph 2, of the Convention, responsible for the supervision of all judgments: pilot, "quasi-pilot" judgments or not, principle judgments or not. Rule 4 of the Committee of Ministers' Rules for the supervision of the execution of judgments recalls this responsibility as follows:

- giving priority to the supervision of execution of judgments revealing an underlying systemic problem;
- BUT NOT to the detriment of other deserving cases, notably those where the violation found causes serious negative consequences for the applicant.

Let me recall, that over the years, the Committee of Ministers has already had to identify, in cooperation with national authorities, systemic problems and measures to be adopted to remedy the situation in well over 2 000 judgments. The Committee of Ministers defined these cases as "leading cases".

To date, there have *sensu stricto* been three judgments of the European Court which have been clearly referred to thereby as pilot judgments: *Broniowski, Hutten-Czapska* and the very recent final *Burdov 2* judgment. But there are quite a number of "*variantes*".

Does this evolution call for a new or different role of the Committee of Ministers in its supervisory functions?

I will address this question in the first part of my intervention (I), before reflecting on the possibility of specific interaction with the European Court in its procedures for pilot judgments (II).

2. Pilot Judgments: a new or different role for the Committee of Ministers?

This question is closely linked with the features of the pilot judgment procedure, and in my opinion, with the potential for added value of pilot judgments to the execution mechanism.

A. Pilot judgments: an added value to the execution process?

We are all aware of the two fundamental texts in the background of the pilot judgment procedure: i.e.

- The Committee of Ministers' Resolution (2004)3 on judgments revealing an underlying systemic problem;
- Recommendation (2004) 6 on the improvement of domestic remedies.

1. The Committee of Ministers' Resolution (2004)3 was, more particularly, based on the idea that the execution process would be facilitated if the existence of a systemic problem was identified from the out set in the European Court judgment itself. Such identification may indeed speed up the execution process, as it will save a significant time- and resource-consuming stage in the execution process. In addition, should a respondent state be unwilling or reluctant to acknowledge the systemic nature of a problem, the Court's authority will in all likelihood play a decisive role in this respect.

However, for the Court this raises the issue of delimiting the scope of the systemic problem, or notably, identifying it. Indeed, the development of the pilot judgment procedure may well suggest that the European Court will have to engage increasingly in such on identification process. Let me stress that the Committee of Ministers has for years been dealing with the problem of how to identify systemic problems, and has developed a pragmatic approach to it. I listened with great interest to what my colleague John Darcy said about the "diagnosis stage" for the Court. From the Committee of Ministers' experience, it appears that an adequate and clearly circumscribed scope of the systemic problem is essential for swift and proper execution of judgments.

2. Turning to the Committee of Ministers' Recommendation (2004)6 on the improvement of effective remedies, I think that we all agree that its aim is to avoid the Court's being compelled to address huge numbers of "manifestly well-founded complaints" simply to provide redress unavailable at domestic level.

The Imposition on respondent States of an obligation to adopt an effective remedy was an innovative development in the *Broniowski* case, notably when combined with the freezing/adjournment of "clone" applications, until an effective remedy is in place.

However,it has been questioned whether this is always in the interests of the applicants has been questioned. The Appendix to Recommendation (2004)6 (paragraph 19) added a provision in this respect, namely *that in certain circumstances, it may be preferable to leave the cases to the examination of the Court, particularly to avoid compelling the applicant to bear the further burden of having once again to exhaust domestic remedies, which, moreover, would not be in place until the adoption of legislative changes.* Referring to the recent pilot judgment in *Burdov 2*, it appears that the Court has demonstrated similar sensitivities, by increasing the obligation on domestic authorities to grant rapid redress (see in particular paragraphs 144 and 148 of the judgment).

3. Over and above the creation of effective remedies, should the Court seize the occasion to provide more specific indications as to what other remedial action is to be taken by respondent states? This question has been widely debated and is still discussed at various fora.

I just note that in most judgments the Court appears to be extremely cautious and refrains in principle from engaging in this "*terrain*". Only the main aims to be achieved to prevent new violations are mentioned, leaving the concrete measures to be adopted to respondent states albeit under the Committee of Ministers' supervision.

This approach seems to be confirmed in the *Burdov 2* judgment (as well as in the recent *Kauczor v. Poland* judgment), in line with long-standing practice. Notably it continues to allow the Committee of Ministers and the Department for the Execution of Judgments to assist respondent states with advice on the concrete measures required and often to continue the work already started in other cases related to the same issue (see for example the Committee of Ministers' Interim Resolution (2009)43 in the *Timofeyev group of cases*).

B. Pilot judgments: what responses should the Committee of Ministers offer?

It has very often been argued, including by the European Court itself, that the success of the pilot judgment exercise lies very much in the hands of the Committee of Ministers, and more precisely in its means of ensuring speedier execution in the special situations chosen for the pilot procedure.

I fully agree with the necessity of the Committee of Ministers clearly giving pilot judgments the priority treatment they need. Several general improvements have been introduced in recent years, and this may well prove also in the context of the execution of pilot judgments also.

Let me mention some rules from the 2006 Committee of Ministers' Rules on the supervision of the execution of judgments:

- Rule 9 (2) which provides for increased involvement of civil society and national institutions for the protection and promotion of human rights in the execution process;
- Rule 14 which provides for better public access to information on the execution process;
- Rule 5 on the adoption of an annual report by the Committee of Ministers, which shall be made public and transmitted to the Court, the Secretary General, the Parliamentary Assembly and the Commissioner for Human Rights.

Last but not least, the experience of the Committee of Ministers resulting from the supervision of the numerous leading cases, has emphasized the need for increased "in-the-field" cooperation with national authorities, and increased synergies between various instances within the Council of Europe.

Indeed, since 2006, the Committee of Ministers – via the Department for the Execution of Judgments – has been actively engaged in the development of technical co-operation activities with respondent states

(high-level consultations with competent national authorities, expert opinions on legislation, technical round tables and seminars with the participation of other bodies of the organisation). The year 2009 will see further developments in this area, notably through two important projects agreed to by the Human Rights Trust Fund set up in 2008. These projects are devoted to the non-enforcement of domestic judgments and to human rights violations by security forces. The year 2008 has also confirmed the important links between the execution of the Court's judgments and the activities of other bodies which are active in areas under Committee of Ministers' supervision (the Commissioner for Human Rights, Venice Commission, CPT and CEPEJ – just to mention certain key players in the process). There is also no doubt, that the Parliamentary Assembly, due to its own initiative as regards execution of judgments, should be seen as a key player in the execution process of pilot judgments/leading cases.

This has been acknowledged in Resolution (2004)3 in which the Committee of Ministers invites the Court to specially notify any such judgment to the Parliamentary Assembly, the Secretary General of the Council of Europe and the Commissioner for Human Rights.

Further, at national level, the implementation of the recent Recommendation (2008)2 on efficient domestic capacity for rapid execution of the Court's judgments will constitute a decisive element in the process, notably in the capacity of the national authorities to prepare and submit rapidly to the Committee of Ministers a proper and sound action plan on the measures taken and envisaged to execute the European Court's judgments.

The Committee of Ministers has started, as one can see, to introduce new concrete ways to respond to the challenges of its supervision mandate. An area still to be explored in respect of the pilot judgment procedure is the following: is there a possibility for specific interaction between the Court and the Committee of Ministers?

3. Possible specific interaction between the Court and the Committee of Ministers

Most of the questions addressed by the Court in the context of the pilot judgment procedure inscribe themselves in existing practices of the Committee of Ministers. This "overlap" is not surprising as this procedure is eminently related to Article 46 of the Convention. Developments in this procedure may well benefit from continuing to take due account of the Committee of Ministers' experience and the results of its supervision work.

In this respect I refer, *inter alia*, to the Registry of the Court's memorandum "The Pilot Judgment Procedure" (document DH-S-GDR(2009)010).

For example, responses by respondent States to Court judgments which might reveal systemic problems could receive particular attention from the Court. Such a situation may well be indicative of the need for a "pilot judgment procedure", notably when the Court considers, on the basis of the information available from the Committee of Ministers, that additional support or pressure would be helpful in speeding up the execution process.

Another example of interaction could be a situation where in the information available from the Committee of Ministers reveals that there is a persistent refusal on the part of the respondent State to accept the existence of a systemic problem or to adequately deal with it. The clear identification of the problem in a "pilot judgment" may prove very helpful in ensuring execution.

Further, I would suggest that a pilot judgment procedure should bear in mind the execution process/dimension. How can the procedure be organised to ensure that the judgment may readily be executed? For example, should the procedure be based on one or several cases? In saying this, I refer to the concerns expressed in the Parliamentary Assembly's Resolution 1516 (2006) in respect of recourse to the procedure based on a single case in a complex situation.

Obviously, the Committee of Ministers has to extend rapidly support to the Court in pilot cases. The quick adoption of an interim resolution may be an important means to ensure continued public and political awareness of the importance of action, as well as a useful tool by which to provide support for, and advice on, appropriate action. I am inclined to believe that the adoption of such an interim resolution was quite helpful in ensuring that the required legislation was adopted rapidly following in the *Broniowski* case.

Based on the *Broniowski* experience, I renture to outline roughly, in my conclusion, a possible scheme/scenario for specific interaction between the Court and the Committee of Ministers.

The Court adopts a pilot judgment and, to an appropriate extent, freezes other pending cases in anticipation of the putting in place of effective remedies. The pilot judgment is immediately taken up for discussion in the Committee of Ministers, with a view to ensuring the rapid submission of an action plan. Where necessary, cooperation activities are engaged in.

The Committee of Ministers rapidly adopts an interim resolution to support execution and, to the extent that is necessary, provides advice and relevant observations on progress with execution.

The Court renders its judgment on Article 41 if the question has been reserved with preliminary comments on the progress achieved. The Committee of Ministers organises subsequent execution supervision and cooperation activities in the light of the Court's comments.

The Court unfreezes certain cases to test the real effectiveness of the reforms/remedies introduced. The Committee of Ministers takes the results into account in deciding whether or not it is possible to put an end to its execution supervision on the basis of the Court's conclusions.

If appropriately used, the pilot judgment procedure opens interesting perspectives for both the Court and the Committee of Ministers. The potential of the procedure can even be greater with interactions between the Court and the Committee of Ministers becoming exploited appropriately.

Thank you.

CHAPTER 1:

PRESENTATIONS

(moderated by Philip Leach)

The concept of "legal peace" as a possible modality of pilot judgment procedure

Michał Balcerzak,
Nicholaus Copernicus University, Toruń

It is an honour to address you during this informal seminar, which concerns one of the most intriguing phenomena in the recent case-law of the European Court of Human Rights.

I realize that we have already heard no less than eleven interesting presentations, and that is a lot for just one afternoon. Nevertheless, before going to the point I cannot resist the temptation to say that the original concept of this seminar was born in November last year. It was in the cafeteria of the London Metropolitan University, where Professor Philip Leach kindly invited me for a cup of coffee and mentioned the project on pilot judgments which was at the time being carried out by the Human Rights and Social Justice Institute. I suggested then that we might have an informal exchange of views on the subject in Warsaw among ten or twelve persons. As you can see, the original idea was developed into far more than that, and I wish to thank everyone who contributed to this success.

Having said that, I wish to make the preliminary remark that I am not entirely sure whether the contents of my short presentation will exactly match the title proposed by the organizers. This is so because, instead of discussing the concept of legal peace as a possible modality of pilot judgment procedure, I will rather try to explain what "legal peace" might be, and elaborate whether it has any legal meaning.

Well, the concept of "legal peace" has thus far been used by the Polish Government to describe a situation wherein, in the face of mass applications concerning a systemic problem, a strategic response of the Government restores compliance with Convention standards following consultations with the Court's Registry as to the standards required in a given situation.

In these terms, "legal peace" is achieved when, as a result of the said consultations and Government action, the situation is no longer at odds with the Convention standards even before the Court pointed to a systemic problem being faced by the respondent State.

In fact, the term "legal peace" seems to refer to an informal procedure of co-operation between the Government and the Registry, and also, if appropriate, the Council of Europe Commissioner for Human Rights. The co-operation aims at ensuring compliance with Convention standards in a pre-emptive manner, i.e. without waiting for the Court's judgment.

Obviously, the Court is in no way bound by the consultations and – at the end of the day – it may express a different evaluation of the Convention standards as applied to a particular systemic problem. However, irrespective of the Court's final views presented in a pilot judgment, the benefits of the "consultation procedure" are quite evident.

First of all, this approach may allow for the discontinuonce, or at least diminution of the pattern of violations occuring in the respondent State before the Court confirms the systemic nature of the problem. All practitioners who deal with the Convention on a daily basis are well aware that systemic problems are not "discovered" suddenly by the Court on the day of delivery of a judgment. They are never a surprise. The pilot judgments or quasi-pilot judgments are a confirmation of what has already been well known before.

Therefore, it is practicable and necessary to counteract a systemic problem a long time before the Court confirms it. This is not only relevant from the perspective of potential applicants, but also from the perspective of the Government itself. The sooner an effective remedy for systemic violations is proposed, the less likely it is that the problem will become pandemic. It is of relevance that an early introduction of a domestic remedy may also influence the issue of just satisfaction as required by applicants in clone cases.

Notwithstanding the practical perspective, an early reaction and restoration of compliance with the Convention standards is also an international obligation of the respondent State, as perceived in the law of international state responsibility. The discontinuation of a violation and provision

of appropriate redress (*restitutio in integrum*) are primary consequences of that responsibility.

Now, the actors involved in the consultations concerning an effective domestic remedy included – at least in the Polish example – the Government, the Court's Registry and the Council of Europe Commissioner for Human Rights, who provided valuable feedback for the exercise. The Government might also be willing to consult non-governmental organizations and experts, depending on circumstances and needs.

It is true that neither the Convention nor the Rules of Court provide any framework for such consultations, but such is also the case with pilot judgments themselves. It is my opinion that, whereas some more solid ground would be desirable in the case of pilot judgment procedure, there is actually no real need to formalize a procedure for such consultations. The so-called "legal peace" might be achieved as a result of a joint effort of the Government and actors or bodies willing to assist the State without any formal patterns.

And I think these are the key words describing the informal procedure: assistance and co-operation between a State Party and the Council of Europe in ensuring conformity with Convention obligations.

The expected or desired outcome of the informal procedure entails a changing of domestic law and/or practice in anticipation of the Court's first pilot judgment in the given field.

I should again stress that the possible agreement as to the required measures achieved this way does not influence the Court's ability to specify the scope of respondent states' obligations. Obviously, we may not expect the Court to simply discontinue the examination of pending cases only because a Government has introduced a new remedy or changed domestic practice. However, the Government's activism prior to the delivery of a pilot judgment is a much better approach than simply waiting for the judgment to come, along with an indication of the Government as to how to restore compliance with the Convention.

In view of the above, I should say that it might be a bit awkward – or at least ambiguous – to use the term "legal peace" in order to describe "a process of achieving conformity with the Convention in anticipation of a pilot judgment". Actually, I do not know any domestic jurisdiction which provides an exact legal meaning to this term. It is almost never used in Europe, and only very rarely with respect to certain disputes in the United States.

Be that as it may, I suggest that perhaps some other term be proposed to describe the procedure of informal consultations to achieve compliance with Convention standards. After all, the choice of words is secondary, what matters is the idea of a pre-emptive attitude of a Government facing a systemic problem in anticipation of a pilot judgment.

Now, my final – and brief – remarks will concern something different, and notably the difficulty of drawing a clear line between the role of the Court and the Committee of Ministers after a pilot judgment has been delivered. This difficulty was recalled by Professor Leach this afternoon and also expressed earlier in separate opinions to several pilot judgments.

Understandably, the Court has the power to interpret Article 46 in a manner which does justice to States' general obligation as expressed in Article 1 of the Convention. However, the Court in fact might have gone one step too far in its efforts to complete the pilot procedure in the *Hutten-Czapska* case. A question arises as to whether it would not be more suitable to entrust another body (for instance, the Department of Execution) with some sort of quasi-judicial competence in supervising compliance with the Court's pilot judgments. This would definitely require some intervention of the States Parties to the Convention, but not necessarily an amendment of the Convention itself. Perhaps it is a point worth considering in the future work of the Reflection Group.

Lastly, I wish to express my strong belief that this Seminar will provide a valuable contribution to future developments in the area of pilot judgments. I am sure that the States Parties to the Convention will not lose all their energy on introducing Protocol no. 14 bis, and will continue their struggle to improve the European system for the protection of human rights.

Without a doubt, pilot judgments are already part and parcel of that system.

CHAPTER 2:

DISCUSSION

(moderated by Jakub Wołąsiewicz)

Jill Heine

My name is Jill Heine and I am from Amnesty International. Thank you, Mr. Wołąsiewicz, for hosting this seminar and inviting us to participate in it, both myself and other NGO colleagues who are here. I have found this seminar very useful, interesting and provocative. As some of you may know we have been very concerned about the place of the applicant in the procedures. From the time the Court communicates the application to the government that it is minded to use the procedures, whether the applicant takes it into consideration. Also what happens to those application, People whose applications have been frozen, they have been waiting for years and years for redress. I think Costas Paraskeva's comments about the new possibilities of three-judge committee procedures were interesting and bear thinking about, and I am sure that the Registry of the Court has already had those thoughts. There are two more points I'd like to make briefly. One, which has been striking to me in the presentation from government representatives, which have experience in pilot judgment procedures. There was not more information about the involvement of the Parliament in the scope of dividing the remedy. How were the parliaments brought on board and at what stage were they brought on board? Some people from CDDH may recall that we were interested in ensuring that government kept parliament regularly informed about the judgments coming through with the Court. Parliament is certainly a partner in achieving the result when the result is either legislative or has to do with the budget. So, more information in encouragement, to engage the Parliament and the parliamentary committees earlier and more often. I'd like to hear from some of the participants about how and whether the parliament was engaged. It would be very interesting. Also we have been interested in the role of civil society, the input into these cases, particularly in guiding the Court to look at some of solutions. It was something that Irene Kitsou-

-Milonas touched on – about the role of national organizations, domestic organizations and international organizations that write papers on subjects related to pilot judgments and what could be the result of pilot judgments, what the solution could be in the recommendation. I would be interested to see how the Court would react to a request made by NGO's or a national human rights institution. Could these bodies intervene on issue on the remedy. Those are some of the thoughts which come to me in the course of discussion which I hope others would find interesting and may- be we can pick up on.

Jakub Wołąsiewicz

As to the first question concerning the rights of the applicants in clone cases, this is also mentioned in my statement. Frankly speaking. – there are no rules to take. You should as a representatives of civil societies trust all actors in the especially friendly settlement. That means to trust the government, to trust agents, to trust the Court Registry and to trust the applicants, especially the one applicant in the main case. As I told you, I tried from the very beginning to avoid the peaceful settlement in pilot cases, and to create all this balance between individual measures and redress, financial redress to the general measures and potential redress by the others applicants And it was approved by the Registry and by the Court so I must say that the main applicant is receiving rather the same kind of redress as the potential applicant of those clone cases which have never launched a complaint to the Court, but he potentially could use this system. Concerning the second question, is there a volunteer to answer? Igor Dzialuk – the Deputy Minister of Justice of Poland, could you answer this question about the role of the parliament, how easy it is to negotiate general measures between the government and the Parliament?

Igor Dzialuk

Actually I have not very much to say on this topic. The experience of Poland is not very encouraging, I must say. The parliament is normally included into the legislative process in the very final stage – when the draft is accepted by the government and the bill goes to the parliament. We have never experienced the general interest of parliamentarians but also politicians. It can be explained by the fact that the members of the parliament are politicians and they usually think in terms of their term of office. And therefore if there is no judgment in this stage, I am referring to Dr Balcerzak, there is very little interest from the side of the parliamentarians to take a position in the case. Probably they do not expect the judgment to be finally finished while they are still in their term of office. So this is a problem, probably not for them, but for those who will come to the

government and the parliament in the future. This is a political involvement; I mean the politicians do not always think in a longer term than their term of office. I am holding a political position currently, so you may be surprised that I am saying these words, but I used to be a civil servant for quite a while and I still retain this kind of philosophy, and sometimes it is hard to me to switch from one way of thinking to another. But I need to say that the involvement of parliament is rather marginal in Poland and it comes late only, when the bill is presented to Members of Parliament to be debated. Obviously the government's justifications of the bill contain a referral to a judgment and it's more often than not a valid argument in the debate in parliament. The same case in the budgetary allocation that again the examples of Poland show that the parliament will improve what the government suggest. There are more political issues that attract the attention of Members of Parliament. We have never actually suggested anything that would inflict large budgetary allocation. That would be inherent to the reform draft. It was more often than not the case that it would be a part of a reform, so the judgment and the pilot judgment were just one of the supporting arguments, not the basis for the request for the budgetary allocation. The experience may differ from country to country. For the government it is not a pilot judgment which makes this final convincing argument in the discussion with the parliament.

Jakub Wołąsiewicz

Thank you. Maybe I will say one word. We have of course the Committee of Ministers which is supervising the activity of government, and also the Parliamentary Assembly deals in some way with the implementation of the judgments. The problem is the lack of balance. In my opinion, the Parliamentary Assembly should supervise the implementation of the judgments, but especially the activity of the national parliaments. However, we have rather another experience, when there is a discussion in the Parliamentary Assembly that the government is receiving questions and we are answering. Frankly speaking, there is no input from the parliament.

Peter Pavlin

Thank you, Mr Wołąsiewicz. With this question that was raised about the role of the national parliament, I can, of course speak only concerning Slovenia's national Parliament, in all cases that were decided by the Strasburg Court or shall be decided by the Strasburg Court in the future, when there is systemic problem discovered even if it is not a pilot case, even if it is an ordinary case, the case will find its way into our Parliament. Why? Whenever we have restrictions, it is in Constitution, whenever we have to

regulate rights and obligations; it has to be regulated by the "statute" of the parliament. And in case of *Lukenda*, as I have mentioned, there were two projects going on. The Act, which I was drafting, and the *Lukenda* Project about increasing capabilities of courts and education of judges. And this second project, the *Lukenda* Project, which we also drafted, was submitted to the Parliament as a piece of information to the parliamentary body, responsible for judiciary one month after the Lukenda judgment. So the Parliament was really informed quickly. And of course, when the judgment in the Lukenda case was adopted, it was published; the Slovene translation was published on the website to the Supreme Court, Information Office of the Council of Europe in Slovenia, Ministry of Justice... I can provide you with some other cases, which was one year later. It was not a pilot case *per se* – the case was *Matko against Slovenia*. It concerns the violations of human rights of a person by the Slovenian police. Let's say it: the illegal methods of arrest. It shows that the police are not maybe totally capable of investigating crimes or alleged crimes among its own officers or members. So, we have amended the State Prosecutor's Office Act and the Criminal Procedure Act. It had to go to Parliament of course. And as a result of this judgment, which is not a pilot judgment, I have to emphasise, that we have formed a special Police Department at the Supreme State Prosecutors` Office, which is quite unusual for Slovenia. And this department is systematically or originally responsible for investigating all violations of human rights supposedly committed by the police or military. Now in 2009 we have another case – the case of *Šilih against Slovenia*. It's also not a pilot case but it is also a case, which shows some systemic problems. It concerns a person who died in hospital in 1993 and his parents are totally convinced this is as a result of physicians' mistake or negligence. I do not know what shall be the result, but it seems for now that some parliamentary decisions shall be required and there is some concern for the investigations of these physicians' mistakes to be left completely within the physician's society, chamber of physicians – maybe forming some independent body or more independent body or impartial body within the chamber of physicians. I think in relation to the Strasburg case law – these are the best three examples.

Jakub Wołąsiewicz

Thank you very much Peter. I have this feeling, that when you mentioned the *Silih* case. I'm very sorry it was against Slovenia, but it could be very inspiring for the work of the Group of Impunity, which Derek Walton will be leading very soon. So I have the feeling that this problem could be discuss maybe even tomorrow. And Geneviève Mayer?

Geneviève Mayer

Yes, thank you. I do not want to respond on the part of Andrew Drzemczewski. But I just would like to recall Recommendation (2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution, and in particular paragraph 9 in which, *inter alia*, the Committee of Ministers recommended that the coordinator – an individual or an instance in charge of execution of the European Court's judgments – should, as appropriate, keep domestic parliaments informed of the situation concerning the execution of judgments and the measures taken or needed in this regard. This is particularly important where the execution measures imply a change of law or adoption of a new law. I would be interested for my part to hear if there is already (it is a quite recent recommendation), any experience on the national level in this respect, or if there is in the room such an instance or individual entrusted with this role of coordinator, if it/she/he already has experience in raising the awareness of parliamentarians of the measures required or to be taken. Finally, I just would like to recall that, in the previous experience of the first annual report of the Committee of Ministers, it appears that some national parliaments have carefully studied the Committee of Ministers' first annual report, and that this has led to questions and discussion within national parliaments. So it is maybe just a modest answer to Jill's questions, but there are tools in the process of execution in this respect. Thank you.

Jakub Wołąsiewicz

Thank you. Just adding a few words about the annual report. The problem is that it's in English or in French. There is no obligation for the state to translate into the national languages. I have a feeling, still, personally that this report gives a lot of information, not only for government agents or other government officers but also for parliamentarians. Maybe one day it will be unnecessary to think about some kind of recommendations about translation of the annual report into the national languages. Well, I think Jill Heine, that we tried to answer all your questions. Who is next?

Philip Leach

Thank you very much. I have one observation and a couple of questions. The first observation: I think it has already been mentioned that the Court practice now is to refer to the possibility of the application of the pilot judgment process at the communication stage. It's a form of 'consultation' and John Darcy may correct me if I am wrong. The application of the PJP was recently raised in some of the cases from South Ossetia. Many of you know that there have been more than 3,000 cases lodged at Court from South Ossetia against Georgia, as a result of the armed conflict last

summer. And of course a lot of cases were also lodged against Russia. And in the South Ossetian cases, at the communication stage, the parties were asked by the Court whether the case is suitable for the pilot judgment process. I think it is an interesting development and I would welcome comments on that.

The question I have relates to the monitoring of legislation and practice which are changed as a result of pilot judgments. I wonder whether we can hear from Polish colleagues here about the possibility of an institution like the ombudsman taking on a role of that sort in terms of monitoring the effectiveness of pilot judgments and quasi-pilot judgment and of changes in the law. And then I have two questions in relation to the role of the Committee of Ministres which may or may not be for Geneviève Mayer or for others. Erik Fribergh in Stockholm, in June last year talked about the need to develop enforcement in relation to pilot judgments and talked about the possibility of having some sort of judicial mechanism, or quasi – judicial mechanism, possibly under the auspices of the Committee of Ministres. And I wonder whether that idea will run, will it have the support from anyone in the room?. And the only question for Mrs Mayer – is about the ability of the Committee of Ministres to prioritize the execution of pilot judgments. What forms could, or should, it take? What does it mean apart from the obvious things like speeding things up: are there other ways in which the Committee could reflect this obligation to prioritize pilot judgments?

Jakub Wołąsiewicz

I think that the answer should be given by Geneviève Mayer once again. As I understand Mr Leach, this is also the concept presented by Italian colleagues and concerning panels of the Committee of the Ministres to dealing with some difficult cases but I think that Mrs Mayer will answer for this question much more better than me.

Geneviève Mayer

Frankly speaking, the key question here is how can or what is the will of the national authorities to respond to the implementation of the measures required by a judgment. The real question lies in the identification of the obstacles national authorities may face when they have to take measures. A pilot-judgment, even if it has to be given priority, does not mean that there is an immediate solution available. In France, we say that Paris was not built in one day, and everything depends on the complexity of the measures to be taken. If you take, for example, the necessity of changing a law or adopting new legislation, you have to convince politicians, you have to convince parliaments and I can tell you, it is a heavy

responsibility on the shoulders of the national authorities entrusted with the responsibility of execution: I think there are more straightforward questions which we have to answer. First of all, there is the question of having the right diagnosis of the problem, and then the question of finding people who are able to tackle the problem. This is something which again has been developed since 2006. In order for the Committee of Ministers during its sessions to have a proper, sound debate and evaluation, you cannot deal with the measures to be taken just by sitting behind the office and doing paper work. You have to see what is going on the spot; you have to see the challenges, to see the problems and you have to work in cooperation with the states. I heard yesterday at another forum, someone saying that he thinks the Committee of Ministers is very patient. If you have to tackle a wide range of measures, you have to be at some stage patient. But you have also, and I agree with you, at some stage to see what the reason is for the time taken for execution. In this context, there is considerable room for synergies not only within the bodies of the Council of Europe, but also outside with civil society and National Institutes for Human Rights. I would like in this respect to refer to the United Kingdom experience of the Joint Committee, which, as far as I know, scrutinizes very carefully the results of execution. So the stimulus has to come from various sides, also to support the Committee of Ministers. In my opinion, it is a joint venture between the Committee of Ministers, national authorities and all other actors involved. As regards the last question – prioritization. Since the Committee of Ministers has been dealing with what I have tried to describe as leading cases, it has adopted a prag- matic approach, which might appear be very technical. For example, if you have excessive length of civil proceedings, you group the cases; then you might have a problem of length in criminal proceedings and in administrative proceedings. So you have a kind of sectoral approach, but at some stage you might have to join the group to raise awareness and to have a more firm approach from the Committee of Ministers to make sure that reforms are on the way and see if the reforms work. But when serious reforms have already started, you might well go back to the sectoral approach and cut the problem into the pieces again in order to advance step by step. Of course, when I made my introduction, I quoted the Committee of Ministers' Rules for the supervision of the execution of judgments and I mentioned the challenges. Let me just say that the Committee of Ministers for the time being has 7000 pending cases and there are in the department 22 lawyers preparing and assisting the work of the Committee of Ministers for these 7000 cases. The Committee of Ministers has worked very intensively on its working methods, and it has also placed on its agenda at every meeting a special item aimed at improving the execution process. So,

working methods are part of on-going reflection. More proactive work with national authorities, with the delegations in Strasbourg and with government agents has been developed. Finally, let me mention the discussion within the CDDH which resulted in proposals from the CDDH on how to tackle issues concerning delays in execution, including action plans or action reports to be drawn up by national authorities in response to the Court's judgments. These proposals have been taken up in the format of the Committee of Ministers DH meeting to see how it can also adopt its working methods on this.

Mr Jakub Wołąsiewicz

Thank you Mrs Mayer.

Levan Meskhoradze

My name is Levan Maskhoradze. I'm government agent of Georgia. I will try to elaborate on the issue raised by Mr Leach, concerning the Ossetian cases in the context of the pilot judgments procedure. According to the European Court of Human Rights, more than three thousand applications have been lodged before the Court against the Government of Georgia in the context of the hostilities which took place in August last year.

One of the questions raised with the government is the applicability of the pilot judgment procedure in respect of the above. The deadline for the submission of the position in this regard is the end of this month.

Honestly, I do not know the final position of the Government, however, what I know is that I want to come out from the case law of the European Court, the principles developed by *Hutten-Czapska* and *Broniowski* and other cases dealing with the pilot judgment procedure.

As already mentioned here, pilot judgment is applicable to clone cases which concern an identifiable class of persons. I have to note Ossetian cases have some principally important distinguishing traits from the previous pilot cases. I would like to emphasize that the description of the factual situation in the Ossetian cases cannot be a pattern and a typical to the rest of the pilot cases in question by virtue of the fact that they relate to large--scale hostilities with the engagement of the multiple armed groups and forces. Moreover, due to the absence of any proof to the contrary, it may not be stated as proven that the alleged actions are attributable to the Respondent Government due to the very fact that the Georgian forces were not the only forces engaged in the events in question. Nevertheless, since the mentioned problem comes out from the same root, the question is to what extent the pilot procedure could be applicable here. My question

would also be to what extent the consent of the government concerning the applicability of the pilot procedure is decisive.

Jakub Wołąsiewicz

Thank you Levan Maskhoradze. The volunteers, Aleksandra Mężykowska first and then, Monica Mijic and John Darcy.

Aleksandra Mężykowska

Thank you very much, my name is Aleksandra Mężykowska, I am co-agent of the Government of Poland. I would like to touch on the same problem as the previous speaker. What are the conditions for considering a case suitable for a pilot judgment? I wonder whether maybe one of our distinguished guests could answer this question, which relates to my experience as co-agent and that of my colleagues. When the Court communicated a case concerning local development plans and asked our government whether the case is suitable for a pilot judgment procedure, the government answered "no" and the Court in this case accepted the government's position.

I therefore would like to know what are the requirements that a case has to meet in order to be qualified as a pilot judgment case, because, as we can see, there are potentially a lot of such cases – concerning a range of possible violations of the Convention, cases related to Article 2 and others. The scope of possible violations is very broad and for this reason I am wondering which types of cases are suitable for the pilot judgment procedure. Thank you very much.

Monica Mijic

Thank you very much, well I see that the Government Agents have very practical problems with these Court questions. I'm the Government Agent of Bosnia and Herzegovina, we also have a case, where the Court asked a question whether the case is suitable for pilot judgment procedure. So, I have two questions concerning this Court's question and I think that the right addressee is Mr. John Darcy, because he is the representative of the Court here. The first question is: what is the purpose of this Court question and my second concern is if the government answers positively and says *yes, this case is suitable for the pilot judgment procedure* that it means that the governments acknowledge in advance the violation of the Convention. If we say "yes", it is suitable, it inplies that we think that there is a violation. So, in this particular case concerning all foreign currency savings issues, we answered "no, it is not suitable for the pilot judgment procedure, because we are of the opinion, that we have solved this systematic problem, which was confirmed by the Constitutional Court of Bosnia

and Herzegovina. I think that other Governments Agents share these concerns. If we say "yes, it is suitable", does it mean, that we acknowledge the violation of the Convention, even before the Court has decided on the merits. Thank you very much.

Jakub Wołąsiewicz

Thank you Monica, the proper Court question should concern whether the government accepts the pilot judgment procedure, but take into the account, that the pilot procedure does not exist. Pilot judgment means that there is already a violation.

Vit Schorm, you have asked for the floor?

Vít Schorm

It is even a tricky situation when the Court raises the issue of the existence of a systemic problem. Does it want to know whether there is a wider problem or does it ask about the suitability of one, two, three, four or eight concrete cases preselected for the possible pilot judgment procedure? We have already had such a question put to us concerning the issue of rent regulation presenting similarities with the *Hutten-Czapska* case. Our reply was certainly quite nuanced, whereas the other party's reply – because, of course behind these four cases there is a huge organization of landlords – was "no", these cases are not suitable, because there are more typical ones. But they were rather against the choice of cases made by the Court than against the application of the pilot judgment procedure.

John Darcy

Thank you very much. I will just come back rather with comments more than answers, and maybe even with a few questions. What we see in the context of the South Ossetian applications is, I think, how exploratory the pilot judgment procedure is. Given what Levan Meskhoradze and Philip Leach have said about this question, a rather surprising question, which asks the authorities of Georgia whether or not all of these applications, submitted by residents of South Ossetia, disclose a "systemic problem", and there is reference to *Broniowski*. It seems to me that frankly it is stretching language a little here – can it be said that a "system" has broken down when the subject measure of the complaints is that there have been violation of Article 2, Article 3, destruction of property, people have been victims of military action? That seems to me to go a long way from the word "systemic". Or structural problems, as well. The subject-matter of the applications seems of a very different order and a very different nature. As Mr Meskhoradze has said, what we have seen thus far in the two Polish cases is a large number of identical cases, so there was no fact-finding aspect to

it. The legal solution to one case is also the legal solution to pretty much all of them (maybe with some variation). So therefore it is a surprising question in the context of South Ossetia, which you may find difficult or easy to answer depending on how you are going to approach this.

An additional complicating factor is that these applications have been taken in a very high-charged political context, in the context of recent military conflict, which has very real consequences to the present day. So they are really far removed from the rent control problem in this country, or in the Czech Republic.

But you did ask a question about the consent – is it a question of seeking the consent of the respondent government when the Court puts a question like this. I don't think so. I think that really what counts most is a cooperative stance, rather than consent in any formal way. I think that part of the Court's estimation of whether or not it could take a pilot approach in one form or another depends on its reading of the situation, how far it is likely to get by taking such an approach with the cooperation of the national authorities. It will not have escaped your notice that, in the two Polish cases and in the *Burdov* case, the Court was able to draw upon the jurisprudence of the Constitutional Court in Poland, and the legislative initiative of the Supreme Court in Russia that was tabled in September last year. In other words, forces were already moving in the right direction. That can be an incentive for the Court to try out the pilot procedure and it would be a possible indicator of the success of the pilot procedure. That is why I see it more as the Court looking for cooperation, first of all from the government and the government agent, but also in a broader sense it is looking for a cooperative stance on the part of other crucial, national authorities, who will be part of the solution. The solution to the problem lies in their hands and if they are already mobilized, I think, that will serve as one of the green lights for the Court to launch the pilot judgment procedure. The agent of Poland has referred to the situation where the Government said "no" and the Court said "o.k". That shows that at the outset it is really an exploratory question. The Court is testing both the analysis and the attitude. The government agent can therefore say "no" and give his reasons.

As for the purpose of the pilot judgment, or rather what does it mean if the government says "yes" to the question. Well, Mr Wołąsiewicz, I will agree with you that to say "yes" is to say "yes, there is a systemic problem, yes it has to be redressed, yes, all of the other cases are probably well-founded", so it is a very broad admission, to make. But I think that in *Hutten-Czapska* the government stance was that, there was no violation of

the substance and thus is nothing to pursue under Article 46, if my memory serves me right.

Jakub Wołąsiewicz

In both cases, in *Broniowski* case we also do the same.

John Darcy

And therefore I think that, consistent with your view on the merits, that there is no violation and there is no further question to be addressed under Article 46.

But the purpose of the procedure, it is, as far as the Court is concerned, to ensure, that well-founded complaints of human rights violations will be solved, and solved within a reasonable time. Ideally, the conditions can be created so that they will be resolved at the national level, that a systemic problem will find its solution within the national system, that the system will correct itself, with guidance from the Court on how to put the situation right in the light of Convention principles. But the pilot judgment procedure is not the only way that the Court can respond to a large number of cases. You may have seen earlier this year that there was a case given against Italy, it is the *Simaldone against Italy* judgment given about two months ago, and in that case, which is about the Pinto law, this recurrent question from Italy is the operation of the Pinto law and there are problems, which are picked up by the Court in that judgment. But it also goes on to point out that although there are many cases, very similar cases to that of Mr. Simaldone, complaining that in the last one or years, that their attempts to use the Pinto remedy have not been satisfactory, the Court does not consider it a systemic problem. It has statistics to back this up: there are 500 cases pending with more or less the same complaint, but over the same period of two years, some 16 000 cases seem to have been decided by the Court of Appeal in Italy, in a more or less satisfactory way. So the Court's technique there is to communicate them all to the poor agent of the Italian Government, who got 500 cases, all in one go with the very simple question *does this case disclose a violation of Article 6 of the Convention?* Either there will be a friendly settlement or there will be very, very short judgments – "skinny" judgments, as they are called. So the Court still has the capacity to shift quite large numbers of simple cases, but when it gets to thousands, well, it would be beyond the capacity of the agent's office to deal with litigation on such a scale, and also beyond the capacity of the Court to proceed on a case by case basis as things stand at the moment.

The challenges are there and the pilot judgment procedure is part of the Court's answer to it, but it doesn't exclude the more traditional

means. Indeed, there is a fertile process of using something old, inventing something new and combining them together, in whatever way that seems to be the way forward, in the circumstances of the case. It is really a judgment call, which is why I think that regulation at this stage will be very difficult to do, because there are so many elements involved in trying to weigh up at the start of the procedure or perhaps half way through it, or even at the later stage, whether or not there is some scope for a sort of pilot approach. I think this is the age of exploration with the pilot procedure. Today's discussion has shown that it is a fascinating question, that touches upon a fundamental aspect of the operation of the system and, behind that, on the protection of human rights themselves.

Jakub Wołąsiewicz

What is the possibility of future activity of the Parliamentary Assembly on pilot cases *vis a vis* national parliaments? We have the process of monitoring implementation of the judgment by the Committee of Ministers which is monitoring of the government but that it is still a lack of this kind of procedure of the work of parliament. Andrew Drzemczewski, could you be so kind as to explain the situation, please?

Andrew Drzemczewski

Thanks for letting me volunteer to begin the day, as I was not in the meeting room yesterday afternoon when a question was (apparently) addressed to me!

I am unable to provide you with a specific reply as to pilot judgments, as these are dealt with in the context of a more general mandate the Assembly has given itself with respect to the implementation of Court judgments.

First of all, let's put things into context. Execution of the Strasbourg Court's judgments – Article 46 paragraph 2 of the ECHR – is, *prima facie*, the exclusive jurisdiction of the Committee of Ministers. But as the execution of Strasbourg Court judgments is a question of "State responsibility", our parliamentarians, wearing the dual hat of national parliamentarians and being members of the Council of Europe's Parliamentary Assembly (there are 636 of them, of whom 84 are members of the Legal Affairs & Human Rights Commission), consider themselves entitled, as it were, to poke their noses into this important subject if and when they can provide a helping-hand. More specifically, back in 2000, the Assembly decided, *ex officio*, that the execution of the Strasbourg Court judgments is so important that, if a case has not been satisfactorily resolved and is still pending before the Committee of Ministers for over 5 years, or if there are

substantial structural problems that may need (national) parliamentary intervention, it is logical that they closely follow-up developments.

So, if a case is pending before the Committee of Ministers for more than 5 years or if there is major structural problem within a country, we – the Parliamentary Assembly, in particular the Legal Affairs and Human Rights Committee – will take it upon itself to look into the issue of non or late execution of Court judgments. This work had been done by the Legal Committee's former rapporteur on this subject, Mr Erik Jurgens, a Dutch Senator, who issued six reports, with the last one being presented in September 2006 (see PACE document 11020). The rapporteurship, which is not an easy task, has now been taken over by the Committee's Vice-Chairman, Cypriot parliamentarian Christos Pourgourides.

Although certain in-house observers consider that parliamentarians ought not to step on the toes of the Committee of Ministers, by virtue of Article 46, § 2 ECHR, it stands to reason that parliamentarians cannot just sit back and simply do nothing in a situation where there may soon be 8,000 cases pending before the Committee of Ministers... most of which have not (yet) been appropriately executed. Here, there is a need to maintain and reinforce the credibility of the Convention control system. The rapporteurs, Mr Jurgens, now followed by Mr Pourgourides, have – with the Assembly's benediction – taken a pro-active approach in this matter. The Committee of Ministers has also indicated that it counts on the help of parliamentarians in this respect! For example, in 2005–2006, Mr Jurgens dealt with 13 states in which (major) problems remained unresolved, and undertook *in situ* visits to 5 of them (Italy, Russia, Turkey, Ukraine & the United Kingdom). Mr Pourgourides is also to make on-the-spot visits to 8 out of 11 states on his list: Bulgaria, Greece, Italy, Moldova, Romania, Russia, Turkey and Ukraine. These visits are to take place between May 2009 & early 2010. Mr Pourgourides issued an introductory memorandum on this subject in May 2008 and intends to make public a "progress report" this coming September.

So, those countries will be visited. What do these visits consist of? Visits include meetings with ministers of justice, prosecutors' general and ministers of the interior, as well as discussions with various governmental, judicial (where need be) representatives, non-governmental organisations and lawyers with specific experience in dealing with cases in Strasbourg. All this with the aim of seeing how best rapid execution of Strasbourg Court judgments can be obtained. This initiative of the Assembly's Legal Affairs and Human Rights Commission is, above all, based on the conviction that many key issues can be resolved through the increasingly active involvement of the Assembly in such matters, in close liaison with national

parliaments, working through their national delegations. We have examples of there being excellent parliamentary procedures in which committees have a specific mandate to follow-up the implementation of adverse Strasbourg Court findings. The examples in the United Kingdom (Joint Committee on Human Rights) and Italy (Law No12, of 2006, created a special procedure for supervision by the government and parliament) spring to mind. In the Ukraine a law was adopted whereby the government agent before the Court possesses a key role in ensuring proper execution of the Court's judgments. Another interesting example is a Dutch system. In The Netherlands, the Government Agent to the Court makes a yearly report to the government on all cases judgments against The Netherlands. In 2006, the Dutch Senate requested that the report also be transmitted to Parliament – a proposal which was accepted. The government now therefore submits the report every year to the legal (justice) committees of the two Houses of Parliament, which analyse it and make proposals if they are not satisfied with the government's actions. These reports include, not only judgments with respect to The Netherlands, but all judgments relating to other states that may have direct or indirect effect on the Dutch legal system. Here there is a sort of *erga omnes* effect of Strasbourg Court judgments, but without saying so expressly.

Now, in answer to your question. I can assume that certain parliaments, perhaps half a dozen or so, are likely to take into account pilot judgments, when deemed appropriate. Certainly, you can count on Mr Pourgourides, an experienced lawyer, to bring up such matters in his discussions with parliamentarians when visiting countries. But the difficulty is, of course, that there are still only a few national parliaments that exercise regular and effective control of the implementation of Strasboug Court judgments. Pilot judgments are an issue, among many, which parliaments should deal with. We still have, as the French say, *beaucoup du pain sur la planche!*[1]

Jakub Wołąsiewicz

Thank you very much. There was not my question. It was a question from the room yesterday, but we finished a little bit earlier. Mr Vit Schorm.

Vít Schorm

I would like to thank Andrew Drzemczewski for his explanation, which in my opinion proves the well foundedness of a certain reservation of the Committee of Ministers when the recommendation, about which

[1] For more details on this subject, see note sent to the organisers of the seminar entitled "The Parliamentary Assembly's involvement in the supervision of the judgments of the Strasbourg Court", dated 26 May 2009.

Ms Mayer spoke yesterday, was drafted, because there is indeed a paragraph on the role of national parliaments, and I think the understanding is that the parliamentarians should be active, should ask for information and, of course, if they ask for information, they have to obtain it in a system where by the government is responsible before the parliament. And I think it is the case for all our countries.

Jakub Wołąsiewicz

Thank you. Mr Drzemczewski, would you like to reply?

Andrzej Drzemczewski

I understand that here reference is made to the 'famous' incident before the Steering Committee for Human Rights, in late 2007, when Mr Jurgens (justifiably) criticised the drafters of what turned out to be Committee of Ministers Recommendation (2008)2 on efficient domestic capacity for rapid execution of Strasbourg Court judgments. His strong objection to the idea that national parliaments be informed *as appropriate* of measures taken to execute Strasbourg Court judgments was not taken into account. I can only reiterate my full agreement with his comments: surely it is unacceptable that national parliaments be informed of such cases only if and when the state's (administrative? executive?) authorities feel like doing so?! I find it pathetic, indeed totally unacceptable, to permit bureaucrats or civil servants, like you or me, to decide arbitrarily when parliamentarians – elected by the people – are to be told or not to be told about measures taken to comply with judgments of the Strasbourg Court!

Jakub Wołąsiewicz

Thank you very much. Another question, another remark, interventions. Who will volunteer?

Chingiz Askarov

If the matter is close, I would like to go back to yesterday's discussion. Monica Mijic picked up on the matter of the questions imposed by the Court on governments, whether it should be concerned with pilot judgement proceedings or not. Monica Mijic had a question about – if the answer was 'yes' from the government, does it mean there would be the judgment and the government acknowledges the violation and probably there would be the judgment finding a violation. As far as I understand, Mr Darcy's response was "yes". It means that the Court posing this question already knows and Court analysis brings to the conclusion that there might be a violation. I have a quite opposite question in this sense. The government of Azerbaijan is now involved in several cases concerning situations very like the *Louizidou* case. The government know that there is

a systemic and structural problem and there might be a 90% Chance of a violation. But there is no question from the Court that this proceeding should be conceded as a pilot judgement proceeding. Does it mean the Court is not going to find violation in these cases? Maybe it is a question for Mr Darcy also. And another question, at what stage of a proceedings the may Court state that this is a pilot judgement proceeding, is it the initial stage of communication or any further stage also?

Jakub Wołąsiewicz

Thank you. Mr John Darcy will perhaps try to answer the questions. I would like to ask Mr Balcerzak who deals exactly in the academic way with those kind of problems. Mr Balcerzak, could you try to answer?

Michał Balcerzak

It is not possible for me to speak for the Court. I think even Mr. John Darcy would not be willing to express himself on behalf of the Court and provide a "yes or no" answer. Well, the question was whether a government's willingness to engage in the pilot procedure means that the government acknowledges the violation. I think it does, however I believe that what's crucial here is the state's will and the state's readiness to cooperate. Everybody knows that without government cooperation, there is hardly any point in expecting a successful pilot judgment procedure. Back to Mr. Askarov's question, I wouldn't say that the Court is in any way obliged to wait with questions concerning the pilot proceedings. It might be expected that the Court enquires about the government's attitude and observations at the very beginning and also during the procedure.

Let me also take this opportunity to share one brief comment concerning yesterday's discussion which was very interesting. I recall the question asked by our Georgian colleague, who referred to applications concerning the conflict of 2008. I fully share Mr. Darcy's opinion that whenever fact-finding is required, it is not possible to group the cases and to suggest a pilot judgment procedure. But on the other hand is it not the case that we are missing something in the system? A solution somewhere between the adversarial judicial procedure and pursuing a friendly settlement? I mean, perhaps there is a need for a third way. It goes without saying that the Court has powers and possibilities to go into full fact-finding in case of the Georgian and Russian applications, however, it might be very troublesome. And if I may take this opportunity to ask Mr. Darcy to briefly elaborate on that. Do you think that the Court is simply prepared in terms of its capacity to proceed with these cases and to perform the fact-finding? I think it might really be a challenge for the Court. So, there are more questions than answers... Thank you.

Jakub Wołąsiewicz

Thank you very much. So, what about confidence-building measures by the Court in such difficult cases. Mr John Darcy, are you ready?

John Darcy

I can give two very brief answers to the questions put by the Agent of Azerbaijan. If the Court has not put the question about a systemic problem, I do not think you can read into that anything about what it is already thinking about the substance of the cases that it is dealing with, one way or another. The pilot judgement procedure is a means that is going to an end and it may be that the Court considers that, at that particular stage that other means are more appropriate or more effective for that particular case, but that view can change. Your second question was whether the question is put only at the initial stage or can be put later on. It can be put later on and that is the case for example with Ukraine, and I have seen that earlier this year the Court put the question in a case which is really quite similar to *Burdov*. So, the government will have a very fresh example of how the procedures might go at that point. That is something that can come up during the examination of a case. Remember that it can take many years from the initial reading of the files and initial thinking about the Convention questions posed and how it may be answered to many stages later, when finally we get to judgement, and more for execution. So, it can come at any stage or indeed later on. There were 200 cases about non-execution in Russia before *Burdov II* became the major pilot judgement that it is today.

Mr. Balcerzak put a question about how the Court will deal with cases coming out of complaints from the residents of South Ossetia and directed against Georgia. It is a big question. As you know what the Court has done is as a first step – it takes 7 or 8 cases which will be used to find its way into the subject and to test Convention arguments in adversarial process with the parties. What it will do next I really cannot say. These are very serious cases in controversial circumstances. It is a concentration of all the imaginable difficulties that the Court can face in dealing with the situation like this, so it is an extremely difficult situation. Will the Court go through every single case? It seems to me that this is a fallback position, but the Court is seized and the matter is between its hands. It has already caused some surprise with its "systemic" question and perhaps there will be more inventiveness ahead, but the stakes are very serious. And I have mentioned in my speech yesterday that the pilot judgement procedure has been used in more controllable situations. Whether it can stretch and adapt into something so different, I think only time will tell. There will be

some creative thinking within the Court seeking to reconcile the imperative of dealing with the cases in a reasonable time with what is at stake in them.

Vit Schorm

I have a small comment concerning the question put by our Azeri colleague. In reality the establishment of the pilot judgement procedure is a gradual thing, it is ongoing, it is not definitive yet. So, it also means that it is one of the factors which contribute to a certain variety of reactions from the Court to the various problems. Of course, there are other factors which can explain why the Court does not put the question about a possible systemic problem to a particular country, where maybe the government know that there is a systemic problem. And the question also is whether the practice of the Court tends to be uniform, or whether, to the contrary, it will not be uniform, because we can see that the Court does not take the same approach to all the countries for various reasons. Maybe there are practical reasons, maybe there are others. I do not know. I do not want to elaborate upon that, but we can see that this approach is not uniform. And that is why some countries are not asked about systemic problems whereas other are asked, probably. And as I say, the question is whether the practice in the field of the pilot judgment procedure will be uniform in some 5 years. I would like to add a very small comment for the attention of our colleagues from the National School of Public Administration of Poland who are not informed about the way in which cases are dealt with by the European Court of Human Rights. We are talking about questions put by the Court and these questions are supposed to be crucial for the definition of the scope of the case, because parties are normally required to reply to these questions. Of course, they can add what they want, but the crucial importance is attached to what the Court asks about, and this should be relevant to the final decision of the Court, so that is why the questions are utterly important. And I would also add one thing which I understood from the Polish experience with the *Broniowski* case, the first pilot judgment. If I am not wrong, the Polish government had not been asked before the judgment was issued about the possibility of pilot proceedings, about a pilot outcome of the case. It should also be placed in a time context, because it was in 2004, when the Committee of Ministers of the Council of Europe had just invited the Court to identify systemic problems where appropriate.

Jakub Wołąsiewicz

Thank you very much. I am absolutely proving your statement about the *Broniowski* case. Not only, in *Broniowski*, but also in *Hutten-Czapska*, the Court did not ask the question, if Poland would accept the

pilot procedure, but taking into account the lack of those questions at the Oslo seminar. I mentioned the need for the Court to ask this kind of question and the Court agreed and started: from this time exactly those question have appeared.

David Milner

Good morning everybody. My name is David Milner, I was the Secretary of the Reflection Group that was working on follow-up to the Wise Persons' Report. One of the ideas looked at by the Reflection Group was expanding the Court's competence to give advisory opinions. Initially there were some concerns about pursuing this idea, on account of the assumption that it would increase the Court's caseload. A proposal was subsequently made by the Dutch and Norwegian experts that was intended to allow the advisory opinion procedure to achieve results similar to those of the pilot judgment procedure. Under this proposal, one could move from the current situation – in which the Strasbourg Court identifies a situation that requires resolution by a general measure to respond to a systemic problem – to one in which national courts would identify the potential systemic problems themselves and could then ask the Court for an advisory opinion on how to resolve the situation in accordance with the general requirements of the Convention. When the idea was expressed in this way, raising the possibility that the advisory opinion procedure could achieve effects similar to those of the pilot judgment procedure, the Reflection Group was far more positive and agreed to retain the idea for further consideration.

I was reminded of this during earlier discussions of how important it is for the Court to help national authorities develop responses to systemic problems, or for the Court to recognise that developments at national level are heading towards resolution of a systemic problem. The emphasis, the initiative moves away from Strasburg to the national authorities through a process of cooperation when responding to a systemic problem; whether through pilot judgments or, as may be the case, advisory opinions.

Constantin Cojocarju

I was wondering is there any consideration of the possibility of communicating to the relevant applicants, to third parties, to the public, those cases in which the possibility of applying the pilot judgment procedure is being considered before the actual judgment is given. Could this be done by the website?

John Darcy

Just very briefly. The questions communicated to Governments are put on a website, so for those who are watching and following, they will see very soon after the question is put what the Court's possible intentions are in relation to that case or group of cases. It is possible to follow and therefore civil society organisations can keep abreast of developments and seek to intervene in normal way, explaining to the Court why their particular perspective or expertise can assist it. Such requests will certainly be considered and could be very helpful to the adversarial process and to framing the pilot judgment so as to achieve its purpose of marking out the way that national authorities can take towards effective resolution of a systemic or structural problem. So I think it is a possibility and it may be a very profitable one for all the parties.

Vít Schorm

The Reflection Group also reflected upon the question of the visibility of important cases, because if you see the weekly report of communicated cases with the statements of facts and the questions put by the Court, you cannot really perceive that there is an important case which requires attention. So maybe the Court could also improve the presentation of important items.

Jakub Wołąsiewicz

Thank you very much. If there is no new volunteer, I think that we could just now try to summarize the presentation of the pilot judgment as well as the discussion which we have had. I will ask Philip Leach to do this. I have the feeling that we have not answered all your questions raised at the beginning, and perhaps you even know that there are many more questions just now. Please try to summarize and find the elements which are common.

CHAPTER 3:

SUMMARY OF DISCUSSION

by Philip Leach

Legality and Definition

1. There are various different forms of 'pilot judgment', 'quasi-pilot judgment' and 'Article 46 judgments' (as well as 'leading cases' identified by the Department for the Execution of Judgments). Their format may be slightly different, but they have in common the Court's diagnosis of a systemic violation.

2. It was noted that doubts had been expressed about the legal basis of the pilot judgment procedure ("PJP"), but it was acknowledged that it was justified by Art 46 of the European Convention on Human Rights ("ECHR").

3. Questions were raised about the circumstances in which the PJP is suitable (for example, is it appropriate in a (post-)conflict situation re Arts 2 & 3 ECHR?).

4. Some participants suggested that there was a need for the rules on the PJP to be codified – the principles of transparency and predictability would support this. But others suggested that it was too early to crystallise the procedure in the form of rules.

The Court's practice

5. The seminar was reminded of the current context for the Court: over 100,000 pending cases – 35,000 of those considered well-founded. The Court has been able to deal with about 2,000 cases per annum.

6. It was now the practice of the Court to raise the possibility of applying the PJP at the communication stage. At that stage, the parties may be asked whether the application is suitable for the PJP. This is a question of consultation – it is not a question of seeking the parties' consent. Concerns were

expressed as to whether a Government is thereby admitting liability if it accepts the application of the PJP.

7. It was suggested that, through the PJP, the Court Registry is providing a form of mediation role.

8. The PJP represents a departure from the Court's 'default approach' of treating applications as individual cases. However, it is not a radical departure, but a change in judicial tone and of case management. Flexibility and pragmatism are the watchwords – the Court is still in an exploratory phase.

9. In terms of prioritisation, after urgent cases, pilot judgments are second in the pecking order, on a par with both inter-state cases and cases raising important new questions of law.

10. In the light of the adoption of Protocol 14 bis, questions were asked as to when the Court would invoke the PJP, as opposed to the 3-judge committee process in 'well-founded' cases.

Examples of the application of the PJP in particular states

11. In Poland, aside from *Broniowski*[1] & *Hutten-Czapska*,[2] there have been several other 'quasi pilot judgments' (and cases concerning systemic issues), including *Kudla*[3] (length of proceedings), cases concerning prison conditions and excessive length of pre-trial detention (*Kauczor*[4]). These other cases were were not pilot judgments *per se*. As regards *Kauczor*, it was stressed that the European Court judgment emerged in the middle of domestic discussions about how to resolve the problem – it was a valid element of those discussions, but it was difficult to say how important a factor it was.

12. In hearing about the legislative responses to *Hutten-Czapska*, the seminar was reminded about the real difficulties with which Goverments are sometimes faced – in this case, a massive post-war housing problem in Poland – and the political decisions which are then taken to address such problems. As regards *Hutten-Czapska*, there was a need to restore the proper balance between property owners and tenants. The discussion of this case gave participants a flavour of the extensive and detailed changes to a complex series of laws which has followed *Hutten-Czapska*. The seminar

1 No. 31443/96, 22.6.04 & 28.9.05.
2 No. 35014/97, 22.2.05, 19.6.06 & 28.4.08.
3 No. 30210/96, 26.10.00.
4 No. 45219/06, 3.2.09.

also heard of the multi-faceted approaches adopted by the Government in response to *Kauczor*.

13. One common thread emerging in a number of cases was the coming together of the European Court with higher national courts, as occurred in *Broniowski*, *Hutten-Czapska* and *Lukenda v Slovenia*.[5]

14. In relation to Romania, the seminar heard about the use of 'Art 46 judgments', in particular in relation to problems concerning the nationalisation of property, which required legislative, administrative and budgetary steps.

15. As regards Northern Cyprus, there was discussion of the case of *Xenides-Arestis*[6] and other post-Loizidou cases. Those judgments established an obligation on the part of Turkey to set up a remedy for those who had lost access to property in Northern Cyprus (there were 1,400 similar cases pending). A new law had been introduced by the 'TRNC' and a new body established (the Immovable Property Commission) but questions remained as to its effectiveness. The Court has selected 8 test cases to examine this issue.

Verification of the adequacy of new domestic remedies

16. It was noted that different forms of redress had been established by respondent Governments in response to systemic cases, for example, expediting cases and the payment of compensation, but also the issuing of public apologies (*Lukenda*).

17. As regards the 'Bug River' cases (i.e. following on from *Broniowski*), priority cases had been selected according to an applicant's age or their particular situation. In those 'priority' cases, the Court verified whether the redress offered was adequate or not. There would be a similar scheme for the *Hutten-Czapska* cases. In those situations, if applicants don't receive compensation then governments will need to explain why not – although it is an obligation of conduct, not of result.

18. A number of participants underlined the need for thorough monitoring of legislative changes in response to pilot judgments. It was also questioned whether there is a need for the Council of Europe oversight bodies, especially the Committee of Ministers, to ensure that there is an

[5] No. 23032/02, 6.10.05.
[6] No. 46347/99, 22.12.05 & 7.12.06.

adequate domestic monitoring system in place (for example, by an Ombudsman) as part of its supervision of the execution of judgments.

The Position of Applicants

19. Concern was expressed about the situation of applicants, in particular where proceedings are suspended. The seminar heard about the 'privileged pilot applicant', whose position can be contrasted with other applicants with similar cases who may not receive a judicial examination of their grievance by the Court.

20. However, it was emphasised that follow-on cases will not necessarily be adjourned (for example, in length of proceedings cases, prison condition cases, or other urgent cases).

21. The Court was seeking to ensure that the situation of applicants is not marginalised. It aims to reconcile three sets of interests: those of the state, of the Court and of applicants.

Delay

22. The problem of delay was highlighted as being potentially very damaging. This issue had been acknowledged by the Court in setting specific time limits for the provision of redress in its recent judgment in *Burdov v Russia (No. 2)*[7] (time limits of 6 months and 1 year).

23. In response to the *Lukenda* judgment, the seminar heard that the Slovenian authorities were able to act quickly (as regards a problem which had originated in 1994) and were able to use precedent legislation on the problem of excessive length of proceedings from Italy and Poland. Drafting of the law and the 'Lukenda Project' began within a matter of days. A draft law was submitted to Parliament within about a month of the judgment, and the new domestic legislation was adopted in 2006 using an urgent procedure that is otherwise reserved, for example, for natural disasters and declaring war.

24. It was noted that there had been relatively swift responses in the drafting of legislation following both *Broniowski* and *Lukenda* (although in practice, amendments had subsequently been needed to iron out various problems which had arisen).

[7] No. 33509/04, 15.1.09.

Supervision of Enforcement – the role of the Committee of Ministers, the Commissioner for Human Rights and other Council of Europe bodies

25. The seminar was reminded of the role of the Committee of Ministers ("CoM") in identifying systemic problems over the years – in well over 2,000 'leading cases'. The PJP represented an important contribution, as execution problems can be facilitated if the systemic problem is identified by the Court. Like the Court, the CoM has resource limitations (there are 7,000 pending cases, being handled by 22 lawyers).

26. The CoM is required to give priority treatment to pilot judgments, and there have been general improvements in the execution process in recent years (for example, the increasing involvement of civil society, better public access and the adoption of Annual Reports). Since 2006, the CoM has also increased its technical activities, including high-level seminars, roundtables, etc.

27. There was a need for increased co-operation with national authorities on the ground. Furthermore, there was the potential for synergies with other CoE mechanisms – including the Commissioner for Human Rights, the Venice Commission, CEPEJ, and PACE.

28. It was also suggested that there was a need for more, and closer, interaction between the Court and the CoM as regards pilot judgments.

29. There was discussion of the potential role of the Commissioner for Human Rights. It was questioned whether the Commissioner could participate by assisting with the identification of problems which may be suitable for the PJP (for example, through contacts with NHRIs). However, the Commissioner has to be conscious of his remit, and of the need not to stray too far into the realm of other CoE bodies such as the Court and the CoM. The Commissioner in practice takes a cautious position on this (as in regard to his position concerning intervening as a third party). It was emphasised that the Commissioner will not be able to act as a mediator in 'friendly settlement' negotiations.

30. As regards execution, this is the realm of the CoM, but it was suggested that there may be more space for synergy between the CoM and the Commissioner for Human Rights. The Commissioner may, for example, be able to address the need for general measures in his contacts with national authorities and with NHRIs and civil society organisations.

31. There was also discussion of the role of the Committee on Legal Affairs and Human Rights of PACE ("the CLAHR"). In recent years, the CLAHR's work on the implementation of European Court judgments has focused on cases which have not been executed adequately over a period of more than 5 years. The CLAHR has now identified 11 states with structural problems, and of those it plans to conduct visits to 8 states. Its emphasis will be on engaging with interlocutors from national Parliaments. Various examples of effective Parliamentary engagement with the implementation process were discussed, including the Joint Committee on Human Rights in the UK, and new legislation in Italy and Ukraine. In The Netherlands, the Parliamentary review process includes judgments against other states, thus increasing the *erga omnes* effects of those judgments. However, it was acknowledged that there had not been a very extensive involvement of Parliament in relation to the implementation of pilot judgments in Poland. A key message is that Parliaments must get more involved.

The Future

32. It was acknowledged that the use of pilot judgments is likely to expand (for example, Ukraine may be the subject of a judgment similar to *Burdov No. 2*).

33. There was discussion of the utility of consultations between the Court Registry and Governments. An ongoing dialogue between the Court and states could also serve to identify future pilot judgment cases, from amongst the Court's pending cases. It was suggested that there was a need for joint efforts of Governments and other actors (including courts) which were willing to assist the state (as well as co-operation with Council of Europe bodies). Governments should be acting in a pre-emptive way, to change domestic law or practice in anticipation of pilot judgments. The recent paper on the possibility of the Court providing Advisory Opinions could further facilitate pre-emptive action as regards systemic problems.

34. It was underlined that there is a need to ensure the involvement of Parliament and civil society in these discussions and processes.

35. Questions remain as to how suitable the PJP is, where a state appears unwilling to comply with it, or to provide adequate redress.

PART TWO:

DISCUSSION ON THE FUTURE DEVELOPMENT OF HUMAN RIGHTS' STANDARDS AND PROCEDURES AND COOPERATION BETWEEN GOVERNMENT AGENTS

(moderated by Vit Schorm)

CHAPTER 1:

IMPUNITY

Derek Walton (key presentation)

I have been invited to discuss the work of the newly formed DH-I group of experts of the Council of Europe's Steering Committee on Human Rights. The Group has been tasked with considering the feasibility of drawing up Guidelines on Impunity within the Council of Europe. The group has not yet met, so it is perhaps difficult to discuss its work. Instead what I want to do is share a few thoughts on what the Group might consider at its first meeting. In particular, I propose to:

- Look at the concept of impunity in the human rights context;
- Consider what specific obligations States are under to combat impunity; and
- Look briefly at some specific problem areas that may arise.

1. Impunity in a human rights context

What do we mean by impunity in a human rights context? At its most general level, impunity refers to exemption from punishment. In a human rights context, it describes a situation where those responsible for human rights violations are not brought to account. This may be the result of a failure in the law, perhaps through a lacuna or an immunity; or it may be the result of a practical failure despite seemingly adequate laws.

This leads to a conceptual difficulty. Although we speak about individuals who are responsible for human rights violations, this is not an accurate reflection of the legal position. Individuals do not commit human rights violations. States do.

Obligations under human rights treaties, including the ECHR, fall squarely on States. If a human rights obligation is breached, it is the State

that is responsible for that violation. That's why cases before the ECtHR can be brought only against States. Thus, if an individual is also to be held responsible, that responsibility has to be established under some other body of law. Typically it will be national criminal law. The question then is: how do we ensure that national criminal law will apply?

At the international level, there needs to be an obligation on States to investigate and criminalize certain conduct. Such an obligation may arise in one of a number of ways:

a) Direct Treaty obligtions

Some treaties expressly oblige States to investigate and criminalize certain conduct. A number of international humanitarian law and counter-terrorism conventions do this. But it is also a feature of a handful of human rights treaties, including the Genocide Convention and the Convention Against Torture. These treaties directly oblige States to make certain serious acts criminal offences and put a direct obligation on States to investigate and either prosecute or extradite offenders.

These Conventions put a direct obligation on States to investigate and prosecute human rights offences. But they apply only to some of the most serious human rights violations. And, it has to be said that the ECHR does not contain any express obligations of this kind.

b) Positive obligations arising from a duty to secure the enjoyment of human rights

The ECHR, like other human rights treaties, does contain an obligation on States to ensure respect for the substantive rights it contains. Article 1 provides: *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention*.

The Court has held that this entails a positive obligation to take steps to prevent impunity for the most serious human rights violations. However, the Court has not implied a duty to investigate and prosecute all substantive rights in the Convention. So it is necessary to look at which rights the Court has identified as entailing such an obligation.

Article 2 – Right to life

There are two distinct situations: (a) where the State itself uses lethal force; and (b) where the lethal force is not attributable to the State. In the former case, the Court has held that, whether the use of lethal force is justified or not, a positive procedural obligation arises to hold an effective

official investigation. The exact nature of the investigation required may vary; but the Court has in a series of cases involving Northern Ireland and Turkey in particular, identified a number of specific requirements:

- The onus is on the authorities to launch the investigation (without waiting for a complaint);
- The investigation has to be conducted by someone genuinely independent of those implicated;
- The investigation must be capable of resolving the question as to whether the force used was justified;
- It must also be capable of identifying and punishing those responsible.
- The obligation is one of means not of result. Reasonable efforts ae required.

There are also cases in which the Convention also imposes a duty on the State to investigate unlawful or suspicious killings by others, even where the State itself is not implicated. One of my first cases as a Government Agent involved just such a situation.

- ***Paul and Audrey Edwards v United Kingdom***

  This case involved the killing of prisoner by another detainee. There was no suggestion that State used the lethal force in question; but a duty to investigate nonetheless arose. The investigation had to be effective. We lost the Edwards case because there were deficiencies in the investigating body's powers that meant the investigation could not be regarded as fully effective.

Article 3 – Torture and Inhuman and Degrading Treatment

Article 3 also confers a duty on the State to investigate and, where appropriate, prosecute. The duty arises whenever an individual raises an arguable claim that he has been seriously ill-treated by the authorities. As with the Article 2 obligation, what is required is an effective, official investigation; and, like under Article 2, that investigation must be capable of leading to the identification and punishment of those responsible.

This is a particularly important tool in fighting impunity because, given the clandestine nature of torture, it is often not possible to gather sufficient evidence to meet the high evidential standards necessary to establish a breach of Article 3.

- ***Labita v Italy***

  This case involved an allegation by a prisoner of assault by prison officers. A lack of records meant the Court had no sufficient basis to find a substantive breach of Article 3; but it found a procedural violation in what it described as the tardy and inactive investigation of the applicant's complaint by the authorities.

Other Articles

The duty to investigate and prosecute has so far been held to arise only in Article 2 and 3 cases. This is because of their particularly fundamental and serious nature. But it is not inconceivable that, in an appropriate case, the Court might imply a similar obligation into for example Article 4 (Slavery). It is also worth noting that Article 5 (Unlawful detention) has been held to contain a positive obligation relevant to the question of impunity, although different in nature to the obligations under Articles 2 and 3. It arises where there is an arguable claim that a person has been taken into custody and has not been seen since. The obligation is to conduct a prompt and effective investigation. Given the difficulty in establishing the fate of people who have disappeared, this requirement could prove to be very useful in combating impunity.

c) Article 13 – The obligation to provide an effective remedy for human rights violations

Then Court has held that, where a right as fundamental as the right to life or the prohibition against torture is at stake, Article 13 requires a thorough and effective investigation capable of leading to the identification and punishment of those responsible.

Of course this looks very similar to the positive obligation that arises under Articles 2 and 3 that we've just considered. Does Article 13 add anything to that? The Court says it does. It says that the requirements of Article 13 are broader than the duty to carry out an effective investigation that arises under Article 2 and 3. But it has not explained how; and it is not altogether clear what the Court has in mind. Perhaps it is the possibility of obtaining compensation that Art 13 affords? In any event, the Court does not generally consider Art 13 separately, once it has decided on the procedural obligations under Article 2 or 3.

One way in which the Article 13 obligation may go further is that it has also been found to apply in some circumstances to allegations under Article 8 or Article 1 of Protocol 1. In a series of cases from Turkey involving

allegations of destruction of property or forcible eviction from homes by State forces, the Court found that there was insufficient evidence to justify a finding of a substantive violation of either Article 8 or A1P1. However, it left open the possibility that Article 13 might still require an effective domestic inquiry into the allegations of property destruction once a *prima facie* case is made out. (e.g. *Solyu v Turkey*).

It is also noteworthy that Article 13 requires an effective remedy to be provided *notwithstanding that the violation has been committed by persons acting in an official capacity*. This suggests that where Article 13 applies, a State may not invoke national law to provide immunity for public officials responsible for the wrongdoing in question.

2. Particular concerns

Finally, I want to explore a couple of practical problems that may be relevant to the Working Groups's examination of impunity.

a) Extraterritorial application

The Convention only obliges States to secure the rights contained in it within their jurisdiction. Jurisdiction for these purposes is said to be primarily territorial. There are some exceptions, but the scope of these remains uncertain. The UK currently has three cases before the Court relating to actions by British troops in Iraq where this jurisdictional question is a key issue.

The question then arises: If the Convention does not apply outside the State's territory, does that mean that agents of the State can act with impunity overseas?

The observations I submitted in one of the UK cases I mentioned, *Al Saadoon and Mufdhi v United Kingdom*, argued that this was not necessarily the case. You have to look beyond human rights obligations alone when considering whether there is impunity; and that since other international and domestic laws apply to the actions of British troops in Iraq the non-application of the Convention would not result in impunity.

But this is of course a controversial issue and one that is currently before the Court; so it may be difficult for the Group of Experts to reach any firm conclusions on this.

b) Immunity

National laws sometimes provide immunity for individuals. This can take many forms. It can take the form of State or diplomatic immunity for representatives of foreign States; it can take the form of parliamentary immunity for elected representatives; or there may be amnesties as part of a reconciliation or peace process.

Laws on immunity can, of course, be seen as leaving space for impunity. The Court has nonetheless accepted that in some circumstances immunity laws may be legitimate (see for example *Al-Adsani v UK*).

3. Conclusion

The Group on Impunity will certainly have some interesting issues to discuss:

- It will have to clarify what we mean by impunity in a human rights context;
- It will have to identify the specific obligations that States are under to combat impunity; and
- It will have to decide how to deal with some of the particular problems that arise when considering impunity issues.

I look forward to working with many of you as we grapple with these questions at our first meeting in September.

Discussion

Vít Schorm

Thank you very much indeed, Mr. Walton. I wonder whether someone wants to intervene on what we have just heard. I see Michał Balcerzak and Andrew Drzemczewski. So who will speak first?

Andrew Drzemczewski

Just a few points on this subject, if I may.

(a) In its Recommendation 1791 of 2007 on *The state of human rights and democracy in Europe* the Parliamentary Assembly of the Council of Europe indicated to the Committee of Ministers that *Impunity is a major threat to the rule of law in Europe.*

Therefore, the Assembly recommends that the Committee of Ministers envisage, in particular, the preparation of a set of guidelines ... drawing on, inter alia, the case-law of the European Court of Human Rights, the work of the CPT and that of the United Nations on this issue (quoted from paragraph 4 of the Recommendation. See also § 13 of Assembly Resolution 1547 (2007) on the same subject). I am delighted to see that this initiative has been taken on board by the Committee of Ministers and that the CDDH has set up a group of experts which may draw up a set of guidelines to combat impunity.

(b) *The state of human rights in Europe: the need to eradicate impunity* was the subject of an important conference organized in the German Bundestag on 23 March 2009, by the Assembly's Legal Affairs and Human Rights Committee and its Bundestag counterpart. Keynote speakers at the conference included Juan Mendez, Françoise Hampson, Vincent Berger (the Court's Jurisconsult, who presented an excellent overview of the Strasbourg Court's case-law on "impunity issues"), Tanya Lokshina, Monica Macovei, Nuala Mole and Luis Moreno-Ocampo, among others. I refer you to the Assembly's press release for more details about the Berlin conference: http://assembly.coe.int/-ASP/NewsManager/EMB_NewsManagerView.asp?ID=4505.

(c) Today I'm in Warsaw for this seminar, but tomorrow I'll be off to Targu Mures, in Romania, where – on Monday 18th May – the Assembly's Legal Affairs and Human Rights Committee will be adopting a report on this subject. The report (PACE "working document" 11934 http://assembly.coe.int/Main.asp?-link=/Documents/WorkingDocs/Doc09/EDOC11934.htm), prepared by the Committee's Chairperson, Mrs Herta Däubler--Gmelin, former Minister of Justice of Germany, will be debated in plenary session on 24 June 2009, with the participation of Antonio Cassese, former President of the CPT and the ex--Yugoslavia Tribunal. I strongly recommend that members of the CDDH's newly constituted group of experts on the question of impunity should read this report. [The texts adopted on 24 June 2009: Assembly Resolution 1675 (2009) http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/-ERES1676.htm & Recommendation 1876 (2009). http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/-EREC1876.htm.

Vit Schorm

Thank you very much indeed for these important points. Michał Balcerzak, you have the floor.

Michał Balcerzak

Thank you very much and first of all I would like to thank Derek Walton for his in-depth and outstanding presentation of issues which will be taken up by the group. My comment will be brief. I just would like to add a couple of points, but I will start from what Andrew Drzemczewski said just a minute ago. Well, indeed, this theme has already been on the agenda of the UN, for instance, and I think this is very lucky because it is not a legal vacuum. So it means that the group will benefit from what has already been said in other fora. But also I have the impression that this issue goes beyond the European Convention on Human Rights. While the group will probably focus on Convention-related items, I think this is an opportunity for the Council of Europe to take a broader perspective.

Mr. Walton indicated that some other UN conventions come into play. I believe that the issue of impunity should also be viewed in the context of the Council of Europe Convention against trafficking in human beings, as one of its principles is prosecuting and punishing those responsible. I also think that the group should consider the issue of "limits" on prosecuting and punishing. There is a case against Latvia concerning the temporal limits of prosecuting acts considered by domestic courts as war crimes. The case – *Kononov v. Latvia* – is now being reviewed by the Grand Chamber.

Lastly, I had an impression – maybe I should be corrected – that the issue of impunity will be discussed in the context of some states' unwillingness or failure to cooperate with international criminal courts, and notably the ICTY and the International Criminal Court. Maybe that was just my impression, but I think that this matter was not out of the Council of Europe's field of concern. It is dramatically important whether or not states cooperate with the International Criminal Court in fighting impunity.

Vit Schorm

Thank you. Andrew Drzemczewski, just a small point.

Andrzej Drzemczewski

Just a *post scriptum*. I think we have forgotten something very important, that`s why I`ve again asked for the floor. What about the responsibility of international organisations and international actors in the context of what is happening in Europe (and beyond)? Here I have in mind the question of impunity/immunity for alleged major human rights

violations in the light of, *inter alia*, the Strasbourg Court's quite controversial case-law (*Bankovic*, *Behrami*). Who, in Strasbourg, is responsible for possible human rights violations by international actors (the EU, KFOR, NATO, the United Nations, UNMIK). Isn't it about time for Council of Europe experts (on impunity or others) to delve into the situation of state responsibility in the wider context? Perhaps joint responsibility of international actors and States, if not before the Strasbourg Court, then before other international jurisdictions? And what about impunity of private (military) security companies; who has responsibility for what they do, internationally? Can Council of Europe Member States simply "wash their hands" of responsibility for arbitrary decisions taken by international actors with respect to those found, for example, on UNSC and EU (terrorist) blacklists? I refer you here, in this connection, to the PACE report of Mr. Marty. [See AS/Jur Report (Doc. 11454) and Addendum; PACE Resolution 1597 (2008) and Recommendation 1824 (2008)]

Brigitte Ohms

Thank you, dear colleagues. My name is Brigitte Ohms and I am the Deputy Agent of Austria.

Listening to this impressive outline on the issue of impunity, I was wondering whether we should assign the same priority: to all the listed issues. As already mentioned by Mr Drzemczewski, there are real and practical problems concerning the issue of extra-territorial application of Convention rights during peace-keeping actions where immunity in the sense we normally use it is debatable.

In my personal view, some of the problems mentioned by Mr Walton, e.g. the positive obligations of states deriving from Articles 2, 3 and 5, are already well-known problems and are very often isolated cases. Usually, they are just no systemic failures. I do not want to put it cynically, but such failures unfortunately occur from time to time. Of course these failures are also a matter of concern and we have to take them into consideration in the context of length of procedure problems or, more generally, when discussing improper administration.

When examining more closely the phenomenon of impunity, however, I would like to suggest focusing on different problems, in particular the issue of peacekeeping abroad and ancillary activities. In Austria we are discussing this question quite intensively, since Austria is very often engaged in peacekeeping actions, and we are not only active in areas where we have participated in these operations for a long time and therefore have substantial experience, e.g. Cyprus. So we are eagerly looking forward to solid solutions to be in a position to educate our soldiers and other personnel

abroad how they should act, not only from the humanitarian perspective, but also from the point of view of human rights.

Vit Schorm

Thank you. Philip Leach and then Jakub Wołąsiewicz. And then I think it will be wise to close the discussion on this point, because you can see that we are not sticking to the timetable. But the discussion is interesting.

Philip Leach

I will be very brief. Thank you, Derek, for your presentation. I was reminded, while you were talking about the French case of Siliadin concerning the young girl from Togo, who was taken into domestic service, which I think the Commission should look at, because it is an interesting case about the extent to which the national legislation was ineffective on that question.

If I may, I also urge you to look at the position of Russia. You mentioned the Northern Ireland and the Turkish Article 2 and 3 cases. Please, also look very carefully at the Russian-Chechen cases, as there are now more than a hundred judgments relating to Chechnya, most of which find Russia directly responsible for Article 2 and 3 violations.

The point I would make about those cases is that you can make a case for there being a systemic violation. There is, for example a systemic failure to investigate these very serious cases, and that it is something that I would urge you to consider carefully. Thank you.

Vit Schorm

Thank you. And Jakub Wołąsiewicz?

Jakub Wołąsiewicz

Thank you very much. I will really be very brief. Derek, you have a great group and I believe that the work of that group will be really very interesting for all of us. I would like to add also another problem which we discussed during the last Committee of Ministers in the form of DH. That means impunity in post-judgements procedures. We discussed this matter with Genevieve and Corinne, and perhaps it Secretariat will also prepare some kind of information or memorandum, which could maybe be helpful in your future work. Those are of course problems with the implementation of a judgment. This is also a part of the impunity problem. Thank you.

Vit Schorm

Thank you very much indeed for all these points. I think they seem useful for the future work of the group which have not met yet, so I think it is completely premature to draw any conclusions. I would like to thank Derek for launching the discussion and wish him and his colleagues a good job when working on various impunity issues. Thank you very much.

CHAPTER 2:

EFFECTIVE REMEDIES FOR EXCESSIVE LENGTH OF PROCEEDINGS

Katarzyna Kowalska (key presentation)

Vit Schorm

As you can see from the agenda, there is now half an hour reserved for Mrs. Katarzyna Kowalska from the Polish Ministry of Justice, but she promised that it won't be half an hour, rather half of that time. She will speak on effective remedies for excessive lengths of proceedings, which seemed to be an eternal subject of discussions within the Convention system. So, Mrs. Kowalska, you have the floor.

First of all I would like to thank Mr Jakub Wołąsiewicz, the Polish Agent for the possibility to be here and to present the Polish regulations on the remedy for a breach of the right to a trial within a reasonable time.

The European Convention for the Protection of Human Rights and Fundamental Freedoms in its Article 6 formulates guarantees for a fair trial, demanding, among other things, that the case should be examined within a reasonable time.

In the case of *Kudła versus Poland*, the Court underlined that if the national legal system did not provide the effective remedy for an alleged breach of the requirement under Article 6 para. 1 to hear a case within a reasonable time there had been a violation of Article 13 of the Convention. That also meant that if a Contracting State establishes its own procedure for complaining damages caused by undue delay of proceedings, an applicant has to exhaust the domestic remedies before lodging with the Court a complaint concerned excessive length of proceedings and breaching Article 6 of the Convention. However, The Court stressed that such proceedings had to meet the standard of "effectiveness" for the purposes of

Article 13 because the required remedy must be effective both in law and in practice.

Fulfilling the Court's recommendation given in the aforementioned case of *Kudła versus Poland*, the Codification Commission on Civil Law to the Ministry of Justice prepared a draft Act on Complaints about a breach of the right to a trial within a reasonable time. This Act came into force on 17 September 2004 and applies to undue delays of court proceedings and executory or any other proceedings regarding enforcement of a court decision conducted by a court enforcement officer.

The *ratio legis* of the 2004 Act was to enable the Polish authorities to remedy, and to redress at domestic level, violations of the right to a hearing within a reasonable time, and consequently, to reduce the number of applications lodged with the Strasbourg Court.

Under the Act a party is entitled to file a complaint seeking ascertainment that the proceedings that are the object of the complaint involve infringement of the party's right to have a case examined without undue delay, where the proceedings are pending for longer than would be needed to clarify factual and legal circumstances essential for resolving the case, or to successfully conclude executory or other proceedings regarding enforcement of a court decision (protracted character of proceedings).

Criteria for an evaluation if the case was examined without undue delay are based on the case-law of the Court.

As a rule the complaint shall be examined by a court superior to the court conducting the proceedings. If the complaint concerns undue delay in executory proceedings or other proceedings regarding the enforcement of a court decision, it shall be examined by the regional court in whose circuit the execution or other acts are performed. Where the execution or other proceedings regarding the enforcement of a court decision are being conducted in several circuits, the complaint shall be examined by the court before whom the first act was performed.

Pursuant to the Act complaints about a breach of the right to a trial within a reasonable time may be lodged only if proceedings are still pending. However, it must be emphasized that the law provides that a party who suffered any damages resulting from undue delay of the proceedings may claim for pecuniary and non-pecuniary damage under the Civil Code, after the proceedings are concluded.

The Act established proceedings on complaints about a breach of the right to a trial within a reasonable time as an incidental proceedings within the main proceedings. There is no requirement that an applicant be

represented by a qualified lawyer in those proceedings (except in the case of proceedings conducted before the Supreme Court).

The requirement that a decision be issued within two months of the date a complaint is lodged is a guarantee of complaints being examined without undue delay.

In allowing a complaint, the court shall ascertain undue delay in the proceedings that are the object of the complaint. Acting at the request of the party, the court might recommend that the court examining the case as to its substance pursue appropriate measures within a fixed time-limit in order to accelerate the impugned proceedings. It must be noted that the recommendations should not address the factual and legal assessment of the case.

Moreover, in allowing a complaint, if it is requested by the complainant, the court might order the State Treasury, or, when the complaint concerns undue delay in proceedings conducted by a court enforcement officer, the relevant court enforcement officer, to pay an amount of money not exceeding PLN 10,000. The applicant could obtain further redress by bringing a civil action under the provisions of the Civil Code.

Under the 2004 Act, a party could lodge a new complaint in the same case after the lapse of twelve months from the date of the court decision finding the infringement.

Between 17 September 2004, when a Act came into force and 31 December 2008, common courts received 15 040 complaints concerning excessive length of judicial and executory proceedings. Civil cases were the most numerous category of case complained about, amounting to 61.03% of all cases (9185 complaints).

The average redress afforded by the courts in a single case was PLN 2000.

The Court generally found the Act to be an effective national remedy for excessive length of judicial proceedings under Article 13 of the Convention. However, there are some rulings of the Court, in which improper application of the Act of 17 June 2004 by national courts and as a result a violation of Article 13 of the European Convention on Human Rights were found.

The Court pointed out that, in some cases in which excessive length of judicial proceedings was found, the Polish courts did not afford appropriate redress. Furthermore, the Court negatively assessed the partial examination of proceedings i.e. a limiting of the re-examination of

proceedings before the court of first instance as a result of the repeal of the ruling and examining only that part of the proceedings conducted after the 2004 Act came into force, i.e. after 17 September 2004.

Despite the training of judges and the dissemination of the case law of the Court concerning excessive length of proceedings, the Government was forced to take legislative action to improve the national legal system.

In the Ministry of Justice, an amendment to the Act on complaints about a breach of the right to a trial within a reasonable time was prepared. This amendment came into force on 1 May 2009.

The main assumption of the new legislation is that complaints about a breach of the right to a trial within a reasonable time in the preparatory proceedings night be lodged if the right to have a case examined without undue delay has been infringed, due to action or inaction on the part of the prosecutor conducting or supervising preparatory proceedings. The new amendment also establishes:

- mandatory instruction of a court hearing the case as to its substance, or the taking of appropriate measures within a fixed time limit by the prosecutor conducting or supervising preparatory proceedings. The recommendations may also be *ex officio* given by the court examining the complaint;
- mandatory granting just satisfaction to the complainant in amounts ranging from PLN 2000 to 20,000;
- on obligation of the president of the proper court or the prosecutor superior to the prosecutor conducting or supervising the preparatory proceedings to take supervisory measures under the Common Courts System Act or the Prosecutor Service Act;
- examination of a case in its entirety, by an appellate court if a complaint concerns undue delay in proceedings before a district court and a regional court or proceedings before a regional court and an appellate court.

What is important is the way in which the new amendment provides that, within 6 months of its entry into force, persons who before that date lodged an application with the European Court of Human Rights alleging infringement of their right to have their case heard within a reasonable time in the preparatory proceedings, may lodge a complaint against undue delay in proceedings hereunder, if the application to the Court has been

lodged in the course of preparatory proceedings subject to that application, provided the Court has not ruled as to the admissibility of the application.

At the end of my speech, I'd like to say that the Ministry of Justice is monitoring the implementation of the 2004 Act constantly. Every three months, my Unit collects data from all of the presidents of the regional and appellate courts, something that allows the trends in domestic judiciary to be observed.

Discussion

Vít Schorm

I would like to say a few words before we start on short discussion. The first of these is that the amended act is available. The second thing is that I read very quickly the transitional provision, that is the additional Article 2 of the amended act, and I wondered, and I am echoing yesterday's discussions on the *Burdov II* case, to what extent the court has changed its case law concerning the length of proceedings in similar cases, because the classical approach of the Court to the introduction of new domestic remedies with retroactive effect is not the approach put forward in the *Burdov II* case. It is rather the approach put forward in the first Italian decisions, which were (even before *Appicella*) the first decisions on the Pinto law in Italy that the remedy provided for in that law should be exhausted even if it was introduced in the legislation after lodging of the application with the Court. In reality the Court intended to strengthen the subsidiary effect of the Convention mechanism in these cases. So I wonder to what extent the *Burdov II* judgment means a change of this approach. The third question is a particular one concerning Poland. There are proceedings before higher courts concerning the length of proceedings and also concerning just satisfaction to be provided to damaged persons. I would like to know to which extent these proceedings on the length of proceedings are contradictory, or to what extent there are two parties to the proceedings, to what extent someone responds to the applicant with respect to the satisfaction issue. I am interested in knowing it from the point of view of the possible introduction of such a system in to the Czech legal order. Can you explain to me whether the proceedings are contradictory, whether there is someone who responds?

Katarzyna Kowalska

I will try to find the appropriate provision in the act.

Vít Schorm

In the meantime, I would say that we have a system which enables higher courts to speed up proceedings before lower courts, but if there is no just satisfaction issue raised in these proceedings, there is no need to have someone respond in the name of the state.

Katarzyna Kowalska

This is the provision – Article 10.

Vit Schorm

So, is it the State's Treasury that responds?

Katarzyna Kowalska

Article 10 section 3: If they will not disobey respective intention to join the case, the State Treasury and the Guard in post officer shall enjoy the rights of the party to the complaint procedure. Because the proceedings on the complaint is conducted as a let me call it part of main proceedings (incidental proceedings). I do not know how to say it in English. I better called it incidental in my speech. In the main proceedings there may be a situation whereby the State Treasury is not a party or court in post officer is not a party to, so this is the obligation for the court to conduct the proceedings on the complaint and inform the State Treasury or court in post officer. They may join the proceedings conducted on the complaint because they will pay the redress.

Vit Schorm

So, it is the State Treasury or the services under the Finance Ministry who eventually...

Katarzyna Kowalska

No, the State Treasury represented by the president of the court or the prosecutor superior to the prosecutor conducting or supervising the preparatory proceedings.

Vít Schorm

Thank you for this clarification. Who would like the floor now?

Maciej Bernatt

Hello my name is Maciej Bernatt, Helsinki Foundation for Human Rights, Poland. I would like to thank you for your short description of the law we had and we have (because it has been changed as was said), but in my opinion our law still has really. I would say a lot of problems in practice, when applied. We are addressed, as a Polish NGO by many people, in which they complain. For example, the fact that is risen now that there is

the court, if the court concludes that the proceedings were, that there was length in the proceedings, that the damages should be paid for them. Before there were many cases in which the courts were simply saying that the proceedings were too long but we do not give even a single zloty. So we really appreciate this change in the law. But I put a question to the representative of the Ministry, that under this new law there is a provision that for me to some extent is a bit controversial. If you look into Article 13 right now. I understand that, as before, the change of law Polish citizens could not complain on the long finance of the proceedings when it comes to the preparatory stages of the proceedings, so basically the proceedings in front of the prosecutor. Right now they have this right, but under this article they will have to, even if there are cases pending in the Court in Strasbourg, they obtain a right to complain about the preparatory proceedings somehow that occurred in the past before this new law had come into the force. This means and my question is: what if the applicant does not know about this change of law and in fact does not exhaust the domestic remedies? I do not know if I am clear. And this will mean that the Court at some point right now will say, look, the law was changed, and even if you filed your complaint even three years ago right now you can complain in Poland. So you really did not exhaust domestic proceedings and this means that this case finally could be struck out by the Court by saying that this new remedy was not exhausted and I do not know how the Court would behave and what the interpretation of the ministry is when it comes to this provision.

Katarzyna Kowalska

When you mean the court you mean the Strasbourg Court or common courts in Poland?

Maciej Bernatt

I meant the Strasbourg Court, because right now there is a new domestic remedy. You can complain about the long finance of the proceedings in front of the Polish prosecutor that occurred in 2007 and after that you filed a complaint to the European Court of the Human Rights in Strasbourg and right now a new law gives you a kind of retroactive right to complain on the proceedings.

Katarzyna Kowalska

This provision is almost the same as it was in the original version of the 2004 Act and if you are asking me what will be the behaviour or judgment of the Strasbourg Court to be honest I may say or I should say I do not know. I might presume that the Court would check out the

application from the list but this is a question you should address to the Strasbourg Court, and not to the Ministry of Justice.

Maciej Bernatt

But I understand that this provision was made by the Ministry of Justice.

Katarzyna Kowalska

Yes.

Maciej Bernatt

And they somehow decided to solve the problem also in this way.

Katarzyna Kowalska

That was the intention of the Ministry of Justice.

Vit Schorm

I think we understand your point, and I also think that Jakub Wołąsiewicz can explain how the Court in general deals with such situations in those cases.

Jakub Wołąsiewicz

Thank you very much. Well the situation is, it looks maybe complicated but I think it is very easy. I remind you that the retroactive effect in this situation is made in Article 2 of the amended law, but this is exactly the same situation as was in the original Act of 2004, in which we have this retroactive effect in Article 16, as I remember. Of course just now this Article 16 is not working because it was fulfilled already. But I have a feeling that the complaint if already registered in the European Court of Human Rights will be struck out from the list. We have procedural tools in the Registry at the European Human Rights Court and I believe that if finally the new Act is declared to be effective, this procedure will be like four years ago to what the Act of 2004. So I do not actually think that there will be any problems. The only factor which could be fulfilled to be proven by the Court, is if this new remedy is effective. That is all. After this decision the applicant who lodged the complaint with the European Court of Human Rights will be invited to use the domestic remedy as such, as it was amended by the recent amendment of 2009. That is all.

Katarzyna Kowalska

The same situation was in the *Charzyński* decision? Right?

Jakub Wołąsiewicz

Yes.

Vit Schorm

I think that the Court usually invites the applicant in such a situation to use the domestic remedy and then wants to know whether the applicant used this remedy or not and accordingly it decides on the admissibility of the applications. It was also the case for the Czech Republic when we introduced a new remedy for the length of proceedings with retroactive effect for the applications pending before the Court and the Court informed the applicants about the change of the legislation in the Czech Republic, and the applicants were asked to inform the Court whether they intend to use this remedy or not, and if yes, to inform the Court about the outcome of these proceedings. So nobody was surprised by such a situation, even though one must recall one of the fundamental principles of law which is that no one is supposed to ignore it. So if there is such a change in the legislation it is considered generally to be known to everybody when it is published, of course. Are there wishes on the floor for questions concerning this particular topic? I would maybe like to add that, within the framework of the discussions of the Reflection Group in Strasbourg, the question of a new instrument, let's say a recommendation on the effective domestic remedies against the length of the proceedings, was raised, and if I am not wrong it the Committee of Ministers approved the idea that their work should be carried out on such a recommendation that normally should complement another recommendation adopted in 2004 on the domestic remedies focused rather on the establishment of domestic remedies, on monitoring whether there are domestic remedies and things like that. This new recommendation should aim especially at length of proceedings, and should also contain practical hints for governments and legislators as to the principles on which such legislation and domestic remedies should be based. Other questions from the floor? Well if that is not the case I would like to thank Mrs. Kowalska for her contribution. It is very interesting to see that, in reality, if you enact a domestic remedy, very often it is necessary, it is inevitable, after some time, to enact amendments because it is very likely that there is something which does not function properly. I think it was the case of Italy and no surprise if it is also the case of other countries concerned by the length of proceedings issue. So, if we have exhausted the theme, can I ask Professor Drzewicki to start the discussion on the statue of the Court?

CHAPTER 3:

THE CONCEPT OF THE "STATUTE OF THE COURT"

(*On the Concept of a "Statute" for the European Court of Human Rights*)

by Professor Krzysztof Drzewicki, former Polish Government Agent

1. Introduction[1]

The aim of this paper is to examine the latest developments on the concept of a 'statute' within a wider debate concerning the ongoing reforms of the European Court of Human Rights (hereinafter – the Court or the European Court). By latest developments it is notably meant a submission of the final Report by the Group of Wise Persons (hereinafter – GWP) and most important reactions thereto. Before embarking upon this task it may be helpful to summarise briefly my major submissions made prior to the final Report of the GWP.

A point of departure has been a submission that reforming the European system for the protection of human rights, based upon accumulated and thus traditional methods, requires above all a fundamental change of philosophy.[2] As far as a system of legal bases for the European Court is concerned, a new philosophy implies a need to depart from the presently prevailing method of amending the European Convention on Human Rights and arranging its radical reorientation. The model of adopting consecutive, piecemeal and sometimes very detailed amendments should be abandoned in favour of the choice of reforming the Convention's procedure in a simplified way. Such a role may be assumed by remodeling or restructuring the

[1] The present paper is based on my oral submission made at the *Informal Seminar for Government Agents and Other Institutions on Pilot Judgment Procedure in the European Court of Human Rights and the Future Development of Human Rights' Standards and Procedures* (Warsaw, 14–15 May 2009).

[2] For more see my article in Polish – K. Drzewicki, *Reforma Europejskiego Trybunału Praw Człowieka – filozofia zmian czy zmiana filozofii?* (The Reform of the European Court of Human Rights – Philosophy of Change or Change of Philosophy?), *Europejski Przegląd Sądowy* (European Judicial Review), 2006, No. 6, June, pp. 4–13.

treaty bases of the European human rights system into a three-level system which would introduce a statute in between the European Convention of Human Rights (ECHR) and the Rules of Court.[3]

The European Convention as a *constitutional* or *organic* type of instrument for the European human rights protection system would continue to contain all its substantive provisions, fundamental procedural rules and formal treaty clauses. The substantive provisions of the ECHR with its additional protocols ought to be regarded as rules of on 'untouchable' nature. Rules of Court would be, as now, adopted by the Court itself as an instrument regulating the internal organization and functioning of the Court, with the aim of the provisions of the Convention and statute being implemented.

Some provisions of Rules of Court could preferably be 'upgraded' to the statute or the Convention, due to their 'constitutional' or otherwise fundamental character.[4] Importantly, a statute of the Court would be adopted and amended by the Committee of Ministers of the Council of Europe following drafting work by a designated body of government experts. The Committee of Ministers would exercise its delegated powers to adopt a statute by passing a binding resolution as a sort of implementing legislation. This way a lengthy and cumbersome domestic ratification procedure in 47 states parties could be avoided, and hence on average 4-5 years spared.

The realisation of the concept of a statute would nevertheless require, once again, a traditional procedure of amending the European Convention through an amending protocol.

There is a hope, however, that this could probably be the last protocol to the Convention amending its procedure. Referring to a proposed concept of four 'A' stages – *Adoption*, *Application*, *Assessment* and *Adjustment*, there is ample evidence that the situation with the procedural arrangements of the European Convention has passed a threshold of assessment and approaches the stage at which *adjustment* of the ECHR appears indispensable.[5]

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[3] K. Drzewicki, *Remodelling of the Treaty-Based System for the European Human Rights Protection*, in H. Machińska (ed.), *The European Court of Human Rights. Agenda for the 21st Century*, Warsaw: Information Office of the Council of Europe, 2007, pp. 97–106.

[4] *Ibidem*, p. 102. This could for example be a provision of Article 80 of the Rules of Court (revision of judgments) or a rule on interim measures which was strengthened by the Court's case law and thus require anchor entrenchment in the Convention or statute.

[5] The concept of four stages was developed and designed to serve as a set of parameters to facilitate counteracting unreasonable and premature treaty-making – see K. Drzewicki, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life – Five Years After and More Years Ahead*, *International Journal on Minority and Group Rights*, 2005/2–3, pp. 130–131.

As briefly recounted above, the proposal for a statute was initially outlined in my expert report (3 February 2006) drawn up for the Ministry of Foreign Affairs of Poland and designed for a Group of Wise Persons of the Council of Europe and subsequently presented at the Warsaw Seminar the 'European Court of Human Rights – Agenda for the 21st Century' on 24 June 2006. As it appeared the Polish member of the Group of Wise Persons – Ambassador Hanna Suchocka – succeeded in promoting the proposal of three-level legal bases for the European Court of Human Rights.[6] The Group of Wise Persons first presented its Interim Report on 10 May 2006, and then its final Report on 15 November 2006.

2. Interim Report of the Group of Wise Persons on the Concept of a Statute

The Interim Report of the GWP addressed the issue of the statute in its Paragraphs 34–36 making up a subsection on 'Making the system more flexible as regards the conditions for reforming it'.[7]

In Paragraph 34 the Group of Wise Persons acknowledged that *consideration should be given to the possibility of introducing greater flexibility into the judicial system of the Convention through an amendment thereto authorising the Committee of Ministers to carry out certain reforms relating to judicial organisation by way of unanimously adopted resolutions without an amendment to the Convention being necessary each time*.

The Group has moreover explained in Paragraph 35 that [T]*his method has been used on numerous occasions in the European Communities. One notable example was the setting up of the Court of First Instance. The Treaty of Nice subsequently introduced the possibility for the Council to create 'judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas'. It was this means that was employed to set up the new European Union Civil Service Tribunal. In addition, under Article 245, 2nd paragraph, of the Treaty, the provisions of the Statute of the*

[6] K. Drzewicki, *Proposals for the Reform of the European Court of Human Rights. A Contribution to the Work of Wise Persons*, Gdańsk–The Hague, 3 February 2006, pp. 1–5 (expert report drawn up for the Department of Legal and Treaty Issues of the Ministry of Foreign Affairs and the Polish member of the Group of Wise Persons – Ambassador Hanna Suchocka). See H. Suchocka, *Main Problems Related to the Reform of the European Court of Human Rights*, in H. Machińska (ed.), *The European Court of Human Rights. Agenda for the 21st Century*, op. cit., pp. 107–113, at p. 111.

[7] Cfr. *Ministers' Deputies. Interim report of the Group of Wise Persons to the Committee of Ministers, 116th Session of the Committee of Ministers (Strasbourg, 18–19 May 2006)*, CM(2006)88, 10 May 2006 (the report was declassified on 19 May 2006), p. 5.

Court of Justice of the European Communities, with the exception of Title I, may also be amended by the Council acting unanimously.

Summing up its conclusions, the Group of Wise Persons considered in Paragraph 36 that *such a method could prove effective in the long term as a tool for making the convention system more flexible and capable of adapting to new circumstances. The Group notes, however, that this flexibility could not apply to the substantive rights set forth in the Convention and should be confined to the provisions relating to the Court's operating procedures, and solely on the Court's own initiative.*[8]

Already at this preliminary stage the very concept of three-level legal bases for the European Court seems to have been accepted. However, the Report included certain suggestions of a controversial nature, such as adoption of a possible statute and amendments thereto exclusively by unanimous resolutions, and their adoption solely on the Court's own initiative (see Paras. 35 and 36 above). But much more surprising and disappointing proposals came later.

3. The Final Report of the Group of Wise Persons

The Report of the Group of Wise Persons proposed ten essential measures for ensuring the long-term effectiveness of the European Convention on Human Rights. Under the first heading the Report sets out 'Greater flexibility of the procedure for reforming the judicial machinery' (Paras. 44–50) within broader proposals concerning the structure and modification of the judicial machinery.[9] It is within this first heading that the question of a possible statute of the European Court is discussed.

In general its main conclusions contain two groups of provisions. The first repeats all major conclusions of the Interim Report. Its three Paragraphs (Nos. 34–36) have essentially been reproduced in Paragraphs 44–46 of the final Report, however with certain modifications. The second part of the Report deals with a number of fundamental and detailed proposals which at the same time include a lot of detailed reservations and qualifications (Paras. 47–50). Before embarking upon their assessment a brief description of the new provisions appears indispensable.

Paragraph 45 of the Report repeats Paragraph 35 of the Interim Report and contains an additional sentence at the end which points to the

[8] See more H. Suchocka, op. cit., pp. 109–110.

[9] Cfr. *Ministers' Deputies. Report of the Group of Wise Persons to the Committee of Ministers, 979bis Meeting, 15 November 2006*, CM Documents, CM(2006)203, pp. 1–15. On the statute see also Paragraphs 127–128 of the summary of the Report.

experience of the European Union in adjusting its judicial system in the light of the Treaty of Nice.[10] The added provision says that [T]*his reform facilitated the adjustments to the Community judicial system that were deemed necessary having regard to the trends in litigation*. This sentence does not actually add a lot and it rather tends to strengthen the argument in favour of non-treaty based changes of judicial organisation and procedure. More far-reaching change was introduced in Paragraph 46 of the Report in comparison to its counterpart Paragraph 36 of the Interim Report. The latter provides that amendments of the statute's procedural rules by the Committee of Ministers could take place "solely on the Court's own initiative." In the final Report this sentence was replaced by a statement whereby *any amendment would have to be subject to the Court's approval*. Consequently, an evolution of provisions from "Court's initiative" to "Court's approval" means a substantial change. It will be examined extensively below.

Paragraph 47 of the final Report summarises the core of the proposal for the statute by listing three levels of rules governing the system:

- first of all, the Convention itself and its protocols, for which the amendment procedure would remain unchanged;
- secondly, the "statute" of the Court, a legal level whose content would need to be defined, comprising provisions relating to the operating procedures of the Court (and the "Judicial Committee" – see paragraphs 51 *et seq.*)[11];
- lastly, texts such as the Rules of Court, which could be amended by decisions taken by the Court itself.

Paragraph 48 concludes by saying that the *innovation suggested by the Group is the establishment of a "second" level of rules: the statute. The provisions of a statute could be amended by the Committee of Ministers, with the Court's approval*.

Far from being of a purely technical nature are the provisions of Paragraphs 49 and 50 which set out further limitations to the scope of the possible procedural regulation of the statute. Paragraph 49 deserves therefore to be referred to *in extenso*:

If the European Union model were to be followed, the statute would be appended to the Convention and would form part of it, but, in accordance with

[10] The Treaty of Nice allowed the Council to set up the Court of First Instance and the new European Union Civil Service Tribunal, and to amend other procedural rules by a unanimous decision.

[11] This provision thus refers to procedural arrangements for both the Court, and a possible future Judicial Committee as a filtering mechanism (Paras. 51–65 of the Report of the GWP).

a provision of the Convention itself, its provisions, with some exceptions, would be subject to a "simplified" amendment procedure, is by decision of the Committee of Ministers with the Court's agreement. The statute of the Court should include all the provisions of section II of the Convention (and those governing the operation of the Judicial Committee, see paragraphs 51 et seq) with the exception of the following provisions, which could either be kept in the body of the Convention or included in the statute, but would be explicitly excluded from any possibility of "simplified" amendment:

- *Art. 19 (Establishment of the Court)*
- *Art. 20 (Number of judges)*
- *Art. 21 (Criteria for office)*
- *Art. 22 (Election of judges)*
- *Art. 23 (Terms of office and dismissal)*
- *Art. 24, paragraph 1 (Registry)*
- *Art. 32 (Jurisdiction of the Court)*
- *Art. 33 (Interstate cases)*
- *Art. 34 (Individual applications)*
- *Art. 35, paragraph 1 (Admissibility criteria)*
- *Art. 46 (Binding force and execution of judgments)*
- *Art. 47 (Advisory opinions)*
- *Art. 51 (Privileges and immunities of judges).*

For its part, Paragraph 50 explains that the *criterion governing this choice is the removal from the "simplified" amendment procedure of provisions defining key institutional, structural and organisational elements of the judicial system of the Convention, namely the establishment of the Court, its jurisdiction and the status of its judges.*

At very first glance considerable differences and changes between the Interim Report in May 2006 and the final version of the Report of the Group of Wise Persons of November 2006 are discernible. While the former seemed to be openly positive to the concept of the statute, the latter brought into the debate a long list of fundamental doubts and detailed reservations. The most important of these prompt critical examination.

4. Critical Observations on the Report of the Group of Wise Persons

a) For a 'new concept' of separation of powers in international law? The rule of law versus the rule of judges?

The most disturbing parts of the GWP's Report are those which attempt to redefine the role of the European Court of Human Rights in the whole new setup under discussion. Paragraphs 46 and 48 of the Report unequivocally demand approval by the Court of any amendment to be introduced to the statute. Worse, these demands of the Wise Persons have been formulated in such categorical terms that they can hardly be found open to more flexible solutions. As noted above, the Interim Report was similarly, though less rigidly, favouring the Court by proposing that amendments would be adopted "solely on the Court's own initiative." (Para. 36).

The final Report has thus attempted to introduce an imbalance into the relationship between the governments and the European Court. If any amendment of the statute would only become effective with the Court's approval this would be tantamount to excessive limitation of the law--making role of governments in international law and would deprive them of the right to initiate relevant changes and adopt them freely. Narrowing the procedural changes of the statute only to those requested by the Court would redefine the role of the European Court through a departure from the principle of the separation of powers as one of the pillars of the rule of law.

So far the practice under international law has respected the primary role of governments in the field of law-making and the role of international courts in adjudication. This separation of powers at the international level is deeply embedded in and follows on from the constitutional principles of democratic governance.[12] It empowers domestic and international courts to apply and interpret international law but not to create it. Admittedly, it is exceptionally acceptable within the concept of

[12] A standard definition reminds us that the separation of powers is secured only if the three primary functions (legislative, executive, and judicial) are exercised by distinct and independent organs. It is further explained that while the judiciary is largely independent, the legislature and the executive depend on one another – see E.A. Martin and J. Law (eds.), *A Dictionary of Law*, Oxford: Oxford University Press, 6th edition, 2006, p. 489. This is equally applicable to the relationship between international courts and governments as international legislators.

the so-called 'judicial activism' that a 'law-making' power of the Court is admissible if it serves functionally to fill gaps in law.[13] However, this possibility may only occur within the stage of adjudication.

What is most disturbing is thus that the Report of Wise Persons went far beyond the limits of the concept of 'judicial activism'. It tends to give the European Court, not an influence on future legislation (statute) through, say, non-binding consultation, but a piece of the actual legislative power in the form of an explicit approval of legislative instruments of the Committee of Ministers. It must also be emphasised that this legislative power has been designed as a sort of veto, because any amendments to the statute would have to be 'approved by the Court'. Furthermore, while legislating so, the Group of Wise Persons gave insufficient attention to such logically predictable implications as possible rejections by the European Court of draft amendments adopted by the Committee of Ministers. This and other options can generate a series of tensions between the governments and the Court. The latter would have automatically become involved in a political process. It is highly regrettable that the Wise Persons overlooked quite a natural and reasonable conclusion arrived at under the European Convention on Human Rights whereby *a judicial tribunal needs to be independent vis-à-vis the legislature*.[14]

These proposals of Wise Persons should be rejected as a dangerous attempt to undermine the international rule of law and thus to replace it by the rule of judges. The role of governments should be maintained. They lawfully represent states as subjects of international law and they not the courts are vested with a prerogative of *ius tractatuum et contrahendi*. It is regrettable that the Group of Wise Persons has not focused its attention on certain implications of its suggestions and on more plausible forms of the Court's impact on the content of the statute.

As far as possible implications resulting from the proposed amendment procedure are concerned, a question cannot be left unanswered about the procedural methods of expressing the Court's approval. It is less relevant whether the Court's approval should be required to achieve

[13] 'Judicial activism' is even better defined as opposed to the concept of 'judicial constraint' whereby "there is a fundamental difference between legislation and adjudication. The judge's task is to apply the law" and "never think of himself as a legislator" – for more see on both concepts in the jurisprudence of the European Court see J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester–New York: Manchester University Press, 1990, pp. 207–211, at 209.

[14] See the cases referred to against a broader background of profound examination of judicial independence and impartiality under the ECHR by M. Kuijer, *The Blindfold of Lady Justice. Judicial Independence and Impartiality in the Light of the Requirements of Article 6 ECHR*, Leiden: M. Kuijer, 2004, pp. 259–261 at 260.

unanimity and, if not, what type of majority vote would be necessary. Most important is whether a consensus or majority of 47 judges could realistically be ensured. These questions have become particularly relevant if one recalls the experience gained in the course of consultations arranged by the Steering Committee for Human Rights (CDDH) with the Court and its Registry on the draft Protocols No. 11 and 14 to the ECHR.

It became clear that the judges were heavily divided in debates prior to the adoption of Protocol 11 on whether the Convention system should continue as a two-tier procedure or as a single court. Likewise, views of the Court on certain proposals for reforms examined by the Evaluation Group to the Committee of Ministers on the European Court of Human Rights were presented by the Court's President solely, most probably due to lack of time or a difficulty in arriving at jointly shared conclusions.[15] This experience has reminded us that judges represent a variety of legal systems and cultures and thus they naturally represent different views and are actually divided on numerous reform issues. The role for the Court in the procedure of approval can also become a time-consuming factor, time they desperately need for adjudication activity.

Another problem with the Report of the Group of Wise Persons has been their failure to address other forms of possible influence of the Court on the content of amendments to the statute. Instead of encroaching upon the governmental powers in standard-setting, the Group could have considered a number of arrangements for consultation between the Court and governments. It is a well established tradition in the Council of Europe to consult the Court and Parliamentary Assembly on pre-final drafts of treaties, to invite registry officials to meetings of intergovernmental bodies (e.g. CDDH, DH-PR[16]), or to create special bodies for contacts and consultations like the Committee of Minister's liaison body with the Court. Unfortunately, the assessment of such bodies and mechanisms appeared to have been overlooked by the Group of Wise Persons.

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[15] Cfr. *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, Strasbourg, 27 September 2001, p. 51, footnote 1, which says that "Mr Wildhaber wishes to stress that this Chapter of the report reflects his personal views and not those of the Court, which has not yet discussed amendments to the Convention in plenary session."

[16] The DH-PR – Committee of Experts for the Improvement of the Procedures of the Protection of Human Rights – is a body answerable to the CDDH. It was a symptom of wisdom respecting the separation of powers that a small group established by the Committee of Ministers to discuss budgetary and other issues with the Court was characterized as an organ of 'liaison' and as a joint body.

It should be fairly submitted that instead of the Court's approval, which should be rejected, mechanisms for consultation can further be developed and applied.

b) Requirement of unanimity

It is also disturbing in the Report by the GWP that it has envisaged adoption of amendments to the statute by unanimous resolutions of the Committee of Ministers (Para. 44). This proposal has been substantiated by a reference to the relevant procedure of the EU Council (see Para. 45). What is actually controversial with this proposal is that it puts on the equal footing a variety of provisions of the future statute, irrespective of their fairly diversified content and importance. Among the provisions to constitute the statute there would be those of a fundamental character, as well as those of technical or secondary procedural substance. Consequently, there is a need to reconsider whether the principle of unanimity is to apply to both categories of provisions, or is to be resorted to in cases where the most fundamental procedural arrangements amended.

For other matters, a qualified majority could be sufficient. This solution could be helpful in overcoming resistance on the part of some governments to specific non-fundamental provisions supported by a qualified majority but blocked by a slight minority. In other words, rules concerning voting at the Committee of Ministers on amendments to the statute should not be based exclusively on the principle of unanimity, but should allow for more diversification and flexibility, depending upon the degree to which amended rules are of a fundamental character. The rules on voting are already quite flexible, and could easily be adjusted to the needs of statute adoption and amendment.[17] If such a diversification of voting rules becomes acceptable *lex specialis* provisions would have to be envisaged by the future statute.

In conclusion, would submit that the requirement of unanimity is most likely the best solution, but its possible applicability to each provision of the statute would preferably be discussed.

[17] For more on procedural and voting modalities see G. De Vel, *The Committee of Ministers of the Council of Europe*, Strasbourg: Council of Europe Press, 1995, pp. 36-38 and 71–73. One should note the CoE's tradition of integrating to majority voting (simple or qualified, the latter usually as two-thirds) of an additional requirement of 'a majority of the representatives entitled to sit on the Committee' – see the variety of modalities set forth by Art. 20 of the Statute of the Council of Europe.

c) List of provisions to be excluded from the statute

The Report by the Group of Wise Persons has introduced yet another set of limitations to the concept of the future statute of the Court, a set absent from the Interim Report. It is a list of provisions of the European Convention whose devolution to the statute should be prevented (Paras. 49–50 GWP). The Wise Persons explained that removal from the 'simplified' amendment procedure should apply to provisions defining the *key institutional, structural and organisational elements of the judicial system of the Convention, namely the establishment of the Court, its jurisdiction and the status of its judges*. (Para. 50). In this way, the Wise Persons showed that they were able to be flexible by distinguishing two sets of provisions and subjecting them to two different regimes. Regrettably, they did not show a similar flexibility on the 'approval' procedure and the rule of unanimity (see a) and b) above).

Taking all the reasons given for exclusions seriously, their list is on the whole fairly reasonable, but not sufficiently flexible. The list of exclusions seems a reasonable proposal but it tends to determine in advance a rigid set of 'untouchable' provisions, hence leaving less space for negotiations. Realistically, yet – shorter list of exclusions, or even a total devolution of Section II of the European Convention (organizational and procedural provisions on the Court) to the statute would most likely not find unanimous support among the governments. It is a commendable move by the GWP's Report that the list identifies specific provisions for exclusions in a meticulous way, i.e. by identifying individual articles and paragraphs at stake.[18]

Some criticism against the rigidity of the list of exclusions stems from an experience whereby certain allegedly 'untouchable' provisions of the Conventions have already been amended, and sometimes more than once. This has been the case for terms of office of judges (Art. 23 ECHR) or the establishment of the single Court (Art. 19 ECHR). Among 'untouchable' provisions, there are also those which are being discussed for possible re-adjustments, such as the rule on numbers of judges (Art. 20 ECHR). Anyway, if states parties wished to amend any of the 'untouchable' provisions, the only way would again be through lengthy treaty-making.

[18] This commendable approach is seen, for instance, in cases in which it is not entire articles that are proposed for the exclusion list, but only selected provisions of some paragraphs. See Arts. 24 (Para.1) and 35 (Para. 1). Note that the GWP's Report has already changed the numbering of the Convention's articles in accordance with Protocol No. 14, which is still not in force due to obstruction by Russia (the only party to the ECHR not ratify).

From the point of view of the technicality of law-making, the statute would contain provisions repeating some of the Convention's formulations, and then add in new rules. This technique has been applied by the European Court itself in the drafting and amending process of Rules of Court. Legally speaking, it should be made clear that the statute (to be adopted by a resolution of the Committee of Ministers) would have equal binding status alongside position with the Convention.

A matter for further study and debate concens the scope of possible extension of the Convention's provisions in the statute due to pressing needs or other circumstances. The governments may wish, for instance, to add more detailed rules to the statute to further elaborate on what at present constitutes Article 22 on the election of judges. This may be so due to further developments of rules on the election of judges, following recommendations of the Parliamentary Assembly, or due to uncertainty about the interpretation of gender requirements. The latter situation has actually arisen, in but has not been entirely solved by, the 2008 advisory opinion given by the European Court on gender representation on the lists of candidates for judges of the Court. Having replied to a question about lawfulness of a list of male candidates only, the Court stated that *exceptions to the principle that lists must contain a candidate of the under-represented sex should be defined as soon as possible*.[19] Although this directive was addressed to the Parliamentary Assembly, the governments may legitimately wish to modify Articles 21 and 22 ECHR accordingly, to set more clear rules on the modalities for gender representation. This example proves how it would be more convenient to have rules like those in Articles 21 and 22 in the statute and not in the Convention. However, one cannot preclude both Articles remaining in the Convention and only being further developed in the statute.

In conclusion, the list of exclusions can be said to be welljustified, although it could have been shorter to allow governments to reflect in the future statute a lot more issues than the list of 'untouchable' provisions prevents than from doing. If the list is to offer certain flexibility its exclusions would have to be slightly reduced.

[19] Cfr. *European Court of Human Rights Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, Strasbourg, 12 February 2008 (Para. 54).

5. Reactions to the Report of the Group of Wise Persons

On 17 January 2007 the Ministers' Deputies decided to transmit the Wise Persons' Report to a number of Council of Europe bodies with an invitation to submit views on it. Three groups of reactions deserve particular attention.

a) Parliamentary Assembly of the Council of Europe (PACE)

By the decision of the Assembly's Bureau, the Report was transmitted to the Committee on Legal Affairs and Human Rights. Its rapporteur Mrs Marie Louise Bemelmans-Videc prepared a memorandum on the Report of the GWP.[20] In Paragraph 12 of the Memorandum the rapporteur considered that the idea of greater flexibility of the procedure for reforming the judicial machinery merits further reflection. However she found that the proposal for a more flexible system should be "contingent on the Court's approval." Furthermore, and typically for a 'good and militant parliamentarian' she has raised the question of a possible *diminution of the role of parliamentarians in a situation where the classical ratification process might be abandoned*.[21]

Although brief, the comments by the rapporteur of the PACE Committee on Legal Affairs and Human Rights represent an important voice of parliamentarians on reform issues, including on the procedure for a possible statute of the Court. It would be commendable if the Committee could further develop its observations on the two issues raised therein. One is about the controversial position of the statute as "contingent on the Court's approval." The Committee should consider arguments against this arrangement as a menace to on adequately conceived separation of powers at international level (see 4a. above). It is hoped that the parliamentarians will remain sensitive to attempts to violate a balanced separation of legislative, executive and judicial powers.

As far as the above mentioned question of a reduced role for parliaments is concerned, the Committee could examine a number of possible remedies like prior consultation by governments with the national parliaments or their relevant committees, and consultations by governmental

[20] *Parliamentary Assembly, Committee on Legal Affairs and Human Rights. Report of the Group of Wise persons on the Long-Term Effectiveness of the European Convention on Human Rights Control Mechanism. Memorandum for the attention of the Bureau of the Assembly*, Rapporteur: Mrs Marie Louise Bemelmans-Videc, Netherlands, EPP/CD, AS/Jur (2007) 25, 10 April 2007.

[21] *Ibidem*, p. 3. It can be noted that the rapporteur's argument on the possible diminution of the role of parliamentarians was supported by a reference to my submissions – see K. Drzewicki, *op. cit.* (supra note 3), pp. 103–104.

organs of the Council of Europe with the Parliamentary Assembly and its committees. These consultations should accept as a starting point a distinction between ratification of treaties of a fundamental nature (e.g. on human rights issues) and treaties of a more technical nature. The parliamentarians should therefore be made aware of the fact that fundamental substantive rules (a catalogue of rights and freedoms) and procedural principles (right to individual application, judicial type of procedure, etc.) of the European Convention on Human Rights will remain intact, while only rules of a more technical procedural character are to be subject to amendments by way of resolutions of the Committee of Ministers.

On the whole, one may legitimately expect the Parliamentary Assembly to work out its own views on the reforms of the European Court.

b) The Opinion of the European Court of Human Rights

Another body invited to comment on the Report by the Wise Persons was the European Court of Human Rights itself. On 2 April 2007, the Opinion of the Court on the Wise Persons' Report was adopted by the Plenary Court.[22] In its brief comments the Court devoted a few lines to the issue of *greater flexibility of the procedure for reforming the judicial machinery*. Its main thrust has been spelt out as follows:

The Court shares the analysis of the Group and considers the latter's proposal for an intermediate level of rules to be sound. Experience shows that the continuous evolution of European societies makes periodic readjustment of the Convention mechanism necessary. This should be possible without having to go through the protracted and burdensome procedure of an amending protocol that must be ratified by all Contracting States. The value of such an arrangement is clearly demonstrated in the Community legal order, as the Group indicates.[23]

This positive attitude of the Court to the idea of a statute as a remedy against the protracted and burdensome ratification procedure for further amending protocols must be welcome. The Court has pertinently observed that, in view of the continuous evolution of circumstances in Europe, periodic adjustments of the control mechanism of the Convention will be necessary. However, this statement of the Court was followed by a far-

[22] This document is available on the Court's website: www.echr.coe.int (pp. 1–6 at p. 2).

[23] In a comment of minor importance the Court suggested that the proposal of the statute "could be directly referred to the competent body, i.e. the Steering Committee on Human Rights, for detailed consideration and follow-through." It is rather an inappropriate remark as the Court should abstain from suggesting to the Committee of Ministers which body should deal with drafting process. Currently this can be the CDDH or its subordinate organ (DH-PR, Reflection Group or otherwise) but also a Group Rapporteur-Human Rights (GR-H).

-reaching and radical observation which for a number of reasons seems be implausible. The Court namely found that:

Given that the Statute would encompass organisational and procedural provisions, it would be desirable for the Court to have the right to initiate amendment procedure, in addition to the right to approve amendments proposed by the Committee of Ministers.

It is surprising that the Court wants so much more power and influence on the content of procedural provisions of the statute and Convention. One could have expected more of a constrainted approach on the part of the Court. It is clear from the Opinion that the Court wants to obtain more than the Wise Persons have actually proposed. Let us recall that in their Interim Report, the Wise Persons saw the statute being adopted and amended "solely on the Court's own initiative" (Para. 36), while in the final Report "with the Court's approval" (Paras. 48 and also 46). This means then that the Court wishes to be empowered both to be the only actor in initiating amendments to the statute and the only body with an unlimited and exclusive power to approve or endorse the statute.

This solution would produce an unprecedented case of the accumulation of legislative and judicial powers in the hands of one body. It is regrettable that such an understanding of the separation of powers was proposed by the judicial body. In addition to arguments recounted above against encroachments on the principle of separation of powers (see sub-section 4a), it needs to be emphasized that the governments would be deprived of a good part of their law-making prerogatives. The statute is to encompass a majority of the provisions taken from Section II of the present Convention, which since 1949–1950 has been never contested before as an area of governmental powers. Further development of procedural arrangements also remains within the ambit of governmental powers, while it is for Rules of Court to adopt detailed internal rules and provisions implementing the Convention and future statute.

Needless to say again that the most proper way to amend the statute would be a resolution of the Committee of Ministers drawn up by expert bodies, and duly consulted with other organs of the Council of Europe and the European Court of Human Rights. The latter's views on any amendments of the Convention or statute should be regarded with due attention but never should the Court impose international legislation on the governments.

c) Action by the Committee of Ministers

With the submission of the final Report by the Group of Wise Persons, the Committee of Ministers and the Ministers' Deputies started a new stage by holding on exchange of views and making the first decisions for further operationalisation of tasks aimed at considering the issue of the long-term effectiveness of the ECHR control mechanism. One of the decisions was to invite comments on the GWP Report from the European Court, PACE, the Commissioner for Human Rights and the Secretary-General.

In July 2007, the Ministers' Deputies asked the Steering Committee for Human Rights (CDDH) *to examine in depth the concrete follow-up that could be given to the recommendations contained in the Report of the Group of Wise Persons*. For these needs the CDDH established a Reflection Group (DH-S-GDR), composed of 18 specialists, and issued its terms of reference which gave priority to proposals not requiring amendment of the Convention. Only at a later stage was the Group tasked with presenting a further report focusing on proposals requiring amendment of the Convention.[24]

In its Interim Report, the CDDH concluded that the idea of a Statute for the Court is relevant and interesting, although not necessarily a direct response to the Court's current caseload. The Report raised an important issue about whether the statute should be given a more expansive sense than that contained in the rather minimalist proposal made by the Wise Persons.[25] This as well as other questions, like those on the content and scope of the statute, merit further consideration and work. At this stage, however, a decision must finally be taken whether such work can be commenced under the terms of reference of the CDDH. On this issue the CDDH was consistently following the conclusions of the Reflection Group which felt that *work to enable further detailed consideration of the issue should start straight away*.[26]

It can be concluded that the Committee of Ministers and Ministers' Deputies have pursued their responsibility for implementation of the Report by the Group of Wise Persons. The reform package requires a gradual approach, preceded by a thorough expert examination of a long list of difficult proposals, including that on the statute. The latter, though not

[24] Cfr. *Interim Report. Enhancing the Control System of the European Convention on Human Rights (as adopted by the CDDH at its 66th meeting (25–28 March 2008)*, CDDH(2008)008 Add. II, 2 April 2008, pp. 1–3, and *Terms of Reference* for the Reflection Group – see a file on ECHR reform at www.coe.int.

[25] *Interim Report*, *op. cit.*, p. 3 (Para. 16) which sets out four specific areas of further work necessary before a decision on standard-setting could be pursued.

[26] *Steering Committee for Human Rights (CDDH). Reflection Group (DH-S-GDR). Report, 2nd Meeting, 12–14 March 2008*, DH-S-GDR(2008)007, pp. 4–5 (Paras. 11–13).

a priority and a direct remedy against the Court's caseload, may be helpful in the long-term perspective. Once the problem of Protocol 14 was partly solved by the adoption of Protocol 14 bis, a decision would be necessary to accelerate regular work on the idea of the possible statute. The CDDH is expected to take appropriate decisions in the course of 2009.

6. Conclusion

As far as the idea of the statute is concerned it has passed successfully through its initial stages. So far has it been achieved that a study by eminent personalities – the Group of Wise Persons – was completed. The second stage has seen a series of consultations with the ECHR and main organs of the CoE. Both stages have brought valuable assessment, followed by proposals and recommendations for initiation of a standard-setting phase. A decision in this respect is expected in 2009. Before the initiation of expert diplomatic negotiation on the content of the statute a few conclusions should be inferred from the Report of the GWP and the comments of consulted bodies.

Against the background of the whole reform, the Report by the GWP contains quite an extensive set of comments on the proposal for a statute. Most importantly, the idea of a statute was accepted as a principled position of the Wise Persons. However, this acceptance has been seriously undermined by a number of reservations or qualifications. Such limitations as a requirement of unanimity and list of provisions to be excluded from the statute are generally acceptable, but they prompt a further discussion to make them less rigid and more flexible for a number of arguable reasons (see 4b and 4c above).

Of more fundamental significance are those proposals of the Group of Wise Persons and of the European Court which directly and hence dangerously attempt to challenge the principles of the rule of law and separation of powers (see 4a above). The very idea that the provisions of statute could only be adopted "with the Court's approval" and upon its "right to initiate the amendment procedure" may render the concept of the statute a completely futile endeavour. Such proposals should therefore be ignored and normal consultation mechanisms with the Court applied and perhaps developed further. The idea of introducing greater flexibility to the legal bases of the Court should not become an opportunity to deprive the governments of their law-making powers and to empower the European Court of Human Rights with legislative powers, including that of the veto. Without rejecting proposals that openly challenge the principle of the

separation of powers, the governments should not commence any expert and diplomatic negotiation on the statute.

The European Court of Human Rights should not evolve towards a sort of European Court of Human Rights 'Politics' but ought to continue consistently as the European Court of Human Rights 'Law'.

Discussion

Vít Schorm

Thank you very much, Professor Drzewicki, for this – maybe for some of us provocative – contribution to our discussion. I take my glasses to look for those who wish to take the floor to put questions, to respond, to be even more provocative. I can see Andrew Drzemczewski obviously. You are the first and you have the floor.

Andrew Drzemczewski

Mr Drzewicki, you refer to the importance of the separation of powers. A possible Statute, whose contents could be altered, preferably only in consultation with the Court rather than with its approval, is proposed by the Wise Persons. The separation of powers entails a classic subdivision: legislative, executive and judicial power. What about the idea of States' Parties governments (the Committee of Ministers) being allowed to do what it likes in such matters? Does this not trouble you? Are there not dangers with 'delegating' certain potentially important treaty-making powers to governments? What about the argument that your proposal, if implemented, could in effect circumvent parliamentary authorization? This could be dangerous. It is – on the face of it – quite plausible to delegate certain technical matters to the Committee of Ministers. Fine. But if you are going to give to the Committee of Ministers a certain power, should we – the general public (for a moment I'm a member of general public) – simply be prepared to leave matters like this in the hands of States' executives, to diplomats appointed by a given government, presently in power? Can and should we trust civil servants or diplomats based in Strasbourg for a few years, to deal with potentially important treaty interpretation issues without necessarily obtaining parliamentary authorization? Or worse still, try to ensure that the legislatures of all member States, by accepting a Statute, in effect provide a *carte blanche* to the Committee of Ministers to do what it likes on certain issues when, for example, the Ministers' Deputies are not too happy with some of the Court's case-law. A lot will depend on the exact

content of any possible Statute, I accept. But 'safety valves' must be provided. Hence, even though sometimes cumbersome, I prefer to maintain the need for parliamentary authorization with respect to important matters; we know this can be done fast when the need arises. You stress the issue of the separation of powers, but you do so selectively.

Vit Schorm

Thank you. In this context I would also refer to various difficulties within the European Union, which is a more limited club than the Council of Europe, with these questions. Well, of course, it concerns taxes and things like that which look very technical, which are also very sensitive. Maybe Human Rights will also be sensitive. So, who wants to reply? John Darcy and David Milner?

John Darcy

Thank you very much. I will just to come up with a point on the separation of powers mentioned in the speech we have just heard. And that is to recall when the European Court of Human Rights gave its opinion on the report of the Wise Persons on this particular point – which was whether the role that the Court will have in the adoption of the statute and in the future changes which will be made from time to time at the level of the Committee of the Ministers, is appropriate as a sort of co-decision role; with its consent being needed. It did see it as appropriate, and that is important. And it went further as well in its opinion to say that it should have the right of initiation, that it could formally approach the Committee of Ministers and say in the view of the Court and having regard to the way the things are now – 5 years on since the last provision which was tabled before you, there are certain changes for consideration. There was the previous thought. It is like the double-lock mechanism; that was their vision of how the arrangement with the statute could work. It is just my tip, I just wanted to bring the attention of the audience to this issue today. Thank you.

David Milner

Thank you. This issue was discussed on several occasions and at considerable length by the Reflection Group. There was undoubtedly recognition that the idea of a statute was interesting in principle. On a practical level, however, the Reflection Group showed a certain hesitation. Furthermore, the Group's final proposal, supported also by the CDDH, that a working group be established to start looking at the statute has not so far been accepted by the Ministers' Deputes. The reasons for this hesitance are various, but include the fact that nobody knows exactly what a statute would involve. There are very big questions concerning the potential content. One possible extreme would be merely to take certain

provisions, currently found in the Convention and dealing essentially with the internal structure of the Court, and to transfer those to a statute that would then be subject to amendment by the Committee of Ministers. A much more radical proposal would transfer all of the rules of court to a statute: several states have expressed interest in the idea that at least certain rules of court could be included in a statute. The problem remains, however, that expectations as to the outcome of work on a statute are still very unclear: before detailed drafting could begin, enormous conceptual issues would need to be addressed.

But these are not the only concerns that have been expressed, including in the Reflection Group. There is also the fact that the statute itself could not be put in place by the Committee of Ministers directly, but would need its own amending protocol, so again one would be looking at a period of 7-9 years before the statute came into existence. If thereafter any need to amendment the statue arose, it would then be possible to act more quickly, but this possibility would not arise for 7 to 9 years.

A further point that was strongly emphasised by the Reflection Group is that the statute would imply national parliaments giving up their role in the procedure for amending those provisions that may be transferred from the Convention. States have expressed serious concern that their parliaments would not ratify a protocol containing such a provision, because they would not be prepared to give up national parliamentary supervision of amendment of the Convention.

The Reflection Group also looked at the situation in other international courts, which have very varied legal bases. I don't want to enter into this issue in detail, but one point I will make is that all of the statutes that the Group studied were established at the time of creation of the respective court, so the questions arising now in relation to the Strasbourg Court were in addressed other cases and resolved from the very outset. I think it would be a much, much more difficult process to decide now what should go in the Convention, what should go in the rules of court and what should go in the statute, given that the Court itself has over the years developed its own rules of court and its own interpretations of the relationship between those and the Convention.

My final point concerns the institutional status of the Convention. It may be over simplistic to say that, although a creation of the Council of Europe, the Convention now has an existence separate from that of the Council of Europe. This analysis may appear to be supported by the fact that the recent agreement on provisional application of certain provisions of Protocol 14 was adopted by a Conference of the Parties to the

Convention and not by the Committee of Ministers of the Council of Europe. Nevertheless, there is in fact a very strong, organic link between the Convention and the other organs of the Council of Europe as such: it was adopted in pursuance of the organisation's statutory objectives; the Committee of Ministers has an express role in supervising execution of judgments; and the Parliamentary Assembly has an express role in the election of judges. I don't think one can say that, because the Convention is an international treaty, the only parties with an interest in its development are the States parties. It remains an instrument of the Council of Europe and other Council of Europe bodies have an express, inherent interest in its development. Equally, and given the important issues at stake, the Court and the Assembly would certainly expect to have a central role in any process that could lead to a statute.

Vit Schorm

Thank you for these explanations. Jill Heine from Amnesty International wished to take the floor.

Jill Heine

No surprise that, I'm sure, to my friends on the CDDH and Reflection Group, that we would want to take the floor. For those who are not in the CDDH or Reflection Group – you may not be aware that we, together with the European Human Rights Advocacy Centre, INTERIGHTS, the International Commission of Jurists, Justice, Liberty and the Air Centre MC International, published a report about its views on the proposals and discussions that took place on the reform of the Court we will be addressing. On the issue of the statutes you know we have laid out our position pretty clearly and some of it's technical, what we think should be in, what should be out of the statute. But, just to add to this discussion, I think what's missing a little bit so far from the discussion is that the Convention is about rights, and the rights of the 800 million people in Europe, and it serves not only to guide the states, but also to affirm and protect the rights of the individuals, and that advocates and would-be applicants have at least an equal interest to that of the states in any reforms to this institution that we've called the main pillar of human rights protection in Europe. The jewel in the crown of the human rights protection system in Europe. And their concern is that there is no... so – far in the proposal, there is no place actually for the consultation or taking of the views of the applicants or those who are about to represent interests of applicants, be they lawyers who appear before the Court or NGOs, or members of civil society. In many treaty processes we are able to be present in the room and present our views and therefore try to impress upon you the interest of those that we

serve but also certainly in a parliament... When treaties are brought before parliament then that is also an opportunity to get the views of the people into the process. What is being proposed is a process in which the views of the people would not have an input into changes to the Court and we would be very concerned about that, and therefore you will see that what comes within our discussion about what we consider would be acceptable to be included or what should be excluded may appear to you to be restrictive. But the reasons for that are very clear and that is if governments... if it is going to be governments and governments alone with or without the consultation or right of initiation of the Court to make these decisions, then you know ...work that out... We take that very seriously and are concerned about that. Thank you.

Vit Schorm

Thank you very much indeed. Jakub Wołąsiewicz.

Jakub Wołąsiewicz

Thank you very much. I'll be really very brief because we have a lack of time. I have a feeling that of course at the moment this is a conceptual discussion and this is a concept of a statute. We have not got a draft or something like that. We have some proposals made by the Wise Persons. But still I have a feeling that there is a need for further and deeper discussion of this issue. Unfortunately, this group on the statute was adjourned – as I understand – for the moment, the work of this group, but maybe on other occasions we could discuss this matter. Why did we put onto the agenda of today's meeting? It was exactly to give a possibility for presentation of the idea, the concept, by Professor Drzewicki. And when the result of our seminar is published, I believe it will be much more understandable for different organs of the Council of Europe, and maybe it will be possible to start a discussion about the first: the concept. And then if the concept is agreed I think that it will be easier to find a solution in some provisions, or some modalities of the work. Thank you very much.

Vít Schorm

Thank you. I think the Council of Europe should be driven by a slogan: Give a statute a chance! Well, now the members of the Committee of Ministers say that they do not know what that statute could be. But if the Committee of Ministers does not allow us to think about the idea of the statute and to come with a more precise idea, then we are turning in a circle. Professor Drzewicki, you will certainly want to respond, so you have the floor.

Krzysztof Drzewicki

I will try to be very brief. First of all, let me thank you very much for so many good reactions to my submissions. I must say that I just agree, not with all, but with a majority of them.

I believe that both Mr. Drzemczewski and Mr. Schorm are absolutely right in their claims about whether a future possible statute of the European Court might circumvent the powers of the national Parliaments. As it is envisaged, the statute and its subsequent amendments would avoid ratification procedure. In this way a 'deficit' of a parliamentary component in the procedure for adoption of the statute would emerge, and the role of Parliaments would be reduced. I am convinced that there are some remedies against this deficit which can mitigate the consequences of the new arrangement.

Firstly, we should be aware that what is at stake is a group of detailed procedural arrangements whose move from the Convention into the statute (e.g. on committees, chambers, Grand Chamber etc.) is envisaged. Since they are a part of the Convention, they were thus accepted already by the national Parliaments within the ratification procedures. Further provisions to be transferred to the statute are those which were not earlier subject to treaty ratification in national legislatures (e.g. possible chambers of five judges, extension of powers of the Commissioner, the setting up of a second Grand Chamber or others). They could and should be consulted with the Parliamentary Assembly of the Council of Europe. This body could be asked not only to submit its opinion on the draft statute or amendments thereto, but also before doing so to consult national Parliaments through their delegations to the Assembly. What I then suggest is that the Parliamentary Assembly be not only informed on the amendments but above all be consulted on the advisability and content of such amendments. This is not the same as full participation in ratification procedures by the national Parliaments, but it gives an opportunity for parliamentarians to be informed and consulted about the proposed changes. But on the whole I agree that it needs some further reflection on how to reduce this sort of deficit or limitation of the powers of the Parliaments. The concept of a statute and its possible consequences constitute just a small part of a larger debate on separation of powers in the Council of Europe, and on a wider international plane.

Secondly, Mr. Darcy raised the question of the position of the Court in the procedure for adoption of the statute. Mr. Darcy pointed out that the Court should have a right to initiate amendments to the Statute, since they are to be about procedural matters for the Court. I have criticized a proposal in the Wise Persons Report whereby the provisions of the Statute,

amended by the Committee of Ministers, would require approval by the Court. I believe that, as far as the right of initiation by the Court is concerned, there is no conflict between the views of Mr. Darcy and I. The Court, among other entities, could be empowered to exercise the right to initiate or submit specific proposals for amendments of the statute. For me to consult the Court and its Registry is a valid and sufficient arrangement for responding to the needs of amending the statute in a climate of consultation with the Court and other organs. However, I continue to be categorically opposed to the idea of approval by the Court of the amendments to the future Statute. International law-making still remains the business of governments. The proposal of the Wise Persons would be against the principle of the separation of powers.

Thirdly, in his submission, Mr. Milner raised an interesting point about the scope and content of the future statute. Bearing in mind a certain hesitation of the Group of Wise Persons, Mr. Milner submitted that we have to do with two approaches: a radical transfer of the procedural part of the Convention, or a limited transfer of certain rules of the Convention only. In my view, this is indeed a serious and real problem. The concept of the statute should be regarded as a proposal requiring profound research. It needs further debates and actually, as a scholar, I would plead in favour of a research approach, whereby one or more human rights experts or bodies of the CoE would conduct a sort of feasibility study. This would allow the pros and cons and very advisability of the statute project to be decided on. One should not preclude abandoning or withdrawing the whole project if the solution with the statute appears unachievable, due to differences of view at expert and diplomatic levels. For instance, if there were to be consent for only a few provisions to be transferred to a statute then probably it is make be to stick to the present system of the Convention with its body of provisions and year-long ratification procedures in 47 states.

Fourthly, I understand Mrs. Heine's concerns about lack of sufficient consultation of and influence by civil society at large and NGOs on the process of reforming the European Court of Human Rights. I believe this is part of a larger process. The Council of Europe still has a lot to do in building up real transparency. For 6 years now I have not regularly been attending meetings of human rights bodies, and I do feel how remote I am from human rights debates. Numerous meeting reports and other documents on the intergovernmental co-operation in the Council of Europe are not easily or timelily available on the CoE website. In this respect, the CoE is lagging behind other international organizations. Furthermore, I entirely share the view of Mrs. Heine that more transparency, including

participation by NGOs, is advisable in the course of all other stages of reforming the European Court. Thank you very much.

Agata Rogalska-Piechota (presentation delivered in written form)

I would like to contribute to the present debate concerning the conception of the Statue for the European Court of Human Rights by reporting its course so far. The main purpose of the presentation is to recall the former discussion of the Statue's philosophy and to systemize the findings that were already stated.

I would like to begin my presentation with the most important remark: the present discussion concerning the Statue's conception is separate from all the proposals which were formulated in the process of drafting Protocol No. 11 and, partly, during the preparation of Protocol No. 14 to the Convention. Then a concept was formulated that an international instrument should be created, constituting an annex to the Convention, which among other provisions, would regulate the status of judges, their pension system, and privileges and immunities for judges. In other words, such a document would act as kind of official practice.

Several years later, while preparations for Protocol No. 14 were being made, a completely different idea was verbalized concerning the role of the Statute of the Court. In accordance with this concept, the matter of the Convention should be divided into two groups:

- the provisions of essential meaning for the whole Convention system, which would be changeable after gaining the consensus of all the State-Parties,
- the provisions of subsidiary meaning (in respect to the essential ones), which it would be possible to amend in the simplified form (e.g. by the votes of a qualified majority of the State--Parties to the Convention).

The main purpose of the other idea was to createa more flexible mechanism allowing necessary amendments to be made to the Convention.

The above-mentioned concept was discussed again during the Second Warsaw Seminar: *the European Court of Human Rights – Agenda for the 21st Century*. (As a little digression it should be recalled that the Seminar was organized in Warsaw, and took place from 23 to 24 June 2006.) The first point of the Seminar's Conclusions includes a proposal, which reads as follows:

> *A three-tier normative system of the European Convention is proposed, including: the Convention and the Protocols, the Statute and the Rules of Court. The Statute would regulate*

> *procedural issues arising from the Convention and would be subject to change through a vote without national ratification. In this way the European system of human rights protection can be adapted to evolving circumstances more effectively and promptly than before. It is proposed that the Committee of Ministers should be empowered to make such procedural changes in the operation of the Convention mechanism through resolutions adopted unanimously.*

The above demand was taken over by the so-called Group of Wise Persons, appointed during the Third Council of Europe Summit [Warsaw, 16 and 17 May 2005]. The Group's Report, which was accepted by the Committee of Ministers' Deputies of the Council of Europe on 15 November 2006 15 November 2006, also dealt with the concept of the Statute for the Court, particularly at its points nos. 44–50 and 127–128, which read as follows [for more details see: Ministers' Deputies CM Documents no. CM(2006)203979, bis Meeting, 15 November 2006 Report of the Group of Wise Persons to the Committee of Ministers]:

> *44. The Group believes that it is essential to make the judicial system of the Convention more flexible. This aim could be achieved through an amendment to the Convention authorising the Committee of Ministers to carry out reforms by way of unanimously adopted resolutions without an amendment to the Convention being necessary each time.*
>
> *45. This method has been used on numerous occasions in the European Communities. One notable example was the setting up of the Court of First Instance. The Treaty of Nice subsequently introduced the possibility for the Council to create "judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas". It was this means that was employed to set up the new European Union Civil Service Tribunal. In addition, under Article 245, second paragraph, of the treaty, the provisions of the Statute of the Court of Justice of the European Communities, with the exception of Title I, may also be amended by the Council acting unanimously. This reform facilitated the adjustments to the Community judicial system that were deemed necessary having regard to the trends in litigation.*
>
> *46. Such a method could prove effective in the long term as a tool for making the Convention system more flexible and capable of adapting to new circumstances. The Group notes, however, that this method cannot apply to the substantive*

rights set forth in the Convention or to the principles governing the judicial system. Furthermore, any amendment would have to be subject to the Court's approval.

47. The idea underlying the proposal is to create a system structured around three levels of rules governing the system, viz:

- *first of all, the Convention itself and its protocols, for which the amendment procedure would remain unchanged;*
- *secondly, the "statute" of the Court, ie a legal level whose content would need to be defined, comprising provisions relating to the operating procedures of the Court (and the "Judicial Committee" – see paragraphs 51 et seq);*
- *lastly, texts such as the Rules of Court, which could be amended by decisions taken by the Court itself.*

48. The innovation suggested by the Group is the establishment of a "second" level of rules: the statute. The provisions of a statute could be amended by the Committee of Ministers, with the Court's approval.

49. If the European Union model were to be followed, the statute would be appended to the Convention and would form part of it, but, in accordance with a provision of the Convention itself, its provisions, with some exceptions, would be subject to a "simplified" amendment procedure, ie by decision of the Committee of Ministers with the Court's agreement. The statute of the Court should include all the provisions of section II of the Convention (and those governing the operation of the Judicial Committee, see paragraphs 51 et seq) with the exception of the following provisions, which could either be kept in the body of the Convention or included in the statute, but would be explicitly excluded from any possibility of "simplified" amendment:

- *Art. 19 (Establishment of the Court)*
  Art. 20 (Number of judges)
  Art. 21 (Criteria for office)
  Art. 22 (Election of judges)
  Art. 23 (Terms of office and dismissal)
  Art. 24, paragraph 1 (Registry)

Art. 32 (Jurisdiction of the Court)
Art. 33 (Interstate cases)
Art. 34 (Individual applications)
Art. 35, paragraph 1 (Admissibility criteria)
Art. 46 (Binding force and execution of judgments)
Art. 47 (Advisory opinions)
Art. 51 (Privileges and immunities of judges).

50. The criterion governing this choice is the removal from the "simplified" amendment procedure of provisions defining key institutional, structural and organisational elements of the judicial system of the Convention, namely the establishment of the Court, its jurisdiction and the status of its judges. (...)

127. The Group believes that it is essential to make the judicial system of the Convention more flexible. This could be achieved through an amendment to the Convention authorising the Committee of Ministers to carry out reforms by way of unanimously adopted resolutions without an amendment to the Convention being necessary each time. This method would make the Convention system more flexible and capable of adapting to new circumstances, but would not apply to the substantive rights set forth in the Convention or to the principles governing the judicial system.

128. The system created would be structured around three levels of rules, namely:

- *the Convention itself and its protocols, for which the amendment procedure would remain unchanged;*
- *the "statute" of the Court, ie a legal level whose content would need to be defined, comprising provisions relating to the operating procedures of the Court. This second level would be an innovation. The provisions of this statute could be amended by the Committee of Ministers with the Court's approval;*
- *texts such as the Rules of Court, which could be amended by the Court itself.*

After the finishing touches were not be the work by the Group of Wise Persons, the Reflection Group (GH-S-GDR) was established, with its main purpose of *guaranteeing the long-term effectiveness of the control system of the European Convention it Human Rights*. Points 45 and 46 of the Report of the above-mentioned Group also refer to the conception of the Statute

for the Court [for more details see Ministers' Deputies CM Documents, no. CM(2009)51, *119th Session of the Committee of Ministers (Madrid, 12 May 2009), Steering Committee for Human Rights (CDDH) – Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights*]:

> *45. The Group of Wise Persons had suggested a need for "greater flexibility of the procedure for reforming the judicial machinery." Its proposal was to create a Statute for the Court in an instrument at a legal level between the Convention, a treaty whose amendment is subject to the normal rules of public international law, and the Rules of Court, which can be amended by the Court itself. The Statute, "whose content would need to be defined", would include "provisions relating to the operating procedures of the Court". The provisions of this statute could be amended by the Committee of Ministers with the Court's approval.*
>
> *46. This proposal is interesting and of value in its own right, although it would not help the Court with its workload in the short term. It could be given a more expansive sense than that contained in the Group of Wise Persons' proposal. It should be noted that elaboration of such a text would involve various technical and political problems and its adoption would be a difficult, complicated and lengthy process, requiring a new amending protocol. Further work could be undertaken by the DH-PR, on the basis of the Reflection Group's conclusions on the possible content of a Statute.*

Reading of the above-mentioned documents leads to a conclusion that, at the present stage, the concept for the Statute of the Court should not be perceived as the only one, determined and specified normative proposal. It should rather be considered a concept for a comprehensive amendment to the Convention that in the future would facilitate necessary amendments to the Convention by the usage of a simplified procedure, which would not require the involvement of national parliaments. Only the provisions that would not change the scope of human rights protection based on the right to the individual complaint, could be subjected to the simplified amendment procedure. The above-mentioned idea derives from the fact that the right to individual complaint and the catalogue of rights and freedoms protected by the Convention and its Protocols are present in every legal order of Council of Europe Member-States. Within the above--mentioned legal orders any change, either restricting or extending both: the right to individual complaint as well as the catalogue of rights and

freedoms, require the parliament's involvement (within the legislative process appropriate to the passing of a bill or during the ratification procedure).

On the other hand, many Convention provisions do not have the attribute of determining the scope of human rights protection, as they concern the proceedings before the Court or the Court's structure. What is more, those elements are repeated, particularized or spontaneously regulated in the Rules of Court. It should also be stressed that the amendment process of the Rules of Court does not require the ratification procedure, or any other form of involvement of the national parliaments, in spite of the fact that they deal with the parties' rights and obligations (including those of the States).

Taking all the above-mentioned argumentation into consideration, it can be stated that the aims of concept of the Statute for the Court are:

- to maintain the hitherto prevailing procedure of amending the Convention (ratification/legislation) of these provisions of the Conventions which concern the catalogue of rights and the freedoms, and basic regulations of procedural nature,
- to create a simplified procedure by which to introduce amendments to the Convention (e.g. decisions by a qualified majority of the State-Parties to the Convention) in respect of provisions thereof that particularize or regulate spontaneously the Court's structure, or govern the proceedings before the Court (this group of regulations would consist of some of the Convention provisions, the majority of the provisions contained in the present Rules of Court, and some new provisions proposed by the Reflection Group, e.g. the pilot judgments procedure),
- to leave a possibility to shape the Rules of Court within its competence, in respect of the provisions of an internal nature.

The form, or – in other words – the visualization of the above-mentioned concept at the present stage seems to be an issue of secondary importance.

In this respect, only the above-mentioned concept of a Statute for the Court (or the Court's revitalization) offers a guarantee of updating the Convention and liquidation of its present deficiencies. It would also give to the possibility for a prompt introduction of the Reflection Group's proposal to be accepted. Moreover, in the future, it could help to provide

the Convention with necessary amendments, which would aim to adapt this so-called living instrument to forthcoming changes.

Vit Schorm

So, let me thank Professor Drzewicki very much indeed and the other participants to the discussion. Let's hope that this discussion will be allowed to continue in other fora, and let's hope that we can have more flexibility in the system for amending the Convention.

As Professor Drzewicki rightly stated, a reform is an ongoing process as everywhere.

I will close this part of the discussion now. I was advised that there are two wishes for interventions concerning the list of topics which are on the agenda. I do not know who and on which topic, but before giving the floor to anyone, I would like to ask you to be quite brief. I think we certainly do not want to spend more time than scheduled, that is till 13.00, and, of course, some of us will have to leave a bit earlier. So, who wishes to take the floor?

CHAPTER 4:

CURRENT TOPICS OF INTEREST FOR INTERGOVERNMENTAL COOPERATION

(presentations delivered in written form)

Adopted and desired modifications of the European Convention's supervisory mechanism

by Marta Kłopocka-Jasińska and Wojciech Jasiński

In our presentation we would like to draw your attention to adopted and desired modifications of the European Convention's supervisory mechanism.

The necessity of radical reform of the European Convention on Human Rights supervisory system is unquestionable. The Annual Report 2008 shows that, in 2008, 49,850 applications were allocated to a judicial formation, but only 32,045 were disposed of judicially. It follows that the annual deficit amounted to 17,805. Unfortunalety the backlog is growing steadiby. At the end of 2008, 97,300 applications were pending before the court (33,850 pending before a Chamber, 63,450 pending before a committee). There were also 21,450 applications at the pre-judicial stage. The problem of the caseload of the European Court of Human Rights is not new. The statistics show, that even in the 1980s, the Convention's organs were not able to deal with all applications registered each year. But a real crisis started from 2002 when the annual disparity between applications allocated to a judicial formation and applications disposed of amounted to 10,000 or more with a peak in 2008 (17,805). Unfortunately the prognosis is not

optimistic. If the current trend continues, the supervisory system will face the danger of collapse.

On the one hand, the impressive number of applications, among which almost all are individual, is proof that the European Court of Human Rights is perceived to be, and in fact is, a fundament of the European human rights protection system. On the other hand, the Court has to pay a high price for its popularity. It usually takes several years to have a case adjudicated. As a consequence, in civil matters especially, it is very often difficult, if possible at all, to reverse the effects of human rights' violation that has occurred. Court rulings therefore risk being a moral satisfaction for the applicant rather than a real remedy allowing for the restitution of violated rights.

The deteriorating situation forced the parties to the European Convention to make an effort to substantially modify the supervisory system, in order to guarantee its effectiveness. The fruit of this work was Protocol no. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention signed on 13 May 2004 in Stasbourg. The Protocol introduced new procedural provisions shaped to respond effectively to the most important challenges faced by the European Court of Human Rights. As the Explanatory Report to Protocol no. 14 states (correctly), these are mainly:

- an increasing number of applications that have no chance of success before the Court, but nonetheless demand time to be analysed and declared inadmissible (more than 90% of the total number of applications),
- a problem of repetitive cases.

The figures prove that these are two most important challenges. In 2008 the Court delivered 1,543 judgments (concerning 1,881 applications) whereas the number of applications declared inadmissible or struck out amounted to 30,146. Among the judgments delivered, only 23% were classed as of importance level 1 or 2 in the Court's case-law database (HUDOC). This means that, in more then 75% of cases, the Court's role was only to apply its well-established case-law.

Protocol no. 14 introduced three main procedural amendments to the supervisory mechanism aiming at caseload reduction. Firstly, it created a possibility of a single judge declaring inadmissible or striking out an individual application. In order to facilitate this task, he or she was to be assisted by non-judicial rapporteurs. Secondly, the committees were empowered to deliver judgments in cases which concern issues that are subject of well-established case-law of the Court. However the committee

might decide on merits by unanimous vote only. Thirdly, the Protocol added a new admissibility criterion – the applicant has to suffer a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on its merits, and provided that no case may be rejected on this grounds unless it had been duly considered by a domestic tribunal. It is also worth mentioning that the Protocol provided a possibility of the size of Chambers being reduced to 5 judges for a fixed period of time. That decision could be taken unanimously by the Committee of Ministers, at the request of the plenary Court.

Although five years have passed the Protocol has still not entered into force. Article 19 therein provides that, for its entry into force, all Parties to the Convention have to express their consent. Unfortunately the unanimity has not been achieved yet. Forty-six member states signed and ratified the Protocol before the end of 2006. The only party to the Convention that has not done that is the Russian Federation. Although the Protocol does not introduce any new or controversial substantive provisions, for now at least there is no sign that Russia is willing to ratify it. Taking under consideration the fact that 28% of the cases awaiting consideration by the European Court of Human Rights are directed against the Russian Federation one can fear whether the decision is political. Whatever the reasons, the indisputable fact is that each year of waiting for the reform means a deepening of the crisis. Therefore the Council of Europe has undertaken further initiatives to find the best solution for the existing difficulties. Among them the setting up of a Group of Wise Persons in 2005 seems to be one of the most important activities. Its role was to prepare a report concerning necessary measures to reform the European Court of Human Rights effectively. In that document, the members of the Group presented opinions concerning Protocol no. 14 and other possible reforms. The former was treated only as a starting point for the necessary modifications of the supervisory mechanism. The Group of Wise Persons also analysed various other measures which might help caseload reduction. Its negative opinion concerned the idea of setting up "regional courts of first instance", giving the Court a discretionary power to decide which cases should be heard and introducing a preliminary ruling mechanism. On the other hand, the Group of Wise Persons proposed a few initiatives extending beyond the framework of Protocol no. 14 amendments. Firstly, the idea of the statute of the Court was discussed. Since the adoption of amendments to the Convention takes a lot of time, it would be reasonable to consider whether at least a part of the existing procedural provisions could be moved from the European Convention to the statute subject to changes

by the Committee of Ministers by unanimously adopted resolutions. As the Group of Wise Persons underlined it cannot concern fundamental elements of the judicial system on this the establishment of the Court, its jurisdiction and the status of its judges. However strictly procedural aspects referring to the way the applications are handled could be moved to the statute. The second recommendation concerned the setting up of a special judicial body – a Judicial Committee – whose role would be to deal with applications that are manifestly ill-founded and give rulings in repetitive cases. It should be composed of judges, but in number not equal to that of the parties to the European Convention. The Group of Wise Persons also advised an introduction of advisory opinions given by the Court on legal questions relating to interpretation of the Convention and the Protocols thereto. A request for an opinion could be submitted by national courts. Additionally, the Report stressed the role of domestic remedies in redressing violations of rights and freedoms guaranteed in the European Convention. Their improvement might have a significant impact on caseload reduction. If the remedies are effective, the victims may obtain redress at national level. The idea of transfer to the national level of the function of assessing the amount of just satisfaction was also recommended. Last but not least, the Group of Wise Persons underlined the significance of the "pilot judgment" procedure, which permits the solving of problems of systemic violations that occur in countries parting to the European Convention. Systemic violations are particularly dangerous for the efficiency of the supervisory mechanism, because they may give rise to numerous subsequent well-founded applications. A pilot judgment procedure serves to introduce an effective remedy at the national level and to permit the Court to avoid the problem of ruling in many repetitive cases.

On 2 April 2007 the Plenary Court adopted the opinion of the Court on the Wise Persons' Report. In that opinion, the Court in brief addressed the issues discussed in the Report. Firstly, the idea of adopting a statute of the Court was accepted. Secondly, the Court welcomed the idea of a Judicial Committee cautiously, underliming that such a decision should be preceded by a careful study of its role and position in the control system. Additionally, the Court stressed that, before a decision is taker, it is also important to observe what increase in case-processing capacity Protocol no 14. will bring about. With respect to advisory opinions, the Court proposed careful reflection as to whether they might constitute a measure to reduce the caseload. The same opinion was expressed in regard to the just satisfaction issue. Lastly, the Opinion of the Court on the Wise Persons' Report stressed the importance of effective domestic remedies for the European Convention supervisory system. But the Court also noted

that, in that area, a great deal depends on the political will of the parties to the European Convention.

A very recent step forward on the road to reforming the European Convention's supervisory mechanism is Protocol no. 14bis. It was adopted on 12 May 2009, at the 119th session of the Council of Europe Committee of Ministers. The Protocol was opened for signature on 27 May 2009. It has already been signed by Slovenia, which took over from Spain as Chair of the Committee of Ministers. The Protocol is only regarded as a provisional measure pending entry into force of Protocol No. 14. It does not bring any new measures simplifying the procedure before the European Court of Human Rights. It contains two procedural amendments taken from Protocol no. 14. These are:

- the introduction of the single-judge formation,
- extended competence of three-judge committees.

The importance of Protocol no. 14bis lies in new provisions concerning entry into force. First of all, Article 6 of the Protocol states that only three states need to consent to be bound by the Protocol for its entry into force. That is in fact a substantial step forward, which gives hope of quick changes in the procedure before the Court. There is also a very important provision in Article 7 of the Protocol. It permits a party to the European Convention, having signed or ratified the Protocol, to declare that the provisions therein shall apply to it on a provisional basis. Additionally, upon entry into force of the Protocol or its provisional application, the regulations can be applied immediately to all applications pending with respect to a certain country (Art. 8). Of course, the Protocol will only be applied to those countries that have ratified it or declared that they will apply it on a provisional basis.

The above overview of measures analysed and adopted in order to reduce the caseload in the European Court of Human Rights raises a few questions. Firstly, it should be stressed that adopting Protocol no. 14bis was necessary. Years of waiting for Protocol no. 14 to enter into force made the situation of the Court complicated. A growing number of cases that could not be dealt with at hand posed a serious threat to the credibility of the supervisory mechanism. However the question is whether Protocols 14bis and 14 can solve the problem of the backlog. It is estimated that the amendments adopted in Protocol no. 14bis could increase the efficiency of the Court by 20-25%. This is a remarkable step forward and might lead to a solving of future problems with a growing number of applications lodged. Nevertheless, it might not result in a quick solution of the problem of the existing backlog. There is therefore a need for further amendments of the

procedure before the European Court of Human Rights. It would seem that there are two possible directions to the reform. The first leads to a radical change in the character of the European Court of Human Rights. Since the Court is not able to deal with applications alleging violations of human rights in individual cases the solution is to limit its jurisdiction only to cases of systemic violations concerning important issues and affecting a larger number of individuals. That can be achieved by installing a procedure alike to the American *certoriari*, which gives discretionary power to the Court to decide whether a certain case deserves to be heard thereby. The Report of the Group of Wise Persons expressly states that this direction should not be followed. It underlines that the right of individual application is the fundament of the European system of human rights protection and should therefore be preserved. Outlles that point of view deserves approval. Substantial progress in human rights protection in Europe is in great part due to the European Court of Human Rights. In countries which have significant problems with the human rights observance In particular the role of the Court is invaluable. The uniqueness of the European system also lies in the fact that it takes under consideration the situation of an individual for whom even minor violations (from a systemic point of view) pose a serious disadvantage. The violations of reasonable time of proceedings seem to be a good example.

Unfortunately Protocol no. 14 introduces a partly discretional power of the Court to declare on application inadmissible where the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on merits, and provided that no case which has not been duly considered by a domestic tribunal may be rejected on this ground. As the Explanatory Report states, these provisions are open to interpretation. But the problematic issue is whether the discretion left for the judges is not too great. What seems to be significant for the applicant may be regarded as a minor issue from the Strasbourg point of view. Another risk is the inconsistency of the Court's case-law.

The obvious response to the above-mentioned objections is that a right of individual application cannot lead to complete paralysis of the Court. Efficiency of the supervisory mechanism entails a necessity to limitat the lodging of individual applications. But a question should be asked as to whether it is possible to keep the average time of case consideration in the European Court of Human Rights at a reasonable level without further limitations of individual applications' admissibility. It seems that this is not something that cannot be achieved. A first step was taken in Protocol no. 14bis. The introduction of the single-judge formation and extended

competence of three-judge committees deserve approval. Although this decision limits the number of judges involved in a case, it is taken only in cases which do not necessarily need to be dealt by three or seven judges. A single judge can only take decisions on admissibility in clear-cut cases. In the case of any controversy, the decision is transferred to a committee or a Chamber. A committee is only empowered to rule when issues important for the case are covered by well-established case-law of the Court. These provisions are far more precise than the vague "significant disadvantage" proposed in Protocol no. 14.

As was stated above, the prevention of a backlog in the European Court of Human Rights needs not only Protocol no. 14bis, but also further procedural amendments. Firstly, the idea of the statute of the Court should be endorsed. The problems with the ratification of Protocol no. 14 prove that the procedure for amendments concerning procedural issues needs to be reshaped. A time for reaction is especially crucial, because the current Court backlog is mostly an effect of delayed reaction in adopting procedural modifications to the supervisory mechanism. Secondly, it is worth reflecting on whether the number of judges in Chambers should not be limited to five. Protocol no. 14 allows for such a reduction, but only at the request of the plenary Court and for a fixed period. This provision seems too cautious. At the national level, it is rather a rare situation for a court to be composed of seven judges. In the case of Poland, even the Constitutional Tribunal is usually composed of five or three judges. Only in particularly complex cases does the Tribunal sit in full bench. A proposed amendment should not jeopardise the quality of the Court's judgments. Thirdly, a careful analysis should be made regarding the existing method of case allocation to sections. The 2008 Annual Report shows that there are significant differences between numbers of cases assigned to sections and disposed of in 2008. This may indicate that there are still possibilities for more efficient allocation of applications. In conclusion, the adoption of proposed amendments to the supervisory mechanism gives hope of overcome the crisis being or at least seriously ameliorated. Their advantage is that they may help in preventing a backlog in the Court, without resort to provisions granting discretionary power to judges when it comes to decisions on admissibility.

The proposed amendments should be accompanied by two complementary measures. The first is closer cooperation with national authorities. The number of applications can be reduced significantly if there are effective remedies at the national level. The complaints concerning violation of reasonable time of proceedings adopted e.g. in Poland, the Czech Republic and Slovenia as a reaction to the Court's case-law are good

examples of measures that give a chance of caseload reduction. Moreover, the national remedies concerning irregularities in court proceedings seem to be crucial, since the Convention provision which gave rise to the greatest number of violations in 2008 was Article 6. From the point of view of the Court and parties to European Convention cooperation, what deserves attention is the pilot judgment procedure. It helps to deal with systemic violations and therefore allows for a reduction in the number of repetitive cases.

The second important issue is to use the potential of the Information Offices of the Council of Europe. Apart from the procedural amendments, on effort to educate people willing to apply to the Court should be made. As the figures show, the majority of applications are declared inadmissible. Therefore the important task is to convince applicants that, where their applications fail to fulfil conditions of admissibility, they should not apply to the Court. Such an educational initiative was undertaken at Warsaw's Information Office of the Council of Europe, and gave remarkable results. This good example should be followed.

The Warsaw Lawyer. A Pilot project of the European Court of Human Rights

by Katarzyna Lakoma,
Advocate, lawyer at the Information Office
of the Council of Europe in Warsaw, 2004–2009

Introduction

The right to lodge an individual complaint with the European Court of Human Rights is a major feature of the European system for the protection of human rights. Bearing in mind that forty-seven States belong to the Council of Europe, an individual right to bring the case to the European Court is ebjoyned by 800 million Europeans. This significant number of prospective applicants who may use the right to individual complaint ensures that the speed of proceedings before the European Court of Human Rights (and in consequence the efficiency of the system) is in danger. For many years the Court's backlog has continued to increase. As example – at the end of 2008, there were 97,300 applications pending before a judicial formation[1]. How many of these cases will be declared admissible? The Court's case law shows that only a small percentage of the applications will be pursuit with success. However, the prospective applicants are convinced that every single case examined by national jurisdiction has the chance to win before European Court of Human Rights.

Against this background, and with a view to stenming the flood of unmeritorious cases, the European Court of Human Rights in close cooperation with the Information Office of the Council of Europe in Warsaw decided to create the post of lawyer for a period of one year, this person's task being to inform individual and potential applicants about admissibility criteria which a complaint to the European Court must fulfil. The trial scheme was financed out of the Court's budget and Warsaw was chosen because of the particularly large number of plainly inadmissible applications lodged by Polish applicants. During the high-level seminar in Oslo (18 October 2004) concerning the reform of the European human rights

[1] European Court of Human Rights, *Statistics 2008* – www.echr.coe.int.

system, as organised by the Norwegian Chairmanship of the Council of Europe's Committee of Ministers, the importance and role of this project was underlined. The participants at the seminar supported the idea, that the Court, the Council of Europe, Member States and civil society should take measures to ensure that prospective applicants receive sufficient and independent information about the Convention's basic admissibility criteria[2].

Against this background, from September 2004 onwards, a lawyer was engaged part-time (20 hours a week) at the Information Office of the Council of Europe in Warsaw. Before taking up her duties the lawyer received two weeks' training at the Registry in Strasbourg. The action plan and ground rules prepared by the Registry for this project are appended[3].

The Lawyer's main task was to provide information on both the European Convention of Human Rights and Fundamental Freedoms and the European Court of Human Rights, and more specifically on:

- the admissibility requirements for individual applications lodged with the European Court of Human Rights;
- the rules governing the functioning of the European Court of Human Rights, that Court's case law and procedures;
- the domestic remedies that have to be exhausted before an application may be lodged with the European Court of Human Rights.

From the very beginning, the lawyer provided information about the European Convention and European Court during individual meetings or by telephone, as well as in writing (including via e-mail correspondence). After each meeting she prepared a short written record concerning the problems "clients" presented. At each meeting or conversation with clients, the lawyer stressed that she does not represent the Court in Strasbourg. Her tasks are solely and exclusively limited to informing potential applicants about the principles governing the procedure of lodging complaints with the European Court of Human Rights. Therefore, explanations given should not be treated as legal advice or a decision on merit as to whether the complaint is justified or not. The aim of the information is only to explain, in light of the Court's case law and the practice of the Court, what the admissibility conditions for individual complaints are, in the light of the requirements of the Court (and based on the Court's jurisprudence in similar cases).

[2] *Reform of the European human rights system, Proceedings of the high-level seminar, Oslo, 18 October 2004*, Directorate General of Human Rights, Council of Europe, 2004, p. 9.

[3] Cfr. Appendix I and Appendix II – pages 9 and 10.

The mandate of the Warsaw Lawyer was prolonged several times, such that ultimately the lawyer performed her duties over four years, until 31 March 2009. From September 2004 the lawyer provided information about the European Court and European Convention to approx 4000 persons[4].

As far as the statistical data is concerned, it should also be noted that, in 2008, the total number of clients approaching the lawyer in person was 849. It should also be pointed out that, in this same period, the number of complaints lodged with the ECHR from Poland was 4369 application[5]. This shows a huge interest on the part of prospective applicants is the pilot project of the lawyer.

Taking into account the statistical data of the ECHR concerning previous years, it should be underlined that: in 2004 (from October to December), 161 persons received legal information from the Warsaw Lawyer about the admissibility criteria for an application and the functioning of the European Court of Human Rights (ECHR); in 2005 – 793 persons (comparing to the statistical data of the ECHR – the number of complaints lodged with the ECHR in 2005 was 4563 applications), in 2006 – 935 persons (ECHR in 2006 – 3975), in 2007 – 811 persons (ECHR in 2007 – 4202).

It should also be noted that, when the lawyer was first engaged within the framework of the Warsaw Pilot Project, her role was to provide information about ECHR conditions of admissibility of applications only to individuals interested in lodging an application. In practice, the services of the lawyer at the Information Office have attracted the huge interest of different groups of clients. Thus, the lawyer's assistance and expertise are offered to:

- individuals who wish to lodge an application with the ECHR;
- individuals who have already lodged an application;
- individuals whose ECHR procedure has been closed (either with a judgment or an inadmissibility decision);
- lawyers preparing ECHR applications for clients and handling ECHR cases;
- judges requesting information about recent ECHR case-law;
- students requesting information about ECHR jurisdiction and the rules for lodging applications.

[4] Figures based on lawyer's statistical data.

[5] *Annual Report 2008. European Court of Human Rights* – www.echr.coe.int.

The important role of the lawyer was underlined in Lord Woolf's Report – *Review of the Working Methods of the European Court of Human Rights*. It was pointed out that information provided by the highly qualified lawyer employed at the Information Office of the Council of Europe can contribute to a reduction in the number of applications lodged in Strasbourg[6].

The Lawyer's clients

The Lawyers' observations reveal that her clients represent all stages of proceedings before the European Court of Human Rights, therefore these are not only people interested in bringing a case to the European Court of Human Rights, but also those who have already done so and are concerned with the outcome of a case pending. In addition, the clients who ask for information and on explanation include a group of those in whose case the Court has already made a decision, and either issued a judgment or a decision on the inadmissibility of the complaint (e.g. questions pertaining to the method of execution of a judgement of the European Court of Human Rights or reasons for the dismissal of a complaint).

The vast majority of individuals who contacted the lawyer are elderly citizens without even a basic knowledge of law. Also among the clients approaching the lawyer are foreigners, and Poles living abroad. They feel they have been deeply wronged by Polish public authorities or justice (e.g. as a result of an unfavourable court judgement or arrogant conduct of a public official). They perceive the European Court of Human Rights as another instance of appeal.

The Lawyer's observations lead her to conclude that Poles do not notice the subsidiary character of the Court. They are convinced that, in any case, they can appeal to "Strasbourg justice" and that the Court is a panacea for all evil, a golden remedy. Clients (including legal representatives) may be aware that their claim does not fulfil formal criteria yet, want to bring it anyway as "it does not cost anything", "I have to take my chance in Strasbourg, because it is free of charge".

It should be noted that the Lawyer is increasingly contacted by representatives of different legal professions: legal counsels, attorneys, judges, and prosecutors, who ask questions about the practical aspect of admissibility criteria for applications to the Court (e.g. in the context of the Court's pilot decisions concerning length of proceedings in Polish cases) as well

[6] Cfr. *Review of the Working Methods of the European Court of Human Rights* – Lord Woolf Report, Human Rights Law Journal, Vol. 26, No 9–12, p. 453.

as the Court's recent judgments in Polish cases (e.g. pilot judgements such as *Broniowski v. Poland* or *Hutten-Czapska v. Poland*).

This shows that the issue of admissibility criteria for prospective applicants as well for their legal representatives is completely unknown. The application of the pilot judgments procedure in Polish cases has proved completely incomprehensible, and, in the eyes of applicants, unfair. One of the reasons for that is that the average client of the European Court does not speak either English or French. Thus, it constitutes another problem of communication and comprehension between the European Court and the applicant.

Typs of issues and questions raised by applicants

The majority of issues and problems raised by clients concern the basic rules of lodging a complaint with the European Court of Human Rights and the practical aspects of admissibility requirements regarding such applications. The persons interested in bringing a case to the ECHR seem not to be aware of the admissibility criteria of an application. They posed the following questions: (a) *May I still appeal in my case to Strasbourg?* and (b) *How do I appeal to the ECHR?* The stereotypical belief of Polish citizens is that the Court is another instance of appeal. That is why many cases brought to the Lawyer are of a "fourth instance" nature. In most such cases, clients claim that the domestic court has breached their right to a fair trial which is guaranteed by Article 6 § 1 of the European Convention of Human Rights and Fundamental Freedoms.

The above was the reason for the Lawyer to provide detailed information and explanation on the provisions of Articles 34-35 of the European Convention on Human Rights and Fundamental Freedoms, and in particular on the requirement to exhaust all domestic remedies (the Lawyer described the domestic remedies), the required period of six months to lodge an application, and the issue of the "fourth instance".

Concluding, not many applicants realize that the legal basis for the application should be a case of the infringement of rights guaranteed by the Convention and its Protocols. Each client expects the Court to examine whether the Polish court applied the domestic law correctly, to further examine the witnesses in the case, and finally to issue a just "verdict" which, of course, will be to the benefit of the client and punitive to the Polish court. In such cases (so called *fourth instance*), most clients straightforwardly declare that they want to appeal against the unjust judgment of Polish court to the ECHR.

Another problem raised by clients was excessive length of proceedings before domestic courts and the application of the Act of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki) by the national judges.

The Lawyer's observations show that, as far as the exhaustion of domestic remedies is concerned, clients are not aware that procedural errors in using domestic remedies, mistakes made by legal representatives or failures to use a domestic legal remedy for reasons of a financial nature all result in the inadmissibility of a possible application to the ECHR. Moreover, clients do not know what legal remedies should be used. As far as the issue of the 6-month rule is concerned, clients are not aware that this period is counted from the day of issue of the final decision or the day the decision is formally handed to the party.

Clients are taken aback upon hearing that, should on application fail to satisfy the formal criteria, particularly that on the exhaustion of domestic legal remedies in the case, or should the complaint be an appeal against a judgment or outcome of judicial proceedings, it shall be deemed inadmissible by the ECHR, which means that the Court shall decline to consider it on its merits. The surprise, or even reluctance, of clients is all the greater upon learning that the ECHR does not quash judgments of Polish courts. Most of the persons who approach the Lawyer count on the ECHR to overturn on unfavorable judgment or halt enforcement proceed- ings.

The Lawyer has noted that a fragmently asked question concerns the costs of proceedings before the Court. The fact that the proceedings are free of charge is, unfortunately, an encouragement for many to lodge on application. The discouraging factor, on the other hand, is that the Court does not quash or alter decisions of Polish courts.

Among presented cases, clients sometimes raised serious problems in light of the Convention – lack of access to court, inhuman treatment, length of judicial and administrative proceedings, violation of the right to privacy. In such cases the lawyer provided comprehensive information about the admissibility criteria for applications to the Court, in particular concerning *rationae materiae* of the application, the Rules of Court and proceedings before it, and the Court's actual case law in relevant matters.

Many clients had already lodged an application with the ECHR. They inquired about the rules of proceedings before the Court and in particular about costs of these proceedings, the manner of considering applications, the hearings before the ECHR, issues of just satisfaction, and

execution of judgments, as well as legal aid provided by the Court. The lawyer observed that the "registration letter" was often interpreted by applicants as confirmation that the Court had found the application well founded and would examine the case on merits as soon as possible. Applicants are, therefore, convinced about the justification of the application lodged. Clients who had already lodged an application with the ECHR asked the Lawyer about communication of the application to the Government, representation of the applicant before the Court and the issue of friendly settlement procedures. The Lawyer assisted individuals whose applications were at the stage of being communicated to the Government. The Lawyer helped them understand the Court's letters in French and in English, and described the rules and benefits of friendly settlement procedure.

Upon meeting with the Lawyer, clients who wish to bring a complaint to European Court of Human Rights very often come to the conclusion that lodging an application with the Court in Strasbourg is not as easy as they had thought. Some of them, upon hearing that the judgment of the Polish court will not be changed, give up on the idea of lodging an application. Moreover, the Lawyer also observed that, when clients who were not in possession of such knowledge and had not yet exhausted all domestic remedies, were informed of the possibilities (national measure of appeal) provided by the national legal system, they also resigned from applying to the ECHR.

The role of the Lawyer

The Lawyer provided all potential applicants with comprehensive information about the admissibility criteria for applications to the Court, the Court's procedures, and the Court's case law. The clients also received a set of documents concerning the competence of the ECHR, as well as formal requirements of on application to the ECHR (the Convention, application forms, explanatory information for applicants, etc.). Contacts with clients indicated that individuals who inquire with the lawyer about the possibility of applying to the ECHR had never seen or read the Convention. They intended to rely on national law in the applications, as they saw the ECHR as an alternative to the Polish judicial system. Those clients who had already applied to the ECHR had received their first copy of the Convention directly from the Court or via the Information Office of the Council of Europe in Warsaw. Importantly, those clients had read the Convention and then contacted the lawyer to communicate that *none of the rights under the Convention fit my case*, *how can I apply in my case if the Convention does not include a right, for example, to a social pension, unless I resort*

to Article 6, the Convention does not match my case. The Lawyer's service was appreciated by the clients who acknowledged the exhaustive information and basic documents provided. The clients claimed that they helped them *to understand something they were ignorant about: the formal requirements of an application.* The clients also appreciated the one-stop-shop which provides complete information in Polish about the admissibility criteria of applications and the Court procedures.

It should be underlined that the project of the Lawyer at the Information Office of the Council of Europe in Warsaw completed the partial legal aid granted to the applicants by the Court. In practice, the stage of lodging the complaint with the European Court is the most difficult stage of the procedure before Court. It decides about the fate of the complaint. At this stage applicants have to manage with the application on their own. Taking into consideration the fact that average applicants do not speak foreign languages and do not possess any legal knowledge, in particular about the formal requirements for the application, they try to bring a complaint to the Court believing that that their application will slip through and the Judges in Strasbourg should know about injustices in the Polish courts. In fact, they don't realise what they can claim before the Court and what sort of help they can received on the part of the Court.

Finally, it should also be pointed out that activities of the Lawyer constitute an important element of visibility of the Court in the Member State of the Council of Europe.

The Lawyer's educational activity

It should be underlined that besides individual meetings with potential applicants, the Lawyer has developed so called "educational activity". Taking into consideration the fact that information concerning admissibility criteria of on application to the Court and the relevant Court case law in a given matter is not available in Poland, the Lawyer established cooperation with national NGOs, the press and schools. For that reason the Lawyer gave a number of public lectures for students, write a number of articles for newspapers on the issue of the admissibility of a complaint to the Court, at prepared a brochure *Practical guide on admissibility criteria of the complaint for potential applicants.*

The Lawyer's activities and expected benefits for the Court

The Lawyer's work may be perceived as a complementary mechanism in the European protection of human rights that reduces the flood of unmeritorious cases to the Court. Contact with individuals who wish to lodge a complaint with the European Court and whom the lawyer provided with information about the admissibility criteria in Polish, as well as documents used in lodging an application (e.g. the application form) may prevent the lodging of inadmissible applications; reduce on number of manifestly ill-founded applications; improve the quality of lodged applications and, in the end, help to identify admissible applications which will raise new interesting issues concerning violations of the Convention (in such a case the lawyer indicates to the applicant the formal criterion to be fulfilled and informs on the Court's case law, e.g. *Ciechonska v. Poland*, *Buczkiewicz v. Poland*).

Mention should be made of positive opinions of the Lawyer's clients concerning the Warsaw Pilot Project; the clients say that:

- information provided by the lawyer is a success factor in procedures before the Court and is crucial to the ECHR opinion on the merits of the case;
- the Lawyer is the only provider of complete information about lodging applications, the jurisdiction of the Court, and the ECHR rules of procedure;
- applicants are informed for the first time by the Lawyer what to do in order to lodge an application which will be deemed admissible by the ECHR.

With regard to individuals who have already lodged an application, benefits to the Court from this activity of the Lawyer may be simplification and acceleration of the work of the Court on the case by way of a reduction in the number of contacts (telephone calls, letters, etc.) between the applicant and the Court, as all questions at this stage may be answered by the Lawyer. It is also possible that more cases will end with a friendly settlement.

With regard to individuals whose ECHR procedure has been closed (either with a judgment or an inadmissibility decision) benefits to the Court from the activity of the Lawyer may be a reduced number of individuals contacting the Court in cases no longer handled thereby; and greater transparency and understanding of the Rules of the Court, which enhances the reputation of the Court among applicants.

With regard to legal representatives of the applicants preparing ECHR applications for clients and handling ECHR cases, benefits to the Court from this activity of the Lawyer may be that: applicants are assisted by professionals in lodging an application properly in compliance with Convention requirements (e.g., the application is lodged on the official form containing all relevant information necessary for the Court to examine the case against formal requirements together with the complete documentation). The Lawyer's explanation of the rules of procedure before the Court may accelerate the procedure in the case by means of:

- immediate execution of requests of the Court by the applicant;
- a reduced number of telephone calls from applicants to the ECHR concerning issues of procedure;
- a reduced number of letters to the Court on issues of procedure (legal assistance, language, implications of the communication of an application for the applicant, explanation of rules of amicable resolution, execution of a judgment).

With regard to judges requesting information about recent ECHR case-law, the Lawyer provides judges with information about recent Court case-law and applications communicated to the Government; the Lawyer acts as an "early warning mechanism" as the provision of such information to courts may prevent future violations of the Convention and impact upon the case-law of national courts in cases where the Court has identified a violation of the Convention (cases regarding vetting procedures, the system of free-of-charge legal assistance, access to justice, temporary detention, freedom of speech).

Open lectures are offered by the Lawyer to introduce students and other interested persons to the recent case-law of the Court concerning admissibility criteria. By reaching this group of potential applicants, the Lawyer helps to prevent lodging of manifestly ill-founded applications, educates the general public, and raises the awareness of applicants concerning the actual benefits of Court procedures and the rules of admissibility (access to reliable information in Polish about the admissibility criteria for individuals potentially interested in lodging a future application).

Conclusions

In terms of the admissibility criteria of complaints to the European Court of Human Rights, one conclusion can be drawn: while everybody knows about the existence of the European Court, few people are aware of its scope of competences and rules of lodging complaints. Also, Clients,

despite the fact that they are aware that their claim does not fulfil formal criteria, want to bring it anyway as *it does not cost anything, so I have to lodge the complaint with the Court*, *I have nothing to lose*, *maybe the Court won't notice that my application does not satisfy the admissibility requirements*, *let them know in Strasbourg about the injustice of Polish courts*. The reform of the European Convention and European Court of Human Rights can not be limited to the internal reform of Court procedure, but should involve the cooperation of the European Court with civil society. It is necessary to shape the legal awareness of prospective applicants about formal requirements of the complaint. It should also be stressed that:

- Access to the European Court there are of Human Rights is very easy for potential applicants: few formal requirements to lodge an application, no mandatory legal representation, no fees to lodge an application and a possibility to lodge an application in the national language. These factors make access to the Court easier than to national courts, so citizens see it as an alternative to the Polish judicial system. The most important obstacle for them is a lack of knowledge of the official languages of the Court.
- Most potential applicants are not familiar with the competences of the ECHR and the effects of its judgments. As a result, they wish to lodge applications of a "fourth-instance" nature.
- Potential applicants are not aware of the admissibility criteria and the Court's case law. There are few publications in Polish on these issues.
- There is ignorance of admissibility criteria: in practise the only source of information for individuals familiar with the Court's case law is HUDOC and the decisions published therein. Individuals who are not familiar with the Convention do not know how to seek such information (decisions are not translated into Polish, no literature is published in Polish). They look for information by reading Court judgments translated into Polish. Additionally, clients very often do not speak the working languages of the Court so the Court's decisions on admissibility are incomprehensible to them.
- Taking into account be fact that applicants do not have the original text of the Rules of Court in their national language, they may not understand the Court's letters.
- The amount of just satisfaction afforded by the ECHR is an important incentive for the submission of applications.

Appendix I

Action plan

1. The purpose of this trial is to determine, in so far as is possible, the extent to which the provision of additional information at national level, through a Council of Europe Information Office, can have an impact on the number of clearly inadmissible applications.

2. This implies two main functions:

   (a) the provision of appropriate information to applicants whose complaints are clearly inadmissible on grounds which are objectively indisputable (eg non-exhaustion, six months, very clear cases of fourth instance);

   (b) detailed recording and reporting of such advice.

3. As far as (a) is concerned the first step for Ms Łakoma is to prepare clear case-law examples of inadmissibility in Polish cases and in particular to draw up a list of remedies available under Polish law that have to be exhausted in different contexts. She should establish a checklist, which can be sent to the Registry for confirmation. As regards the nature of the information given, reference is made to the ground rules appended hereto. The guiding principle must be that it should be information not advice. The prospective applicant must be given a clear idea of what the general rules are so that he/she can work out for him/herself how they apply to his/her situation. There is of course a difficult line to draw, and it may be necessary for Ms Łakoma to recontact the Registry for further advice in the light of her first experiences. She should in any case prepare a short explanatory note which can be given to prospective applicants and which describes her functions and the scope of the information/assistance she can give.

4. For (b), it is clearly essential in attempting to measure the effect of the trial that Ms Łakoma record and report on the persons she meets/ interviews, the type of complaint made, the type of information given out and, where appropriate, the admissibility ground identified. Ms Łakoma should compile reports, which should be submitted to both the Director of the Information Office and the Registry, at two monthly intervals. In the light of the first report, which should be submitted by 1 December, further, more detailed instructions may be issued. As a first step, Ms Łakoma should

prepare a form, which should be filled in for each applicant with the necessary information. This form can be checked with the Registry.

5. After the second report, it may be considered useful for Ms Łakoma to return to Strasbourg for further training in the light of the experience of the first four months.

6. Ms Łakoma will remain in close contact with the Registry; her contact person will be Monika Zacny.

Appendix II

Ground rules for the Lawyer recruited to the Warsaw Information Office

1. The Lawyer is not a Registry official, but should have the same status as other Council of Europe Information Office employees.

7. She/he must make clear that she/he is acting in her/his capacity as an employee of the Information Office and not in any official capacity on behalf of the Registry and the Court.

8. Before giving out any advice or information she/he should ensure that her/his interlocutor understands the basis on which the advice or information is given. A brief explanatory note setting out the functions of the post and the limits of the advice/information that can be given should be handed to the person concerned.

9. The advice should primarily be designed to draw attention to possible obstacles to the admissibility of a complaint by reference to case-law examples.

10. A careful record must be kept of each potential applicant, their complaints, the advice or information given and any follow-up that may be required.

11. The Lawyer will be expected to explain on request the detailed functioning of the Court's procedure and practice.

12. Where the Lawyer considers that there may be some substance to the potential applicant's complaint and there are no obvious obstacles to admissibility, she/he should simply indicate to the person concerned a list of lawyers specialising in human rights. Contacts should be made with the Bar Council in this respect.

13. She/He should not assist the potential applicant in filling out an ECHR application form. Nor should she/he help the potential applicant to draft a letter to the Registry setting out her/his complaints.

14. The Lawyer may not receive documents on behalf of the Registry or the Court. Any documents which are to be lodged in the context of proceedings before the Court must be sent to the Registry in the normal way by the applicant or her/his representative.

15. As regards any written communication that the Lawyer may be called upon to make in response to correspondence, the same principles shall

apply as to the nature and scope of information given. Any correspondence should begin with a disclaimer to the effect that the letter is not from the Court/Registry, does not engage the responsibility of the Court/Registry and should not be regarded as legal advice on behalf of the Court concerning the prospects of success of any proceedings brought in Strasbourg.

Discussion

Katarzyna Łakoma

My name is Katarzyna Łakoma. I work in the Polish Ombudsman's Office. First of all, I would like to express my gratitude to Mr Jakub Wołąsiewicz for the opportunity to be here and to share with you some ideas concerning the Warsaw Pilot Project. As you can suppose, I was the lawyer who was engaged by the European Court under this project in 2004, and I started my mission at the Information Office of the Council of Europe under supervision of the European Court in September 2004. My mandate was limited to providing the public and individuals interested in lodging a complaint with the European Court of Human Rights information about the admissibility requirements regarding individual applications, as well as the rules governing the functioning of the European Court of Human Rights and Court case law. My duties were performed, not only during individual meetings with clients, but also at public lectures for students and public. During the last four years, I have prepared several public lectures for students and individuals interested in the Court's case law, as well cooperating with NGOs and the press (i.e. the Law Journal), where I published some carent information concerning the European Court of Human Rights, and particularly what is new in Polish cases. During these four years of my activities I was approached by approximately 4000 applicants. If this figure is high or not – the assessment of the quantitative impact is yours, but I would like to underline that I was engaged part-time (20 hours a week) and I was the only person to deal with all the issues raised by clients. I know that you are very interested in the final result of this project which was closed on 31 March 2009. My report is now being sent to the Steering Committee, which will analyse the effects of my work. I would just like to point out that, at the end of the first year of my work (in 2005), the European Court drew some conclusions from the Warsaw experiment, so I can give you some references to statistical data prepared at that moment by the Court.

In terms of the quantitative impact, in 2005 the Polish division's secretariat has checked the names of persons who sought advice in Warsaw against the Court's database (CMIS) and this indicates that, of the persons who had not yet lodged an application when they contacted the information office (357), some 77 (21.5%) subsequently did bring an application to Strasbourg. If this proves to be correct, it could be assumed that something like 280 prospective applicants did not lodge an application following the information given by the lawyer; this already represents a significant saving in Registry (lawyer and secretary) time. In addition, the fact that those with applications already pending did not need to contact the Registry after receiving information in Warsaw also eases the Registry's workload. Each month a B2 secretary in a Polish division prepares around 160 replies to letters from applicants, representing 40-50% of her workload on average[7].

Thank you for attention. I am convinced that Mrs. Hanna Machińska will also say something about Warsaw Pilot Project.

Hanna Machinska

The many years of experience of the Office's activities in Warsaw served as a model for a pilot project of the Council of Europe to create the position of lawyer, whose tasks were:

- providing general information about the ECHR and in particular the procedure before the EurCourtHR to those requesting such information from the Office;
- providing upon request detailed information on, and explanations of the admissibility conditions set out in particular in Article 35 of the Convention to persons contemplating lodging an application with the Court, supported where relevant by case-law examples;
- informing potential applicants about possible obstacles to the admissibility of an application to the Court by reference to the particular complaint and also to procedures existing at national level.

The lawyer was obliged to monitor the impact of the information provided on the further actions undertaken by the party interested, as well as to maintain statistics for the Registry of the Court, and to support the Director of the Office in her endeavours[8]. The importance of the solution

[7] Document of 22 July 2005 prepared by the European Court of Human Rights, *Warsaw Information Office Lawyer*, no 1262324 – v 3.

[8] Job description of the lawyer, by the Council of Europe, January 2004.

is revealed by the numerous opinions and positions presented. It is especially worth quoting the conclusions of the high level seminar on the reform of the European Human Rights system: "In order to reduce the flood of unmeritorious cases, the Council of Europe as a whole, member states and civil society should take measures to ensure that prospective applicants receive sufficient and independent information about the Convention's basic admissibility criteria. Reference was made to the potential role, where appropriate of information offices within the general human rights protection system, seen in the light of experience being gained at the Warsaw Council of Europe Information Office[9]." The Lawyer began her duties at the Information Office of the Council of Europe in October 2004, working at the same time for the Ombudsman's Office. The idea for such a merger of positions stemmed from our belief that certain problems could be solved successfully at the national level, either by the Ombudsman's Office or with the intervention of the Ombudsman in cases of legal problems of a systemic nature, e.g. by addressing the Minister of Justice.

The experience of the Lawyer thus far allows us to conclude that the most common perception of the EurCourtHR by potential applicants is that of the so called 4th instance court. Applicants have insufficient knowledge about the Convention or about the admissibility criteria. Furthermore, they do not know how to make use of domestic legal remedies. Such a situation naturally leads to an automatic wish to lodge an application with the European Court of Human Rights. It could be said that, from the perspective of the applicant, the procedure of lodging an application with the EurCourtHR is relatively easy as compared with the Polish system. It was the role of the Lawyer to provide information, not only about the procedure in Strasbourg, but also about the legal possibilities presented by domestic remedies. The information provided by the Lawyer was met with great interest, and it can definitely be said that the pilot project was the right course of action for the Council of Europe. It brought about, not only positive results in terms of individual people (i.e. the potential applicants, a great number of whom gave up on the idea of lodging an application), but also in the general dimension, helping build the concept of reforming the European Court of Human Rights.

The pilot project of the Warsaw Information Office of the Council of Europe has been included in Lord Woolf's report, which contains numerous recommendations regarding the steps to be undertaken so as to improve the functioning of the Court.[10] The report further stresses the

[9] Reform of the European Human Rights system. Proceedings of the high level seminar. Oslo 18 October 2004, Council of Europe 2004, p. 8.

[10] Review of the Working Methods of the European Court of Human Rights by Lord

need to develop the project in the direction of setting up Satellite Offices of the Registry which would, on the one hand, constitute a regional part of the registry and, on the other, play the information role to a certain extent with the support of the Information Office of the Council of Europe. The report indicates that, as such, they could serve as a system for filtering applications, eliminating most of the inadmissible applications and thus reducing the workload of the Court. Lord Woolf's report is the subject of many analyses and studies, so it is not my intention to elaborate on the concepts contained there. However, it is worth stressing that, in the opinion of many experts, having a Satellite Office at the national level can significantly improve the functioning of the Court, as it can become an institution disseminating knowledge about the procedural rules of lodging an application under the ECHR, and thus propagating knowledge about the European system of human rights protection.[11]

Vit Schorm

Thank you very much indeed. I think that during our discussions in the Reflection Group, of course, there was a request for assessment of this activity, but there was also a feeling that it was a pity that this pilot project of a Lawyer giving advice to potential applicants is ended. So I wonder whether there is a hope for a continuation of that project. I do not know whether the Council of Europe has a position on that, but if the project proves efficient, then, maybe, it is worth thinking of it continuing. David Milner, please.

David Milner

I can be very brief, just a point of information really. The CDDH activity report that covered the work of Reflection Group has a single sentence of conclusion on the Warsaw Pilot Project: *It should be continued and could be extended to other Council of Europe Information Offices.* So far, there has been no final decision by the Ministers' Deputies on whether to extend or to renew the project, but for the Steering Committee of Human Rights and for the Reflection Group it appeared to be constructive and beneficial, and given that its budgetary implications were really quite modest, thought should be given to continuing, renewing and also extending it.

Vit Schorm

Thank you for this complementary piece of information. Are there any views from the floor concerning this particular topic? Monika Mijic

Woolf, December 2005, full text see above at p. 447.

[11] Hanna Machinska: Information Office of the Council of Europe. Initial role and transformation. Human Rights Law Journal vol. 26 No. 9–12.

from Bosnia and Herzegovina. They also have an Information Bureau in their country...?

Monika Milic

Thank you very much. No, we don't have any Information Office because we are a small country so the Court is not floaded with applications from Bosnia and Herzegovina, as in the case of Poland. But we also give basic information to applicants when it comes to filling applications to the Court on our website. We have translated the basic information set out in the Court's website. We have translated it in to the local language and we have published it on our website, so the applicants from Bosnia-Herzegovina can have basic information on our website. Also when it comes to the case-law of the Court, we have published the case law concerning Croatia and Serbia, so it means that we have the same language and we have also published on our website all the decisions and judgments concerning Croatia and Serbia. I also think that this kind of information on one website can help applicants and lawyers in Bosnia-Herzegovina. And I also have information from my colleague from Serbia, that they also have that kind of information on their websites and the same situation is in Croatia. So things like that can helpin filtering the applications and can help in spreading the case-law among the countries who share the same language. So, I think that this practice can also be used in some other countries. Thank you very much.

Vit Schorm

Thank you. I think, where languages are shared it is worth using them for the benefit of all the involved countries. Are there further comments from the floor, maybe also on other topics listed on the agenda?

Marta Kaczmarska

My name is Marta Kaczmarska, from the Polish Ministry of Foreign Affairs. I would like to share a few reflections concerning on issue the Polish Government feel very strongly about – the secondment of national judges to the Registry of the European Court of Human Rights.

As we all know, the current system of positions in the Registry of the Court is neither effective nor economical. The need for strengthening the Court and increasing its efficiency is widely recognized. I would question though the solution presented by the Court to create permanent posts in place of the existing temporary positions. The proposition at stake would consolidate the current system where nationals working for the Court are usually young and inexperienced lawyers, often just right after graduation, with no legal training and little knowledge of practical application of the

law. They are trained by the Court and as an outcome all of their knowledge and experience, which are undoubtedly very valuable, are entirely coming from one source. However, while processing the cases before the Court it is crucial to be acquainted, not only with the Convention standards, but also with the legal system of the country of origin. If the temporary positions were transformed to permanent posts within the present system of recruitment it would become almost impossible for new lawyers to work in the Court. Consequently, the current system leads to a state of alienation, and the proposed change does not prevent it. Such a situation should not be accepted.

Therefore the Court should make better use of the possibility of temporary seconding of national judges to the Registry of the Court. Such an institution could prove to be highly beneficial for both the Court and domestic legal systems of the state-parties to the Convention.

The secondment of national judges (and assistant judges) would improve the operational efficiency of the Court, as it would acquire experienced lawyers with a profound knowledge of domestic legal systems, as well as the functioning of the administration of justice. After a certain period of time (3 to 5 years), those judges would return to their national legal systems with a deeper knowledge of Convention issues. It hardly needs saying that such judges would contribute to a better understanding of the Convention standards in their home countries. Obviously, the program of secondment would probably not involve a large number of judges, however those included would acquire experience of a great value, which they would propagate upon their return in their normal occupation. Thus, bearing in mind the importance of national judiciary in ensuring the effectiveness of the application of the Convention standards into the national legal systems and practice, the institution of secondments of judges to the Registry of the Court should not be underestimated.

What is more, the secondment of judges seem to be a perfect way to put the principle of subsidiarity of the Court's jurisdiction in practice. It is also the best way to establish a permanent dialogue between the Court and the state-parties to the Convention that could improve mutual understanding.

Vit Schorm

Thank you, another topic has been raised. Other views from the floor? David Milner.

David Milner

This is another issue that the Reflection Group and CDDH addressed. For information, I would share the conclusions of the activity report on this issue: *the secondment of national judges, as well as other high-level independent lawyers, where appropriate, should therefore be encouraged notably by simplifying the administrative procedures at national level*. I understand that there are several countries that are already seconding national lawyers: the Netherlands and Sweden spring to mind, as well as Germany. Relatively few, although the situation seems to be developing. The impression of the Reflection Group, however, was that it was not just a question of incapacity on the side of the Court, but also of difficulties at the national level in putting people forward.

Vit Schorm

Thank You. Any wishes from the floor? John Darcy.

John Darcy

I will just come on the same subject very briefly. Just to say it is something that is happening because from perspective of the Court all of these arguments being put forward are true, they are all valid and there is much to be gained on both sides by bringing in a working magistrates into the Registry; they will bring something with them. And that says that the fact that are the young lawyers being recruited by the Court and being trained by the Court is not such a bad thing. I think that that is the Court is properly training its staff is what you expect. Remember as well that many of our young lawyers themselves coming for a fixed period of time on the understanding that thereafter they continue to develop their career elsewhere in the international organizations, elsewhere in the Council or returning to the national legal practice, whether as a magistrate or as applicants of law. So there is constant coming-and-going between the institutions at Strasbourg and a different legal systems, and while it takes a managing when it is managed properly it is all to the good. The Court is also taking part in the European wide training of judges which is run in Brussels and last year it agreed to accept on a regular basis trainees who will come in for 6, 12, 18 months stage. So there is certain opening on the part of the management of the Registry, to bring in the professionals like this and it seems that the situation which is enriching both for the Court and its work and also has a very good seeding effect when these professionals return to their normal professional duties.

Krzysztof Drzewicki (delivered in written form)

I would like to submit to our discussion a few observations on the question of secondment of national judges to the Registry of the Court

and a broader issue of staff quality. I fully subscribe to the views of Ms Marta Kaczmarska but I wish to add few arguments.

Firstly, I must confess that the acceptance of the very idea of the secondment of national judges is a great success in itself. It is so because for years the Court's Registry has been active against this idea. As the then Agent of the Polish Government I remember when I was communicated a negative response from the Registrar to our proposal to second a judge. The Ministry of Justice invested a lot of its efforts and money in arranging a competitive recruitment procedure in 9 appeals circuits and a group of six judges was finally selected. This lesson should be remembered, as I would not be surprised if the new approach to secondments of judges would be followed by a series of administrative and other impediments. The seriousness of the problem and further potential risks may well be illustrated by an open resistance to and obstruction of the provision on 'legal secretaries' (Art. 25 ECHR). Drawn on the model of the Luxembourg Court (see Explanatory Report to Protocol No. 11) the provision was envisaged for young practicing lawyers to assist judges. This arrangement remained a dead letter. This way the Registry has demonstrated that if a rule is not convenient for its staff it may be disregarded.

Secondly, we should perceive secondments as a beginning of a long road to improve the legal staff quality of the Registry. A seconded judge could be helpful in upgrading the knowledge of the Registry lawyers on domestic law and jurisprudence. I must say very critically that, in the case of Polish units in the Registry, we have to do with a number of lawyers who have never passed state examinations for the judiciary, prosecutorial offices on bar associations, and have not practiced law for at least a few years. In Strasbourg they may learn about the European Convention and its case law but not so much about Polish law. Consequently, lawyers inexperienced in domestic law make up the staff who examine judgments and other decisions of years-long experienced Polish judges from the courts of law, notably those of Appeal Courts, Supreme Courts, High Administrative Court and the Constitutional Court. Let us also be aware that in Eastern and Central Europe about 60-80% of legislation was changed after the Cold War. It is therefore a legitimate hope that the presence of experienced judge or judges will help to better examine and adjudicate upon cases lodged with the European Court.

Thirdly, the present stage of reforming the Court prompts us to reconsider recruitment and employment policy. When I started as Agent, the then Head of Secretariat of the European Commission on Human Rights informed me about their methodology of recruitment: they wanted young lawyers with a decent knowledge of English or French whom they would

train on the European Convention and its interpretation. Putting this bluntly, specific experience in practicing law was not a requirement.

Fourthly, recruitment should be more transparent and the duration of a contract limited to 7–10 years only (for secondments 3–5 years). This is a valuable experience for the OSCE, which pursues its policy as non--career organisation. An idea of permanent contracts should be abandoned due to its reduced motivation effects. This would altogether generate a regular rotation system whereby a lot of lawyers could come back to their domestic legal occupations enriched with the knowledge of the European Convention. If the present reforms were to maintain such proposals as judicial functions for 'assessors' or 'rapporteurs' selected from the Registry lawyers, the governments should firmly demand that those to be tasked with performing judicial roles must have qualifications corresponding to those of judges, advocates or prosecutors in their countries.

Vít Schorm

Thank you. So, are there any other wishes from the floor, something that should be added? Of course, we must be aware of the fact that many topics were put forward in the agenda – it was impossible to discuss them all, so some of them were discussed more thoroughly and I think the discussion was very interesting. You can also see that many of these items are in progress and we will see what will be the outcome of all the discussions. Now, I would like to say a few words concerning the government agents' forum, because it is a particular point of our agenda, and then I will try to make a summary of the seminar.

So, the forum is something that emerged during the discussions on a greater impact of the Court's case law and impact on the states' respective practices, because a normal case concerns one applicant and one state. Of course, there are exceptions to this rule, but it is the normal situation. But, if the Court's case law is a source of law it should have a more far-reaching effect than only on the state which is bound by the judgment under article 46 of the Convention. Within this framework, there quite quickly appeared the idea of further or deeper cooperation between government agents. You can imagine that the number of cases processed by the Court is enormous, and I do not even want to mention that there are 100 000 cases waiting for a decision, but it is a reality. It is certainly sad and serious and, I would say, critical.

So, within this framework, there was the idea of a government agents' forum. The forum can function quite simply and in a relatively user--friendly way. It has just started to work, two days ago there was one post and one reply concerning just a small practical point. So it may cover

practical points, but also deeper discussions on the evolution of the Court's case law, maybe also reflections on the change of the Court's case-law, etc. It is open and I hope it will become a "living instrument" as the Convention is supposed to be and as the Court says from time to time in its judgments.

CHAPTER 5:

CLOSING REMARKS

Mr. Andrzej Kremer,
Deputy Minister of Foreign Affairs
(presented in written form)

First, let me thank and congratulate all the persons and institutions whose efforts produced the third edition of this seminar, dedicated to the most current issues related to the activity of the European Court of Human Rights. This meeting, which brought together Government Agents and representatives of other institutions concerned with the Court's case law, allowed for a constructive exchange of experiences and opinions. It constitutes an innovative and dynamic method for jointly seeking solutions to problems and challenges connected with the activity of the Court. One of these challenges is the pilot judgment procedure – the focus of discussion at this seminar.

Permit me to share a few reflections on the question of pilot judgments. The institution of pilot judgments is today in its nascent stage, so its final shape is still undetermined. This also applies to the role in pilot cases of the Commissioner for Human Rights and the Committee of Ministers. The process of formulating a fully acceptable definition of a pilot case is not closed, either. However, the introduction of pilot judgment procedures has affirmed the need for streamlining the Convention's procedural mechanisms. After all, ensuring the Court's greater effectiveness and speed of operation is today once of the primary challenges facing the European system of human rights protection.

The seminar made it possible to consider the subject of pilot judgments from the points of view of the parties to the Convention, the Court and independent experts. Though the positions presented were diverse, they did allow us to draw certain common conclusions. And so, the procedure of pilot judgments significantly enhances the efficiency of the entire system of human rights protection. Through individual cases, it signals to states the existence of problems affecting whole groups of people.

That in turn motivates states to introduce general remedies designed to compensate the victims of past violations and to prevent their recurrence in the future. Thus, seeing how pilot judgments have proven effective, perhaps the time has come to lend them a normative status within the Convention system?

In conclusion, I wish to express my great satisfaction with the results of this seminar. It substantially enhanced the understanding of the essence of the Court's pilot judgments. And we should remember that all joint endeavors of the Court, the Member States and other interested entities have one common goal: boosting human rights protection, not only in procedures before the Court, but – first and foremost – in the Member States, which bear primary responsibility for the observance of the fundamental rights and freedoms.

Vit Schorm

I will now try to close the seminar. First of all, I would like to thank the organizers, the Polish authorities, and namely Michał Balcerzak and Jakub Wołąsiewicz, but also Professor Leach for this initiative. It is very interesting to see that the Polish authorities have been active, have come up with initiatives, as Mr. Wołąsiewicz has mentioned already three seminars which took place during the last 5 years approximately. So, it was wonderful and I do not want to repeat the thanks for yesterday's reception which was magnificent as 2 or 3 years ago at the previous seminar. I would also like to express the hope that the participation in the seminar was not only interesting for government agents or members of the offices of government agents but also for students of the National Administrative School of Poland. I hope that you found the subject which is not a purely internal one, interesting despite some technical terms we used, abbreviations like CDDH, PACE, etc. It is all about the fact that the Court is really under a heavy workload, that there are nearly around 100 000 applications waiting for decision. And the situation gets worse and worse every year, month and day. And so something has to be done, and as Professor Drzewicki rightly pointed out today, the usual response is quite slow. So the seminar, in my opinion, was a useful contribution to the process of saving one of the most interesting inventions of European integration from its beginnings in the end of the forth decade of the 20th century – the creation of the Council of Europe and the adoption of the European Convention of Human Rights. So, thanks once more to all who organized and contributed actively. I wish you a pleasing trip back home.

PART THREE:

DOCUMENTS

Document 1:

ACT ON THE PROTECTION OF THE RIGHT TO A TRIAL WITHOUT UNDUE DELAY OF THE REPUBLIC OF SLOVENIA

Disclaimer: The English language translation of the text of the Act on the Protection of the Right to a Trial without Undue Delay (of the Republic of Slovenia) below is provided just for information only and confers no rights nor imposes any obligations on anyone. Only the official publication of the Act on the Protection of the Right to a Trial without Undue Delay in Slovene language, as published and promulgated in the Official Gazette of the Republic of Slovenia, is authentic. The status of the translated text of the Act on the Protection of the Right to a Trial without Undue Delay is as of 21 August 2006 and the status of statutes in footnotes is also as of 21 August 2006. Explanatory footnotes have also been prepared for information only, and the previous text of this Disclaimer also applies to them. While the Government Translation Service prepared the original translation of this Act, the Ministry of Justice of the Republic of Slovenia performed the substantially corrected translation, terminology decisions and annotations. This translation may not be published in any way, without the prior permission of the Ministry of Justice of the Republic of Slovenia, but may be used for information purposes only.

ACT ON THE PROTECTION OF THE RIGHT TO A TRIAL WITHOUT UNDUE DELAY[1] (ZVPSBNO)[2]

CHAPTER 1

General provisions

Purpose and scope of the Act

Article 1

(1) The purpose of this Act shall be to protect the right to a trial without undue delay.

(2) This Act shall regulate performance of matters of court management within the jurisdiction of the courts and matters of the justice administration falling within the jurisdiction of the Ministry responsible for justice which are related to the protection of the right to a trial without undue delay, judicial protection of this right and just satisfaction in cases of its violation.

Right to trial without undue delay

Article 2

A party to court proceedings, a participant under the statute regulating non--contentious procedure[3] and an injured party in the criminal proceedings[4] (hereinafter referred to as: party) shall have the right to have his rights, duties and any charges brought against him to be decided upon by the court without undue delay[5].

Legal remedies

Article 3

Legal remedies to protect the right to a trial without undue delay under this Act shall be as follows:

1) appeal with a motion to expedite the hearing of the case (hereinafter: supervisory appeal);
2) motion to set a deadline (hereinafter: motion for a deadline);
3) claim for just satisfaction.

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[1] The title of this Act in Slovene language is: "Zakon o varstvu pravice do sojenja brez nepotrebnega odlašanja". The Act was published in the Official Gazette of the Republic of Slovenia, No. 49/2006 of 12 May 2006.

[2] "ZVPSBNO" is an official acronym of this Act in Slovene language.

[3] See Article 19 of the Non-Contentious Procedure Act of 1986 (Official Gazette of the SRS, Nos. 30/86, 20/88 – correction, Official Gazette of the RS, Nos. 87/2002 and 131/2003 – Decision of the Constitutional Court).

[4] See especially Article 319, paragraph 2 and Articles 100–111 of the Criminal Procedure Act (Official Gazette of the Republic of Slovenia, No. 8/2006 – Officially Consolidated Text No. 3).

[5] Provision on "shall have the right to have his rights, duties and any charges brought against him to be decided upon by the court without undue delay" represents a "transfer" of provision of Article 23, paragraph 1 of the Constitution of the Republic of Slovenia (Official Gazette of the RS, Nos. 33/1991-I, 42/1997, 66/2000, 24/2003, 69/2004 and 68/2006).

Criteria for decision-making

Article 4

When deciding on the legal remedies under this Act, circumstances of particular case shall be taken into account, namely its complexity in terms of facts and law, actions of parties to proceedings, in particular as regards the use of procedural rights and fulfilment of obligations in proceedings, of the compliance with the rules on the set order of resolving cases, statutory deadlines for fixing preliminary hearings or drawing court decisions, the manner in which a case was heard before a supervisory appeal or motion for a deadline were filed, the nature and type of a case and its importance for a party.

CHAPTER 2

Supervisory appeal and motion for a deadline

Supervisory appeal

Article 5

(1) If a party considers that the court unduly protracts with the decision-making, he may file a supervisory appeal in writing before the court hearing the case; the decision thereon is taken by the lady president or president of the court[6] (hereinafter: president of the court).

(2) For the needs of decision-making concerning the protection of the right to a trial without undue delay, the supervisory appeal shall contain the following elements:

- personal name[7] or company name or any other name of the party, its address of permanent or temporary residence or registered office;
- personal name or company name or any other name of the representative or legal representative[8] and its permanent or temporary residence or registered office;
- indication of the court hearing the case;
- reference number of the case or date of filing the case in the court;
- indication of circumstances or other data concerning the case, which demonstrate that the court unduly protracts with the decision-making;
- hand-written signature of the party, representative or attorney.

[6] The original text in Slovene language uses first the term for the president of the court of female gender "predsednica" and afterwards the term for the president of the court of male gender "predsednik".

[7] Personal name is composed of a name and a surname of a natural person (see Article 3, paragraphs 1 and 2 of the Personal Name Act, Official Gazette of the RS, No. 20/2006).

[8] In Slovene language: *pooblaščenec*. This general term usually designates attorney (counsel).

Decision on supervisory appeal

Article 6

(1) If the supervisory appeal is manifestly unfounded considering the timetable of resolving the case indicated in the supervisory appeal, the president of the court shall reject the appeal by way of a ruling[9].

(2) If the supervisory appeal does not contain all required elements referred to in Article 5, paragraph 2 of this Act, the president of the court shall dismiss it by way of a ruling. No appeal may be filed against this ruling.

(3) If no ruling referred to in the paragraphs 1 or 2 of this Article is issued, the president of the court shall, within the framework of performing the court management competencies under the statute regulating the courts[10], forthwith request the lady judge or judge or a chairwoman or chairman of a court panel (hereinafter: the judge) to whom the case has been assigned for resolving, that he submits a report indicating reasons for the duration of proceedings not later than in fifteen days of receiving the request of the president of the court or after obtaining the file, if necessary for drawing up the report. The report shall include the declaration in respect of criteria referred to in Article 4 of this Act and the opinion on the deadline in which the case may be resolved. The president of the court may also require the judge to submit the case file if he assesses that, in the light of allegations of the party indicated in supervisory appeal, its examination is necessary.

(4) If the judge notifies the president of the court in writing that all relevant procedural acts shall be performed or a decision issued within the deadline not exceeding four months following the receipt of the supervisory appeal, the president of the court shall inform the party thereof and thus conclude the consideration of the supervisory appeal.

(5) If the president of the court establishes that in view of the criteria referred to in Article 4 of this Act the court does not unduly delay the decision-making on the case, he shall reject the supervisory appeal by way of a ruling.

(6) If the president of the court has not informed the party in accordance with paragraph 4 of this Article and if, in view of criteria referred to in Article 4 of this Act, he establishes that the court is unduly delaying the decision-making of the

[9] In Slovene language: "sklep". In German legal terminology: "der Beschluss". The term ruling usually, but not always, means contextually a procedural decision – not deciding upon merits of the case.

[10] Provision on the "framework of performing the court management competencies under the statute regulating the courts" is a reference to provision of Article 60, paragraph 3 of the Courts Act (Official Gazette of the RS, No. 100/2005 – Officially Consolidated Text No. 2) which states that in matters of court management a decision must be made on the right, obligation, or legal benefit of a person following the provisions of the General Administrative Procedure Act (Official Gazette of the RS, No. 24/2006 – Officially Consolidated text No. 2) that shall be *mutatis mutandis* applied in the decision-making procedure of presidents of courts. Therefore rules of general administrative procedure (not to be mistaken with judicial procedural legislation!) apply in cases of decision-making on filed supervisory appeals.

case, he shall, subject to the state and nature of the case and by way of a ruling, order a deadline for performing certain procedural acts and he may also order that the case be resolved as a priority due to the circumstances of the case, particularly when the matter is urgent. If he orders that the appropriate procedural acts be performed by the judge, he also sets the deadline for their performance, which may not be shorter than fifteen days and not longer than six months, as well as the appropriate deadline for the judge to report on the acts performed.

(7) If the president of the court establishes that the undue delay in decision-making of the case is due to excessive workload or extended absence of the judge, he may order that the case be reassigned. He may also propose that the additional judge be assigned to the court or order other measures under the statute regulating the judicial service[11] be implemented.

(8) A judge may be assigned by the annual schedule of allocation to act in place of or together with the president of the court in performing the court management competencies for decision-making on the supervisory appeal.

Limitation on filing a supervisory appeal and motion for a deadline

Article 7

(1) If the president of the court acts in compliance with Article 6, paragraphs 4 or 6 of this Act, the party may not file a new supervisory appeal nor a motion for a deadline concerning the same case before the expiry of deadlines set in the notification or ruling of the president of the court. This provision shall not apply to cases where detention is proposed or ordered or where interim measure is proposed.

(2) If a ruling was issued in accordance with Article 6, paragraphs 1 or 5 of this Act, the party may file a new supervisory appeal only after six months have elapsed from the receipt of the decision. This provision shall not apply to cases where detention is proposed or ordered or where interim measure is proposed.

Motion for a deadline

Article 8

(1) If, under Article 6, paragraphs 1 or 5 of this Act, the president of the court rejects the supervisory appeal or fails to answer to the party within two months or fails to send the notification referred to in Article 6, paragraph 4 of this Act within the said deadline or if appropriate procedural acts were not performed within deadlines set in the notification or ruling of the president of the court, the party may file the motion for a deadline grounded on Article 5, paragraph 1 of this Act at the court hearing the case.

(2) For the purposes of decision-making on the protection of the right to a trial without undue delay, the motion for a deadline shall contain the elements referred to in Article 5, paragraph 2 of this Act.

[11] See the Judicial Service Act (Official Gazette of the RS, No. 41/2006 – Officially Consolidated Text No. 2).

(3) The party may file the motion for a deadline in fifteen days after the receipt of the ruling or the expiry of deadlines set in paragraph one of this Article.

Competence for decision-making

Article 9

(1) The president of the higher court in the judicial area covering the local court, district court or other court of first instance, shall have the competence to decide on the motion for a deadline concerning the cases heard by the local court, district court or other court of first instance.

(2) The president of the Supreme Court of the Republic of Slovenia shall have the competence to decide on the motion for a deadline concerning cases heard by higher court or court having the status of higher court.

(3) The president of the Supreme Court of the Republic of Slovenia shall have the competence to decide on the motion for a deadline concerning cases heard by the Supreme Court of the Republic of Slovenia.

(4) Other judges may be assigned by the annual schedule of allocation to act in place of or together with the presidents of courts referred to in previous paragraphs for decision-making on motions for a deadline.

Referral of the motion for a deadline

Article 10

The president of the court hearing the case shall forthwith refer the motion for a deadline together with the case file and the supervisory appeal file to the president of the court competent to decide on the motion for a deadline.

Decision on the motion for a deadline

Article 11

(1) If the motion for a deadline is manifestly unfounded considering the timetable of the resolution of the case and the actions of the party, the president of the court shall reject it by way of a ruling.

(2) If the motion for a deadline does not contain all required elements referred to in Article 5, paragraph 2 of this Act or is filed after the expiry of time limit set in Article 8, paragraph 3 of this Act, the president of the court shall dismiss it by way of a ruling.

(3) If the president of the court establishes that, in view of the criteria referred to in Article 4 of this Act, the court does not unduly delay with the decision-making of the case, he shall reject the motion for a deadline by way of a ruling.

(4) If the president of the court establishes that, in view of the criteria referred to in Article 4 of this Act, the court unduly delays the decision-making of the case, he shall order, by way of a ruling, that the appropriate procedural acts be performed by the judge and shall also set the deadline for their performance, which may not be shorter than fifteen days and not longer than four months, as well as set the appropriate deadline for the judge to report on the acts performed. According to the circumstances of the case, particularly when the matter is urgent, the president

of the court may also order that the case be resolved as a priority and propose to the president of the court referred to in Article 5, paragraph 1 of this Act to implement measures referred to in Article 6, paragraph 7 of this Act.

(5) The president of the court shall decide on the motion for a deadline within fifteen days following its receipt.

Mutatis mutandis application of provisions of civil procedure

Article 12

For decision-making on the motion for a deadline, the provisions of the Civil Procedure Act[12] relating to the determination of deadline by the court and the ruling and the appeal against the ruling shall be applied mutatis mutandis, unless otherwise provided by this Act.

Exclusion of appeal

Article 13

No appeal is allowed against the ruling of the president of the court issued pursuant to Article 11 of this Act.

Competence of the Ministry responsible for justice

Article 14

(1) If the supervisory appeal is filed before the Ministry responsible for justice (hereinafter referred to as the Ministry), the Minister or lady Minister responsible for justice (hereinafter referred to as the Minister) shall refer it to the president of the court of competent jurisdiction to hear it in accordance with this Act and shall require to be informed on the findings and on the decision.

(2) If the supervisory appeal does not contain all required elements referred to in Article 5, paragraph 2 of this Act, the Minister shall invite the party to supplement it in eight days. If the supervisory appeal is not supplemented within the said deadline, the Minister shall dismiss it by way of a ruling. No appeal is allowed against a ruling on dismissal.

(3) The Minister may require the president of the court to submit a report on all filed supervisory appeals or motions for a deadline and to transmit copies of notices and issued decisions served to parties. These documents may be requested in connection with cases where the supervisory appeal or motion for a deadline was filed not more than two years ago.

(4) The Ministry may use and process personal and other data and information from the documents referred to in paragraph three of this Article for the purpose of implementing or proposing measures or proceedings under the provisions of the statute regulating judicial service, particularly with regard to the assessment of judicial service, proceedings for establishing disciplinary responsibility of a judge,

[12] See Article 110, paragraph 1 and Article 366 of the Civil Procedure Act (Official Gazette of the RS, Nos. 36/2004 – Officially Consolidated Text No. 2, 69/2005 – Decision of the Constitutional Court, 90/2005 – Decision of the Constitutional Court and 43/2006 – Decision of the Constitutional Court).

for the implementation or for proposing measures or proceedings based on other statutory powers or obligations of the Ministry, particularly for assessing the state prosecutor's service or proceedings for establishing disciplinary responsibility of a state prosecutor, for the purpose of statistical and scientific research or for the purpose of preparing draft statutes law and other regulations within the competence of the Ministry.

(5) When the intended use or processing of personal data referred to in paragraph three of this Article is accomplished, the Ministry shall archive them in accordance with the statute regulating archival material and archives; and they must be archived not later than five years after the receipt of such data.

CHAPTER 3

Rights and procedure regarding just satisfaction

Just satisfaction

Article 15

(1) If the supervisory appeal filed by the party was granted or if the motion for a deadline was filed, the party may claim just satisfaction under the present Act.

(2) Just satisfaction shall be provided by:

1) payment of monetary compensation for damage caused by a violation of the right to a trial without undue delay;
2) a written statement of the State Attorneys' Office that the party's right to a trial without undue delay was violated;
3) the publication of a judgement that the party's right to a trial without undue delay was violated.

Monetary compensation

Article 16

(1) Monetary compensation shall be payable for non-pecuniary damage caused by a violation of the right to a trial without undue delay. The strict liability for damage caused shall lie with the Republic of Slovenia.

(2) Monetary compensation for individual finally decided case shall be granted in the amount of 300 up to 5000 Euros.

(3) When deciding on the amount of compensation, the criteria referred to in Article 4 of this Act shall be taken into account, in particular the complexity of the case, actions of the State, actions of the party and the importance of the case for the party.

Written statement

Article 17

(1) Given the circumstances of the case, the State Attorneys' Office may, by agreement with the party under Article 19 of this Act and taking account of criteria referred to in Article 18, paragraph 1 of this Act, make a written statement without monetary compensation to the party as a compensation for non-pecuniary damage

caused by the violation of the right to a trial without undue delay. In case the right to a trial without undue delay has been seriously violated and at the request of the party, the State Attorneys' Office may in addition to the monetary compensation also make a written statement.

(2) The written statement shall include data referred to in the Article 5, paragraph 2, subparagraphs 1, 2, 3 and 4 of this Act, an indication that a violation of the right to a trial without undue delay occurred and the duration of the undue delay.

(3) A written statement shall be made by the State Attorneys' Office within the concluded settlement referred to in Article 19 of the present Act. At the party's request, the written statement shall be published on the website of the State Attorneys' Office which shall cover the costs thereof. The written statement shall be made public for two months and thereupon archived within the website or deleted within fifteen days of the receipt of the request of the party or the majority of parties from the written statement.

Publication of the judgement

Article 18

(1) If the party claims payment of monetary compensation for just satisfaction by bringing an action before the competent court referred to in Article 20 of this Act, the court may, having regard to all circumstances of the case and criteria referred to in Article 4 of this Act, in particular the actions of the party in proceedings, and upon the assessment that just satisfaction for non-pecuniary damage might be afforded merely by establishing a violation of the right, the court may exceptionally decide not to grant monetary compensation but only to set out in the judgment that a violation of the right was established. In this case the court shall also decide, at the request of the party, to publish the judgement.

(2) In case of a serious violation of the right to a trial without undue delay and at the request of the party, the court may in addition to monetary compensation also order the publication of a judgement.

(3) The judgement published shall only contain the following personal or other data of the party: personal name or company or any other name of the plaintiff, his permanent, temporary or other residence and registered office, as well as date of birth if indicated by the party in the action brought under Article 22 of the present Act.

(4) The court in respect of which the judgement established the undue delay in trying the party's case shall publish the final judgement at its website and cover the costs thereof. The judgement shall be made public for two months and thereupon archived within the website or deleted within fifteen days of the receipt of the request of the party or the majority of parties from the judgement.

Proceedings before the State Attorneys' Office

Article 19

(1) Proceedings to enforce a claim for just satisfaction, provided that the condition referred to in Article 15, paragraph 1 of this Act is met, shall be instituted by

a party by way of a motion for settlement filed with the State Attorneys' Office with a view to reaching an agreement on type or amount of just satisfaction. The party may file such motion within nine months of the final resolution of the case. The State Attorneys' Office shall pronounce itself on the motion of the party not later than in three months if it establishes that the just satisfaction claim is substantiated. Until the expiry of the abovementioned period, the party may not assert claim for monetary compensation for just satisfaction by bringing an action before the competent court.

(2) If, in accordance with paragraph one of this Article, the agreement has been reached with the party, the State Attorneys' Office shall conclude an out of court settlement with the party.

Proceedings in a court and special territorial jurisdiction

Article 20

(1) If no agreement under Article 19 of this Act is reached upon the motion for settlement, or the State Attorneys' Office and the party fail to negotiate an agreement within three months of the date of filing the motion, the party may bring an action for damages.

(2) Action for damages against the Republic of Slovenia shall be brought not later than eighteen months of the final resolution of the party's case.

(3) Territorial jurisdiction for decision-making on an action for damages under this Act shall lie with the local court in whose district the plaintiff is a permanent or temporary resident or has registered office.

(4) Notwithstanding paragraph three of this Article, the jurisdiction for decision-making on an action for damages, which would under the provisions of this Act be conferred to the Local Court of Ljubljana, shall lie with the Local Court of Kranj, and the jurisdiction to adjudicate an action for damages, which would under the provisions of this Act be conferred to the Local Court of Maribor, shall lie with the Local Court of Celje.

(5) The for decision-making on an action for damages under this Act, which was brought by a party not permanently or temporary residing or having registered office in the Republic of Slovenia, shall lie with the Local Court of Kranj.

(6) Irrespective of the type or amount of the claim, the provisions of the Civil Procedure Act concerning small claims shall apply in proceedings before a court.

(7) Revision shall be excluded for disputes on damage under this Act.

Seeking pecuniary damage

Article 21

(1) Action for pecuniary damage caused by a violation of the right to a trial without undue delay may be brought by the party within eighteen months of the final ruling of the court on the party's case in accordance with the provisions of the Obligations Code[13] concerning pecuniary damage.

[13] See the Obligations Code (Official Gazette of the RS, Nos. 83/2001, 32/2004 – Authen-

(2) When deciding on pecuniary damage, the court shall take account of the provisions of the Obligations Act and the criteria referred to in Article 4 and Article 16, paragraph 3 of the present Act. The strict liability for damage caused shall lie with the Republic of Slovenia.

Payment of monetary compensation

Article 22

(1) The State Attorneys' Office shall pay monetary compensation on the basis of concluded settlement referred to in Article 19, paragraph 2 of this Act and all appropriate costs incurred by the party in connection therewith.

(2) The State Attorneys' Office shall pay monetary compensation and the party's costs of the proceedings on the basis of a final court decision, which established the violation of the right to a trial without undue delay in the proceedings under Article 20 or Article 21 of the present Act.

Provision of funds

Article 23

Funds referred to in Article 22 of this Act shall be earmarked in the Budget of the Republic of Slovenia within the framework of the financial plan of the State Attorneys' Office.

Exception with regard to entities of public law

Article 24

In respect of the protection of the right to a trial without undue delay, the state bodies, bodies of self-governing local communities, public enterprises, public funds and public agencies acting as parties to proceedings may not be afforded just satisfaction by way of payment of monetary compensation for damage caused[14] by a violation of the right to a trial without undue delay or by way of compensation for pecuniary damage[15] for their benefit or for the benefit of the Republic of Slovenia under this Act or under any other Act.

CHAPTER 4

Transitional and final provisions

Just satisfaction for damages suffered before the date of application of this Act

Article 25

(1) In case a violation of the right to a trial without undue delay has ceased already and the party had maid a claim for just satisfaction in the international court before the date of application of this Act, the State Attorneys' Office shall offer the party a settlement on the amount of just satisfaction within four months of the date of receipt of the case referred by the international court for the settlement procedure. The party shall submit a settlement proposal to the State Attorneys'

tic Interpretation of Article 195 and 28/2006 – Decision of the Constitutional Court).

[14] See Article 16 of this Act.

[15] See Article 21 of this Act.

Office within two months of the date of receipt of the proposal of the State Attorneys' Office. The State Attorneys' Office shall decide on the proposal as soon as possible and not later than in four months. Provisions of Article 16 and 17 of this Act shall apply in respect of the amount and the determination of just satisfaction and in respect of criteria to establish a violation of the right to a trial without undue delay; provisions of Article 19 of this Act shall apply in respect of proceedings.

(2) If the proposal for settlement referred to in paragraph 1 of this Article is not acceded to or the State Attorneys' Office and the party fail to negotiate an agreement within four months of the date of filing the proposal by the party, the latter may bring an action before the competent court under this Act. The party may bring an action within six months after receiving the State Attorneys' Office reply stating that the party's proposal referred to in previous paragraph was not acceded to, or after the expiry of the time limit set out in the previous paragraph for the State Attorneys' Office to decide to conclude the settlement. Irrespective of the type or amount of the claim, the provisions of the Civil Procedure Act concerning small claims shall apply in proceedings before a court.

Amendment in other Act

Article 26

(1) On 1 January 2007, Article 72 of the Courts Act (Official Gazette of the RS, No. 100/05 – Officially Consolidated Text No. 2) shall cease to apply.

(2) Article 73, paragraph 1 of the Courts Act (Official Gazette of the RS, No. Uradni list RS, No. 100/05 – Officially Consolidated Text No. 2) shall be amended as follows: "In case of supervisory appeal and motion for a deadline in accordance with the statute regulating the protection of the right to a trial without undue delay, the president of the court of higher instance may, on his own initiative or on the proposal from the Ministry competent for justice, order that work of the court regarding the subject of the party's complaint be inspected and the findings of the inspection reported to the Minister in writing if the inspection is carried out on the proposal of the Minister responsible for justice, or a copy of the report submitted to the president of the court if the inspection is proposed by the president of the court of higher instance. The Minister and the president of the court where the inspection was carried out may use data or assessments from the report to implement or propose measures or proceedings under the provisions of the statute regulating judicial service, particularly with regard to the assessment of judicial service, proceeding for establishing disciplinary responsibility of a judge, for the implementation or for proposing measures or procedures based on other legislative powers or obligations of the Ministry responsible for justice, particularly for assessing the state prosecutor's service or proceedings for establishing disciplinary responsibility of a state prosecutor."

(3) The amendment of Article 73, paragraph 1 of the Courts Act shall apply as from 1 January 2007, until that time the current provision of Article 73 of the Courts Act shall continue to apply.

Transitional provision on payment of income tax

Article 27

Pending the amendment of the act regulating the income tax, no income tax is payable on monetary compensation for non-pecuniary damage paid in accordance with the provisions of this Act.

Entry into force and application of this Act

Article 28

This Act shall enter into force on the fifteenth day[16] following its publication in the Official Gazette of the Republic of Slovenia, and shall be applied from 1 January 2007.

No. 700-01/06-91/1
Ljubljana, 26 April 2006
EPA 819-IV

President of the National Assembly
of the Republic of Slovenia
France Cukjati, dr. med

[16] The Act on the Protection of the Right to a Trial without Undue Delay was published on 12 May 2006 in the Official Gazette of the Republic of Slovenia, No, 49/2006 and accordingly entered into force on 27 May 2006. It shall be applied as of 1 January 2007.

Document 2:

Text of the Polish Act of 17 June 2004 concerning the complaint on infringement of a party's right to have a case examined in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings without undue delay[1]

Article 1.

1. The Act lays down the principles and procedures of lodging and hearing the complaint of a party whose right to have a case examined without undue delay has been infringed due to an action or inaction of the court and/or prosecutor conducting or supervising preparatory proceedings.

2. The provisions hereof shall apply accordingly where, due to an action or inaction of the court or court enforcement officer, the infringement has occurred of a party's right to have executory or any other proceedings regarding enforcement of a court decision conducted and concluded without undue delay.

Article 2.

1. A party may file a complaint seeking ascertainment that the proceeding that are the object of the complaint involve infringement of the party's right to have a case examined without undue delay, where the proceedings are pending longer than needed to clarify factual and legal circumstances essential for resolving the case, or to successfully conclude executory or other proceedings regarding enforcement of a court decision (protracted character of proceedings).

1a. Article 2(1) shall apply accordingly to preparatory proceedings.

2. In order to ascertain whether undue delay of proceedings has occurred in a case, it must be assessed, in particular, whether the court had acted in a timely and correct manner in order to adjudge the case as to its substance, or whether the prosecutor conducting or supervising preparatory proceedings had acted in a timely and correct manner in order to conclude the preparatory proceedings, or

[1] Journal of Laws (Dz. U.) of 2004, No. 179, item 1843 + the Act of 20 February 2009 amending the Act on the complaint on infringement of a party's right to have a case heard in court proceedings without undue delay Journal of Law (Dz. U.) of 2009, No. 61, item 498 (changes have been underlined).

whether the court or court enforcement officer had acted in a timely and correct manner in order to conduct and conclude executory proceedings or other proceedings regarding enforcement of a court decision, having regard to the nature of the case in question, its factual and legal complexities , the significance of the case for the party who filed the complaint, the issues resolved therein as well as the conduct of the parties, particularly of the party alleging undue delay of the proceedings.

Article 3.

The following shall be entitled to file a complaint:

1) in proceedings concerning fiscal offences and misdemeanors – a party;
2) in proceedings concerning misdemeanors – a party;
3) in proceedings concerning the liability of collective entities for punishable offences – a party or applicant;
4) in criminal proceedings – a party or victim, even if the latter is not a party to the proceedings;
5) in civil proceedings – a party, an accidental intervener and a participant in the proceedings;
6) in judicial-administrative proceedings – a plaintiff and a participant in the proceedings with the rights of a party;
7) in executory proceedings or in other proceedings regarding enforcement of a court decision – a party and another person enforcing his/her right in the proceedings.

Article 4.

1. The complaint shall be heard by a court superior to the court conducting the proceedings.

1a. Where the complaint concerns undue delay in proceedings before a district court and a circuit court – it shall be heard, in its entirety, by an appellate court.

1b. Where the complaint concerns undue delay in proceedings before a circuit court and an appellate court – it shall be heard, in its entirety, by an appellate court.

2. Where the complaint concerns undue delay in proceedings before an appellate court and/or the Supreme Court – it shall be heard by the Supreme Court.

3. Where the complaint concerns undue delay in proceedings before a provincial administrative and/or the Supreme Administrative Court – it shall be heard by the Supreme Administrative Court.

4. Where the complaint concerns undue delay in executory proceedings or other proceedings regarding the enforcement of a court decision, it shall be heard by the circuit court in whose circuit the execution and/or other acts are performed; where the execution or other proceedings regarding the enforcement of a court

decision are being conducted in several circuits, the complaint shall be heard by the court before whom the first act was performed.

5. Where the complaint concerns undue delay in preparatory proceedings, it shall be heard by the court superior to the court that has *ratione materiae* competence.

Article 5.

1. The complaint for ascertainment of undue delay in proceedings that are the object of the complaint shall be filed in the course of the proceedings in the case.

2. The complaint shall be filed with the court before which the proceedings are pending.

3. The complaint concerning undue delay in executory proceedings or other proceedings regarding enforcement of a court decision shall be filed with the court referred to in Article 4 (4) of this Act.

4. The complaint concerning preparatory proceedings shall be filed with the prosecutor conducting or supervising the proceedings.

Article 6.

1. The complaint shall satisfy formal requirements applicable to court filings.

2. The complaint shall also contain:

1) demand for ascertainment of undue delay in the proceedings that are the object of the complaint;

2) elaboration of the circumstances substantiating the request.

3. The complaint may contain a demand for the issuance of instructions to the court hearing the case or the prosecutor conducting or supervising the preparatory proceedings, to take appropriate action within a stipulated period of time and to award an appropriate amount of money as referred to in Article 12(4).

Article 7.

The court or the prosecutor with whom the complaint has been filed shall submit the same forthwith to the competent court, together with the case files of the proceedings.

Article 8.

1. The court shall hear the complaint in a panel of three judges.

2. In matters unregulated by this Act, the court shall apply to proceedings resulting from the complaint regulations on appeal proceedings applicable in the proceedings subject to the complaint.

Article 9.

1. Should a complaint fail to satisfy the requirements set forth in Article 6(2), it shall be rejected by the court competent to hear the same, without requesting correction of its formal defects.

2. The court shall reject a complaint submitted by an unauthorised party or inadmissible pursuant to Article 14.

Article 10.

1. The court competent to hear the complaint shall notify the State Treasury – the president of the court whose action or inaction, as alleged by the complainant, resulted in undue delay of proceedings – of the pending proceedings, serving the president with a copy of the complaint.

2. Where the complaint concerns undue delay in proceedings conducted by a court enforcement officer, the court shall notify the court enforcement officer and the State Treasury – the president of the District Court having jurisdiction over the court enforcement officer, serving the president with a copy of the complaint.

2a. Where the complaint concerns undue delay in preparatory proceedings, the competent Court shall notify the State Treasury – prosecutor superior to the prosecutor conducting or supervising the preparatory proceedings, serving the former with a copy of the complaint.

3. If they give notice of their respective intention to join the case, the State Treasury and the court enforcement officer shall enjoy the rights of a party to the complaint proceedings.

Article 11.

The court shall pass a decision within two months of the complaint being filed.

Article 12.

1. An unjustified complaint shall be dismissed by the court.

2. The court allowing a complaint shall ascertain undue delay in the proceedings that are the object of the complaint.

3. The court, acting at the request of the complainant or ex-officio, shall recommend that the court hearing the case as to its substance or the prosecutor conducting or supervising preparatory proceedings, carry out appropriate measures within a specified period of time, unless making such recommendations is patently redundant. The recommendations shall not address the factual and legal assessment of the case.

4. The court allowing a complaint, where requested by the complainant, shall order the State Treasury, or, when the complaint concerns undue delay in proceedings conducted by a court enforcement officer, the relevant court enforcement officer, to pay an amount of money between PLN 2,000 and PLN 20,000.

5. If the amount of money is awarded from the State Treasury, the payment shall be made by:

1) the court conducting the protracted proceedings, from its own funds;
2) Circuit Prosecutor's Office in whose circuit the protracted preparatory proceedings are being conducted and, as regards preparatory proceedings conducted by local branches of Organised Crime Bureaus of the National Prosecutor's Office , by the competent Appellate Prosecutor's Office, from their own respective funds.

6. Where the amount of money is awarded in the case referred to in Article 4(1a) or in the case referred to in Article 4(1b), the payment shall be made, respectively, by the Circuit Court or the Appellate Court, from their own respective funds.

Article 13.1.

1. The court shall serve a copy of the decision allowing the complaint concerning undue delay in proceedings before a court on the president of the relevant court. The president of the court served with the decision shall take supervisory measures under the Common Courts System Act of 27 July 2001 (Journal of Laws No. 98, item 1070, as amended[2]).

2. The court shall serve a copy of the decision allowing the complaint concerning undue delay in proceedings conducted by a court enforcement officer on the Minister of Justice.

3. The court shall serve a copy of the decision allowing the complaint concerning preparatory proceedings on the prosecutor superior to the prosecutor conducting or supervising the preparatory proceedings. The prosecutor who has been served with a copy of the decision shall take supervisory measures under the Prosecutor Service Act of 20 June 1985 (Journal of Laws of 2008, No. 7, item 39 and 2009, No. 1, item 4 and No. 26, items 156 and 157).

Article 14.

A complainant may lodge a new complaint in the same case after the lapse of twelve months following the date of the court decision referred to in Article 12. In the case of preparatory proceedings involving pre-trial detention, executory proceedings or any other proceedings regarding enforcement of a court decision, the said period shall be 6 months.

Article 15.

1. A party whose complaint is allowed may claim, in separate proceedings, compensation for losses resulting from ascertained undue delay in proceedings, either from the State Treasury or, jointly and severally, from the State Treasury and the court enforcement officer.

2. The ruling allowing a complaint shall be binding on the court in civil proceedings for damages or compensation, with regard to the ascertainment of undue delay in proceedings.

[2] Amendments to the said Act were promulgated in the followings volumes of the Journal of Laws: 2001 No. 154 item 1787; 2002 No. 153 item 1271; No. 213 item 1802 and No. 240 item 2052; 2003 No. 188 item 1838 and No. 228 item 2256; 2004 No. 34 item 304, No. 130 item 1376, No. 185 item 1907 and No. 273 items 2702 and 2703; No. 13 item 98, No. 131 item 1102, No. 167 item 1398, No. 169 items 1410, 1413 and 1417; No. 178 item 1479 and No. 249 item 2104; 2006 No. 144 item 1044 and No. 218 item 1592; 2007 No. 25 item 162, No. 64 item 433, No. 73 item 484, No. 99 item 664, No. 112 item 776, No. 136 item 959, No. 204 item 1482 and No. 230 item 1698; and 2008 No. 41 item 251.

Article 16.

A party who failed to file a complaint against undue delay in proceedings under Article 5(1) may claim damages for losses resulting from undue delay of proceedings under Article 417 of the Civil Code Act of 23 April 1964 (Journal of Laws No. 16 item 93, as amended), after the proceedings are concluded as to their substance with a binding decision.

Article 17.

1. A complaint shall be subject to a fixed filing fee of PLN 100.

2. Where a complaint has been filed by several persons, each of them shall pay the fee separately; where a single fee has been paid without appropriate indication of the payer, it shall be deemed to have been paid by the person first named in the complaint.

3. The court, allowing or rejecting a complaint, shall automatically return the fee paid on such complaint.

Article 18.

1. Within 6 months of the entry into force of this Act, persons who before that date lodged an application with the European Court of Human Rights (hereinafter referred to as "the Court") alleging infringement of their right to have their case heard within a reasonable time, as referred to in Article 6(1) of the Convention on the Protection of Human Rights and Fundamental Freedoms (Journal of Laws 1993 No. 61, item 284; 1995 No. 36, items 175, 176 and 177; 1998 No. 147, item 962 and 2003 No. 42, item 364), may lodge a complaint against undue delay in proceedings hereunder, if the application to the Court has been lodged in the course of proceedings subject to that application, provided the Court has not ruled as to the admissibility of the application.

2. A complaint filed under Article 18(1) shall indicate the date of lodging the application with the Court.

3. The competent court shall immediately notify the minister competent in foreign affairs of any complaints filed under the procedure set out in Article 18(1).

Article 19.

This Act shall enter into force after the lapse of one month following the date of its publication.

Additional articles on the amendment of the Act on the complaint on infringement of a party's right to have a case heard in court proceedings without undue delay that will not be covered by the uniform text of the amended act

Article 2. 1. Within 6 months of the entry into force of this Act, persons who before that date lodged an application with the European Court of Human Rights (hereinafter referred to as "the Court") alleging infringement of their right to have their case heard within a reasonable time, as referred to in Article 6(1) of the Convention on the Protection of Human Rights and Fundamental Freedoms

(Journal of Laws 1993 No. 61, item 284, as amended), may lodge a complaint against undue delay in proceedings hereunder, if the application to the Court has been lodged in the course of proceedings subject to that application, provided the Court has not ruled as to the admissibility of the application.

2. A complaint filed under Article 18(1) shall indicate the date of lodging the application with the Court.

3. The competent court shall immediately notify the minister competent in foreign affairs of any complaints filed under the procedure set out in Article 18(1).

Article 3. This Act shall enter into force after the lapse of 14 days of its publication.

Document 3:

Act of November 21, 2008 on Supporting Thermal Modernization and Renovation[1]

(Official Journal of Laws of December 18, 2008, No. 223, Item 1459)

Article 6.

1. The complaint shall satisfy formal requirements applicable to court filings.
2. The complaint shall also contain:
   1) demand for ascertainment of undue delay in the proceedings that are the object of the complaint;

CHAPTER 1

General provisions

Article 1.

This Act lay down principles of partial financing of the cost of thermal modernization and renovation projects out of the Thermal Modernization and Renovation Fund.

Article 2.

For the purposes of this Act, the following definitions shall apply:

1) investor – owner or administrator of a building, local heating network or local heat source, excluding state budget units and establishments;
2) thermal modernization projects – projects, consisting of:
   a) improvements, resulting in the reduction of demand for energy supplied for the purpose of heating domestic water and heating residential buildings, collective residential buildings and buildings owned by local government entities, utilized to perform their public tasks,

[1] This Act amends the Personal Income Tax Act of July 26, 1991 and the Act on State Assistance in the Repayment of Certain Residential Credits, Obtaining Warranty Bonuses and Reimbursement of Warranty Bonuses Paid by Banks.

b) improvements, resulting in reduction of primary energy losses in local heating networks and local heat sources that power them, provided that buildings specified in Subpoint a, to which energy is supplied from such networks, meet the requirements pertaining to energy savings specified in provisions of the building law, or actions have been taken for the purpose of reducing the consumption of energy supplied to such buildings,

c) construction of a technical connection to a centralized heat source, in connection with the eradication of a local heat source, resulting in reduction of the cost of supplying heat to a building specified in Subpoint a,

d) complete or partial replacement of energy sources with renewable sources or the application of high-efficiency cogeneration;

3) renovation projects – projects related to thermal modernization consisting of:

a) renovation of multifamily buildings,

b) replacement of windows in multifamily buildings or the renovation of balconies, even when used exclusively by owners of the given apartment,

c) reconstruction of multifamily buildings, resulting in their improvement,

d) equipping of multifamily buildings with installations and equipment required for multifamily buildings being commissioned, in conformance with technical-building regulations;

4) collective residential building – social care home, worker hostel, school dormitory, student dormitory, children's home, retirement home, homeless shelter and buildings with a similar purpose, including rectories, convents and monasteries;

5) multifamily building – residential building with more than two dwelling units;

6) local heating network – heating network providing heat to buildings from local heat sources;

7) local heat source:

a) boiler room or heat node from which the heating medium is delivered directly to the heating and hot water installations of a building,

b) housing estate heating station or heat exchanger with nominal power of up to 11.6 MW, supplying heat to buildings;

8) energy audit – report specifying the scope and technical/economic parameters of a thermal modernization project, identifying the optimal solution, with particular reference to the cost of project implementation and energy savings, at the same time constituting guidelines for the building design;

9) renovation audit – report specifying the scope and technical/economic parameters of a renovation project, at the same time constituting guidelines for the building design;

10) bonus – thermal modernization bonus, renovation bonus or compensatory bonus;

11) crediting bank – financial institution authorized to grant credits, providing credit for a thermal modernization project, renovation project or renovation of a single-family residential building, which meet criteria specified in Article 10 Point 1;

12) project cost indicator – relation of the cost of a thermal modernization project, renovation project or renovation cost of a single-family residential building, meeting the criteria specified in Article 10 Point 1, calculated per 1 m^2 of the residential building's usable area, to the price of 1 m^2 of the residential building's usable area, established for the purposes of calculating the warranty bonus for the quarter in which the application for the bonus was submitted;

13) municipal dwelling unit – dwelling unit as defined in the Act on Protection of Tenant Rights, Commune Residential Resources and Amendment of the Civil Code of June 21, 2001 (Journal of Laws of 2005, No. 31, Item 266, as amended[2]), rented on the basis of an administrative decision on allocation or on the basis of another legal title, prior to the introduction of public residential or special rental procedures in the given locality, with rent for the dwelling unit:

    a) regulated,

    b) limited by law to 3% percent per annum of the premises' replacement value,

    c) increase of rent limited by law to 10 % of the previous rent, on an annual basis,
    – during any period between November 12, 1994 and April 25, 2005;

14) conversion indicator – conversion indicator of the cost of replacement of 1 m^2 of usable area a residential building, as defined in the Act on Protection of Tenant Rights, Commune Residential Resources and Amendment of the Civil Code of June 21, 2001, in effect on the date that the application for the bonus was submitted, for the location of the building that the application pertains to.

[2] Amendments to the consolidated text of the cited Act have been published in the Journal of Laws of 2005, No. 69, Item 626, the Journal of Laws of 2006, No. 86, Item 602, No. 167, Item 1193 and No. 249, Item 1833 and the Journal of Laws of 2007, No. 128, Item 902 and No. 173, Item 1218.

CHAPTER 2

Thermal modernization bonus

Article 3.

In connection with the implementation of a thermal modernization project, the investor is entitled to a bonus for repayment of part of the credit obtained for the thermal modernization project, hereinafter referred to as the "thermal modernization bonus", provided that the energy audit indicates that the modernization project will result in the following:

1) reduction in annual energy demand, as referred to in Article 2 Point 2 Subpoint a:
   a) in buildings in which only the heating system is being modernized – by at least 10 %,
   b) in buildings in which modernization of the heating system was performed after 1984 – by at least 15 %,
   c) in other buildings – by at least 25 %, or
2) reduction in annual energy losses, referred to in Article 2 Point 2 Subpoint b – by at least 25 %, or
3) reduction in annual heat supply costs, referred to in Article 2 Point 2 Subpoint c – by at least 20 %, or
4) replacement of the energy source with a renewable source or the application of high efficiency cogeneration.

Article 4.

The credit referred to in Article 3 shall not be used to finance work for which:

1) another credit was obtained, for which a thermal modernization bonus or renovation bonus was awarded;
2) funding was obtained from the budget of the European Union.

Article 5.

1. The amount of a thermal modernization bonus shall constitute 20 % of the utilized amount of the credit, obtained for the implementation of a thermal modernization project, subject to the provisions of Point 2.

2. The amount of a thermal modernization bonus shall not exceed:

1) 16 % of costs incurred for implementation of a thermal modernization project, and
2) double the amount of anticipated annual savings of energy costs, calculated on the basis of an energy audit.

CHAPTER 3

Renovation bonus

Article 6.

1. The subject of a renovation project, constituting the basis of an application for a renovation bonus, may only be a multifamily building, commissioned for use prior to August 14, 1961.

2. The commencement of use, referred to in Point 1, shall be confirmed by the investor by any document indicating the possibility of the multifamily building actually being utilized, and when presenting such a document is not possible, by submission of a written statement certifying that the building is being utilized.

Article 7.

1. An investor being a natural person, a housing community with majority stake holding of natural persons, a housing cooperative or social housing association, shall be entitled to a bonus for repayment of part of the credit obtained for implementation of a renovation project, hereinafter referred to as "renovation bonus", provided that:

1) implementation of the project results in reduction of annual demand for energy delivered to a multifamily building for the purpose of heating and heating domestic water, by at least 10 %, subject to the provisions of Point 2 and Point 3 Subpoints 1 and 2, and

2) the cost indicator of the project is not less than 0.05 and not more than 0.70, subject to the provisions of Point 3 Subpoint 3.

2. When the cost indicator of a renovation project exceeds 0.3, the condition for obtaining a renovation bonus shall be reduction in annual energy demand, referred to in Article 2 Point 2 Subpoint a, of at least 25 %.

3. When the given multifamily building was the subject of:

1) a renovation project, pursuant to which a renovation bonus was granted – the condition for obtaining a bonus related to a subsequent renovation project pertaining to this building shall be obtainment of savings, referred to in Point 1 Subpoint 1, of at least 5 %, unless, as a result of previously completed projects, savings were obtained of at least 25 % of the annual energy demand, prior to implementation of the first renovation project;

2) a thermal modernization project, in connection with which a thermal modernization bonus was granted – the conditions specified in Subpoint 1 and in Point 1 Subpoint 1 and Point 2 shall not apply;

3) a renovation project or thermal modernization project, in connection with which a renovation bonus or thermal modernization bonus was respectively granted – the total value of the project cost indicator as of the day of submission of each application for a bonus shall not exceed 0.70.

4. The provisions of Point 3 Subpoints 2 and 3 shall also apply with respect to a thermal modernization project, in connection with which a thermal modernization

bonus was granted, in conformance with regulations that were binding before the entry into force of this Act.

5. An investor, referred to in Point 1, who submits more than one bonus application shall be entitled to a renovation bonus, provided that:

1) the applications concern different scopes of work,

2) the total cost indicator of these projects and of the project, referred to in Point 3 Subpoint 3, as of the date of submission of each application, does not exceed 0.70.

6. If the renovation audit of a multifamily building indicates that it meets the energy savings requirements specified in provisions of the building law, the conditions specified in Point 1 Subpoint 1 and Point 2 and in Point 3 Subpoint 1 shall not apply.

Article 8.

The credit, referred to in Article 7 Point 1, shall not be used for:

1) renovation of dwelling units, with the exception of works referred to in Article 2 Point 3 Subpoint b;

2) work leading to the expansion of usable area of a building;

3) financing of works for which:

   a) another credit was obtained, for which a thermal modernization bonus or renovation bonus was awarded,

   b) funds were obtained from the budget of the European Union.

Article 9.

1. The amount of a renovation bonus shall constitute 20 % of the utilized amount of the credit, referred to in Article 7 Point 1, however not more than 15 % of the cost of a renovation project, subject to the provisions of Point 2.

2. If a building that is the subject a renovation project contains, in addition to dwelling units, other premises, the amount of the renovation bonus shall constitute the product of the amount determined in accordance with Point 1 and the indicator of the share of the usable areas of the dwelling units in the total usable area of the building.

3. A renovation bonus constituting public aid, in the meaning of Article 87 Point 1 of the Treaty Establishing the European Community, shall be granted as *de minimis* aid, in compliance with the conditions laid down in Commission (EC) Regulation No. 1998/2006 of December 15, 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (Official Journal of the European Union L 379, p. 5). A renovation bonus shall not be awarded to an entity in a difficult economic situation, meeting the criteria specified in provisions of European Union law, pertaining to public aid[3].

[3] These criteria are specified in Points 9–11 of Community Guidelines regarding State Aid for Rescuing and Restructuring Firms in Difficulty (EU Official Journal C 244 of October 1,

CHAPTER 4

Compensatory bonus

Article 10.

1. An investor who is a natural person, who on April 25, 2005 was the owner or heir to a residential building, or who after that date became the heir of an owner of such a residential building, in which there was at least one municipal unit, shall be entitled to a compensatory bonus.

2. A compensatory bonus shall be granted only once with respect to a single building.

3. A compensatory bonus shall be used for partial repayment of a credit obtained for the implementation of:

1) a renovation project,

2) renovation of a single-family residential building
– if they pertain to a building that meets the criteria specified in Point 1.

4. A compensatory bonus shall be awarded jointly with a renovation bonus, excluding the renovations specified in Point 3 Subpoint 2.

Article 11.

1. Subject to the provisions of Points 2 and 3, the amount of a compensatory bonus shall be equal to the product of the project cost indicator and an amount equal to 2 % of the conversion indicator for each 1 m2 of usable area of a municipal unit for each year of the period during which the restrictions specified in Article 2 Point 13 were in effect with respect to the unit, during the period between November 12, 1994 and April 25, 2005; and in the case of buildings acquired after November 12, 1994 in a manner other than through inheritance – from the day of acquisition till April 25, 2005.

2. When the project cost indicator is lower than 0.5, for the purposes of calculating the amount of the compensatory bonus, it shall be assumed that the indicator is equal to 0.5.

3. When the project cost indicator is greater than 0.7, for the purposes of calculating the amount of the compensatory bonus, it shall be assumed that the indicator is equal to 0.7.

4. The formula used to calculate the amount of the compensatory bonus is specified in the Attachment to the Act.

2004, page 2).

CHAPTER 5

Principles governing the granting of bonuses

Article 12.

1. Bonuses are granted by the Bank Gospodarstwa Krajowego, hereinafter referred to as the "BGK", out of the Thermal Modernization and Renovation Fund, hereinafter referred to as the "Fund".

2. The investor shall submit an application for the granting of a bonus to the BGK via the financing bank.

3. The financing bank, in delivering the application referred to in Point 2 to the BGK, appends it with a crediting agreement , concluded on condition of the bonus being granted.

Article 13.

1. The following documents shall be attached to an application for granting a thermal modernization bonus:

1) energy audit;

2) statement by the investor that the credit to finance the thermal modernization project will not be used to finance work for which funds have been obtained from the budget of the European Union and that no other credit has been obtained for which a thermal modernization bonus or renovation bonus was granted.

2. The energy audit shall contain:

1) identification data of:

   a) the building, local heat sources or local heating network

   b) the investor, including the first and last name for a natural person, mail address and PESEL number, and in the case of an alien, the name and number of his/her identity document;

2) evaluation of the technical condition of the building, local heat source or local heating network;

3) description of feasible scenarios for implementing the thermal modernization project;

4) identification of the optimum scenario for implementing the thermal modernization project.

Article 14.

1. The following documents shall be attached to an application for the granting of a renovation bonus:

1) renovation audit;

2) statement by the investor that the credit to finance the thermal modernization project will not be used to finance work for which funds have been obtained from the budget of the European Union and that no other credit

has been obtained for which a thermal modernization bonus or renovation bonus was granted.

3) all certificates concerning *de minimis* aid obtained during the current tax year and during two preceding tax years.

2. The renovation audit shall contain:

1) identification data of:

a) the residential building,

b) the investor, including the first and last name for a natural person, mail address and PESEL number, and in the case of aliens, name and number of his/her identity document;

2) calculation of the value of the E indicator, specifying the computational demand for final energy (heat) to heat the building during a heating season;

3) specification of the tangible scope of works required to meet the conditions, referred to in Article 7 Point 1 Subpoint 1 or Point 2;

4) plan of renovation works, referred to in regulations specifying conditions for utilizing residential buildings;

5) specification of the scope of renovation works covered by the renovation project being applied for, in conformance with the plan of renovation works and tangible scope of works, referred to in Point 3;

6) documents specifying the estimated costs of the project.

Article 15.

1. The application for a compensatory bonus shall be submitted together with the application for a renovation bonus, unless it pertains to a credit for renovation, referred to in Article 10 Point 3 Subpoint 2.

2. The application for a compensatory bonus shall contain:

1) identification data of the residential building;

2) the first and last name of the investor, mail address and PESEL number, and in the case of aliens, name and number of his/her identity document;

3) information on municipal units, their usable area and periods for which their rental was subject to limitations, referred to in Article 2 Point 13, to the extent required to calculate the amount of the compensatory bonus, in conformance with Article 11.

3. Certified copies of documents confirming the information referred to in Point 2 Subpoint 3 shall be attached to the application for a compensatory bonus.

Article 16.

1. The BGK shall grant bonuses within the limits of available Fund resources, subject to the limits for bonuses of each type, specified in the financial plan of the Fund.

2. In the event of Fund resources being temporarily unavailable:

1) The BGK shall publish information on the lack of available Fund resources and the crediting banks shall suspend acceptance of applications, beginning on the day after such an announcement is made. Reinstatement of application acceptance after a period when resources were temporarily unavailable shall take place under the same procedure;

2) The BGK shall promptly notify the investor and crediting bank when an application for the granting of a bonus is left without being considered. Applications that are not considered shall be considered first after the Fund obtains additional resources.

3. The BGK publishes the information referred to in Point 2 Subpoint 1, in *Biuletyn Informacji Publicznej* (Public Information Bulletin).

Article 17.

1. The BGK shall consider applications for bonuses in the order they are received.

2. The BGK shall perform verification of the energy audit or the renovation audit, in the part specified in Article 14 Point 2 Subpoints 2 and 3, or shall assign this task to other entities, selected in conformance with the Public Orders Act of January 29, 2004 (Journal of Laws of 2007, No. 223, Item 1655 and Journal of Laws of 2008, No. 171, Item 1058 and No. 220, Item 1420).

3. The BGK shall notify the investor and the crediting bank of a negative verification of an audit.

4. In the event of positive verification of the audit and ascertainment that conditions for granting the bonus have been met, the BGK shall notify the investor and the financing bank about the granting of the bonus, specifying its amount.

5. In the event of amendment of the crediting agreement with regard to the scope of the project or the amount of the credit, it shall be necessary to resubmit the bonus application, except when the amendment of the crediting agreement only pertains to the amount of the loan and takes place prior to the BGK making a decision on granting the bonus.

Article 18.

1. The minister competent in matters of building and spatial and residential management shall specify, by way of regulation, the detailed scope and form of an energy audit and an renovation audit, in the part specified in Article 14 Point 2 Subpoints 2 and 3, and also the algorithm for evaluating the profitability of a thermal modernization project and specimens of energy audit and renovation audit cards, in the parts specified in Article 14 Point 2 Subpoints 2 and 3, with a view to ensuring the choice of optimum project scenarios and correct performance of the audits.

2. The minister competent in matters of building and spatial and residential management shall specify, by way of regulation, the detailed manner and procedure for verifying energy audits and renovation audits, in the parts specified in Article 14 Point 2 Points 2 and 3, and detailed conditions to be met by entities to

which the BGK may assign the verification of such audits, with a view to ensuring efficient and proper verification of the audits.

Article 19.

1. Subject to the provisions of Point 3, the BGK shall transfer the bonus to the crediting bank, provided that the project has been:

1) implemented in conformance with the building design documentation;

2) completed by the deadline specified in the crediting agreement.

2. The crediting bank shall credit the transferred bonus against repayment of the credit received by the investor.

3. The BGK shall transfer the compensatory bonus, after utilization of the credit to the amount that is not less than the amount of the granted compensatory bonus.

Article 20.

The BGK shall maintain an electronic database register of buildings with respect to which a bonus has been granted, and a register of granted and paid bonuses, taking into account the need to affirm the fulfillment of the conditions for granting a bonus, referred to in Article 7 and Article 10 Point 2.

Article 21.

1. The BGK shall charge investors a commission fee, amounting to 0.6 % of each granted bonus.

2. The crediting bank shall deduct the commission fee, referred to in Point 1, from the first tranche of the extended credit and transfer it to the account of the Fund.

Article 22.

The principles governing cooperation between the BGK and the crediting bank with respect to procedure and deadlines for settlements connected with granted bonuses shall be specified in an agreement.

Article 23.

1. The Thermal Modernization and Renovation Fund is created within the BGK.

2. The Fund shall take over the assets and liabilities of the Thermal Modernization Fund, created on the basis of the Act referred to in Article 30.

3. The minister competent in matters of the State Treasury shall adapt the statute of the BGK to comply with the provisions of this Act, with a view to the principles governing the creation and utilization of the Fund.

Article 24.

1. The Fund shall consist of:

1) funds transferred from the state budget – in amounts specified in the Budget Act;

2) interest on Fund deposits in banks;

3) revenue from the investment of Fund resources in securities issued by the State Treasury or the National Bank of Poland and in securities guaranteed by the State Treasury or the National Bank of Poland, as well as participation units in money market funds, referred to in Article 178 of the Act on Investment Funds dated May 27, 2004 (Journal of Laws No. 146, Item 1546, as amended[4]);

4) gifts and inheritances;

5) other revenue.

2. The total deposits, referred to in Point 1 Subpoint 2, in a single bank or in a group of banks connected through capital or organizational structure, shall not exceed 15 % of the periodically free Fund resources at any time.

Article 25.

1. Fund resources shall be used to:

1) pay granted bonuses;

2) cover the cost of verifying energy audits and renovation audits;

3) cover Fund operating costs;

4) cover Fund promotion costs.

2. Periodically free Fund resources may be:

1) invested in other banks, subject to the provisions of Article 24 Point 2;

2) invested in securities or participation units, referred to in Article 24 Point 1 Subpoint 3.

Article 26.

The BGK:

1) shall isolate the Fund financial plan within its financial plan, elaborated in consultation with the minister competent in public finances, the minister competent in environmental affairs and the minister competent in building and spatial and residential management;

2) a separate balance sheet and profit and loss statement shall be prepared for the Fund, comprising part of the bank's financial statements.

Article 27.

1. The BGK shall submit quarterly reports to the minister competent in building and spatial and residential management, by the end of the month subsequent to each quarter, on the amount of bonuses awarded, anticipated deadlines for their transfer and the amount of bonuses paid, separately for thermal modernization bonuses, renovation bonuses and compensatory bonuses.

[4] Amendments to the cited Act have been published in the Journal of Laws of 2005, No. 83, Item 719, No. 183, Item 1537 and 1538 and No. 184, Item 1539, z 2006, No. 157, Item 1119 and the Polish Journal of Laws of 2007, No. 112, Item 769.

2. Based on the information obtained from energy audits, the BGK shall submit annual reports to the minister competent in environmental affairs on planned changes in demand for fuels and planned reduction in energy demand, anticipated as a result of implemented thermal modernization projects.

3. The BGK shall submit quarterly reports on the implementation of the Fund's financial plan to the minister competent in building and spatial and residential management.

CHAPTER 6

Amendments and final provisions

Article 28.

In the Personal Income Tax Act of July 26, 1991 (Journal of Laws of 2000, No. 14, Item 176, as amended[5]) in Article 21 Point 1 Subpoint 132, the period shall be replaced with a comma and the following Subpoint 133 shall be added:

"133) a thermal modernization bonus, a renovation bonus and a compensatory bonus, obtained on the basis of the Act on Supporting Thermal Modernization and Renovation dated November 21, 2008 (Journal of Laws No. 223, Item 1459)."

Article 29.

In the Act on State Assistance in the Repayment of Certain Residential Credits, Obtaining Warranty Bonuses and Reimbursement of Warranty Bonuses Paid by

[5] Amendments to the consolidated text of the cited Act have been published in the Journal of Laws of 2000, No. 22, Item 270, No. 60, Item 703, No. 70, Item 816, No. 104, Item 1104, No. 117, Item 1228 and No. 122, Item 1324, the Journal of Laws of 2001, No. 4, Item 27, No. 8, Item 64, No. 52, Item 539, No. 73, Item 764, No. 74, Item 784, No. 88, Item 961, No. 89, Item 968, No. 102, Item 1117, No. 106, Item 1150, No. 110, Item 1190, No. 125, Item 1363 and 1370 and No. 134, Item 1509, the Journal of Laws of 2002, No. 19, Item 199, No. 25, Item 253, No. 74, Item 676, No. 78, Item 715, No. 89, Item 804, No. 135, Item 1146, No. 141, Item 1182, No. 169, Item 1384, No. 181, Item 1515, No. 200, Item 1679 and No. 240, Item 2058, the Journal of Laws of 2003, No. 7, Item 79, No. 45, Item 391, No. 65, Item 595, No. 84, Item 774, No. 90, Item 844, No. 96, Item 874, No. 122, Item 1143, No. 135, Item 1268, No. 137, Item 1302, No. 166, Item 1608, No. 202, Item 1956, No. 222, Item 2201, No. 223, Item 2217 and No. 228, Item 2255, the Journal of Laws of 2004, No. 29, Item 257, No. 54, Item 535, No. 93, Item 894, No. 99, Item 1001, No. 109, Item 1163, No. 116, Item 1203, 1205 and 1207, No. 120, Item 1252, No. 123, Item 1291, No. 162, Item 1691, No. 210, Item 2135, No. 263, Item 2619 and No. 281, Items 2779 and 2781, the Journal of Laws of 2005, No. 25, Item 202, No. 30, Item 262, No. 85, Item 725, No. 86, Item 732, No. 90, Item 757, No. 102, Item 852, No. 143, Item 1199 and 1202, No. 155, Item 1298, No. 164, Item 1365 and 1366, No. 169, Item 1418 and 1420, No. 177, Item 1468, No. 179, Item 1484, No. 180, Item 1495 and No. 183, Item 1538, the Journal of Laws of 2006, No. 46, Item 328, No. 104, Item 708 and 711, No. 107, Item 723, No. 136, Item 970, No. 157, Item 1119, No. 183, Item 1353 and 1354, No. 217, Item 1588, No. 226, Item 1657 and No. 249, Item 1824, the Journal of Laws of 2007, No. 35, Item 219, No. 99, Item 658, No. 115, Item 791 and 793, No. 176, Item 1243, No. 181, Item 1288, No. 191, Item 1361 and 1367, No. 192, Item 1378 and No. 211, Item 1549 and the Polish Journal of Laws of 2008, No. 97, Item 623, No. 141, Item 888, No. 143, Item 894, No. 209, Item 1316 and No. 220, Item 1431 and 1432.

Banks of November 30, 1995 (Journal of Laws of 2003, No. 119, Item 1115, as subsequently amended[6]), the following amendments shall be introduced:

1) in Article 3 Point 1 Subpoint 9, the period shall be replaced with a semicolon and the following Subpoint 10 shall be added:
"10) renovation of a dwelling unit, owned by the owner of a housing savings book, or to which the owner of a housing savings book has cooperative rights, consisting in the replacement of:
   a) windows, or
   b) gas installation, or
   c) electrical installation,
   – provided that the total cost of the work is not less than the amount of the deposit in the housing savings book together with the warranty bonus, established as of the date that the application for payment of the warranty bonus is submitted, reflecting the limitations specified in Article 3d.";
2) after Article 3c, the following Article 3d shall be added:
"Art. 3d. 1. In order to exercise his rights to a warranty bonus on the basis of Article 3 Point 1 Subpoint 10, the owner of a housing savings book shall submit an application for payment of the warranty bonus in the year determined on the basis of the year when the housing savings book was established.
2. The period between the years in which the owner of a housing savings book may submit an application for payment of a warranty bonus on the basis of Article 3 Point 1 Subpoint 10, shall not exceed 3 years.
3. The minister competent in building and spatial and housing management shall specify, by way of a regulation, after obtaining the opinion of the minister competent in public finances, a timetable for the implementation of rights to warranty bonuses in connection with the renovation of a dwelling unit, taking into consideration the provisions of Points 1 and 2 and guided by the necessity of evenly distributing state budget expenditures due to the refunding of warranty bonuses in the respective years."

Article 30.

Previously binding provisions shall apply to applications for thermal modernization bonuses, submitted by investors prior to the effective date of this Act.

Article 31.

The Act on Supporting Thermal Modernization Projects of December 18, 1998 (Polish Journal of Laws No. 162, Item 1121, as subsequently amended[7] is hereby superseded.

[6] Amendments to the consolidated text of the cited Act have been published in the Journal of Laws of 2004, No. 213, Item 2157, the Journal of Laws of 2005, No. 94, Item 786 and the Journal of Laws of 2006, No. 53, Item 385 and No. 249, Item 1828.

[7] Amendments to the cited Act have been published in the Journal of Laws of 2000, No.

Article 32.

This Act shall enter into force 3 months after its publication.

Attachment to the Act of November 21 2008 (item 1459)

FORMULA FOR CALCULATING THE AMOUNT OF THE COMPENSATORY BONUS

$$P = k * 0{,}02 * w * \sum_{i=1}^{n} (pu_i * \frac{m_i}{12})$$

Explanations:

P – the amount of the compensatory bonus;

In conformance with Article 11 Points 2 and 3:

k = a) 0.5, under if the project cost indicator is less than 0.5,

b) project cost indicator, if the indicator is not less than 0.5 and not more than 0.7,

c) 0.7, if project cost indicator is more than 0.7;

w – value of the conversion indicator, in effect on the date when the loan application is submitted for the commune, where the building is located;

n – number of municipal units in the building;

pui – usable area of the i-th municipal unit;

mi – period, expressed in the number of months, for which the limitations specified in Article 2 Point 12 were in effect for the i-th municipal unit, during the period between November 12, 1994 and April 25, 2005, and if the building was acquired after November 12, 1994 in a manner other than through inheritance – the period between the acquisition date and April 25, 2005.

The quantity of months is rounded upwards to full months.

The result of calculating the amount of the compensatory bonus is rounded upwards to full PLN.

48, Item 550, the Journal of Laws of 2001, No. 76, Item 808 and No. 154, Item 1800, the Journal of Laws of 2002, No. 25, Item 253, the Journal of Laws of 2004, No. 146, Item 1546 and No. 213, Item 2157 and the Polish Journal of Laws of 2006, No. 220, Item 1600.

Document 4:

CDDH ACTIVITY REPORT: Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights

I. Introduction

1. In July 2007, the Ministers' Deputies asked the Steering Committee for Human Rights (CDDH) to examine in depth the concrete follow-up that could be given to the recommendations contained in the Report of the Group of Wise Persons to the Committee of Ministers, taking into account the various contributions thereto and events thereafter, along with Lord Woolf's report on the Court's working methods and earlier initiatives. The CDDH therefore established a Reflection Group (DH-S-GDR) in November 2007, whose ad hoc terms of reference appear at Appendix I and which met a total of five times. In October 2008, the Ministers' Deputies supplemented the terms of reference by asking the CDDH to give priority attention to certain matters identified at the Stockholm Colloquy (9-10 June 2008) (see Appendix II).

2. Mr Roeland BÖCKER (the Netherlands) was elected Chairperson and Mrs Anne-Françoise TISSIER (France) Vice-Chair. The list of participants at the various meetings appears at Appendix III. In the course of its work, the Group considered a wide range of detailed proposals covering many aspects of the Convention system at national and European level, with the benefit of contributions from representatives of the Registry of the European Court of Human Rights, the Office of the Council of Europe Commissioner for Human Rights and the European Commission for Democracy through Law (see Appendix IV for a list of the main documents). During its final meeting, it also held a half-day hearing with representatives of non-governmental organisations and the European Group of National Human Rights Institutions; the agenda of and list of participants at this hearing appear at Appendix V.

3. The present report constitutes the activity report requested by the Committee of Ministers for 30 April 2009. Since discussion of certain proposals not requiring amendment of the Convention, as well as those requiring amendment, continued after the CDDH adopted the Interim Report at its 66th meeting (25-28

March 2008), the present Activity Report represents an overview of activities and conclusions on both sets of proposals throughout its mandate.

4. It should be noted that the non-entry into force of Protocol No. 14 to the Convention has had a serious impact on the work. As a result, it has been impossible to "draw up an evaluation of the first effects produced by Protocol No. 14 during the first year following its entry into force," as required by the terms of reference. Furthermore, the Group of Wise Persons' proposals presupposed that Protocol No. 14 would be in force. Consideration of these proposals, as well as others that would require amendment of the Convention, was thus made difficult, since the non-entry into force of Protocol No. 14 meant that the context within which such proposals would function was uncertain and the effects of already envisaged intermediary steps were unknown.

5. On the other hand, the Group contributed to the work of the CDDH on the questions of whether and how to put into practice certain procedures foreseen to increase the Court's case-processing capacity. The Group's discussions on Protocol No. 14, including its contribution to the afore-mentioned work of the CDDH, are reflected in the reports of its 3rd, 4th and 5th meetings.

6. It should be recognised that the suggestions contained at the end of this report may not suffice to arrest, let alone reverse, the continuing deterioration in the situation of the Court.

II. Proposals not requiring amendment of the Convention

Filtering of applications

7. The question of how to deal with (i) the very high proportion of inadmissible cases and (ii) the high proportion of admissible cases that raise issues on which the Court's case-law is clear is perhaps the greatest challenge facing the Court. The measures foreseen in Protocol No. 14 represent an essential first step in responding to this challenge. Nevertheless, further reflection is needed to identify measures that would be effective in both the immediate term, before the relevant measures foreseen by Protocol No. 14 are in effect, and, looking beyond Protocol No. 14, the long term.

8. Various possibilities exist for reforming, without amendment of the Convention, the way the Court deals with applications. One example would be creation of a pool of judges within the existing Court devoted to filtering, intended to deal with inadmissible cases under strict management procedures. Even if this work might lack the intellectual stimulation of that involved in deliberating on full judgments – which could be alleviated by a system of rotation – it might be at least a useful short-term palliative, in particular allowing the Court to address the backlog as efficiently as possible.

Improving domestic remedies

9. The Group of Wise Persons had proposed that "Domestic remedies for redressing violations of the rights secured by the Convention should be improved. The length of proceedings in civil, criminal and administrative cases, which is one of the main sources of litigation before the Court, highlights the need for such an improvement..." To this end, they proposed that a convention text be drafted, based largely on the principles set out by the Court in the Grand Chamber judgment in the case of Scordino v. Italy (No. 1).

10. The Ministers' Deputies, in their decision on follow-up to the Stockholm Colloquy, called on the CDDH to give priority attention to and report on "the possibility of drawing up more specific non-binding instruments on effective domestic remedies regarding in particular excessive length of proceedings, including practical steps to prevent violations."

11. As the Deputies' decision suggests, it would indeed be more appropriate to address the issue by means of a non-binding instrument, not least because this would allow for greater flexibility, should revision prove necessary, than would be the case for a convention text. Given the existence of Article 13 and the Court's dynamic interpretation thereof in its case-law, there is no apparent need for an additional convention text.

12. The proposal to take further steps to improve domestic remedies reflects the subsidiary nature of the Court. Effective domestic remedies are particularly important with respect to length of judicial proceedings, since cases raising these issues represent a very large part of the Court's caseload. The Court's case-law on this aspect of the problem is sufficiently developed to form a solid basis for further work, as a first step in implementing the Deputies' decision. The report of the European Commission for Democracy through Law on the effectiveness of national remedies in respect of excessive length of proceedings could also provide inspiration, as could relevant activities of the European Commission for the Efficiency of Justice. The role of national human rights institutions, Ombudspersons, non-governmental organisations and other civil society actors in identifying shortcomings and helping to establish and improve domestic remedies should also be taken into account.

13. The existence of effective remedies, whether acceleratory or compensatory, does not relieve the State of the obligation to take measures addressing the root causes of excessive length of proceedings, which may involve practices as much as legislative deficiencies.

14. Work should begin on a non-binding Committee of Ministers' instrument on domestic remedies for excessive length of proceedings. So as to be of maximum practical value to national authorities when introducing or improving such remedies, it should be short and accompanied by annexed "guidelines" or a "guide to best practice". Further work could take as its starting point the Secretariat background documents considered by the Reflection Group. Work should be under-

taken in liaison with other Council of Europe bodies that have been involved on the issue.

Pilot judgment procedure

15. The Group of Wise Persons had encouraged the Court "to make the fullest possible use of the 'pilot judgment' procedure. In the light of practical experience, consideration would have to be given in future to the question of whether the existing judicial machinery, including the Court's rules of procedure, will suffice for this model to be able to produce the desired results or whether a reform of the Convention should be contemplated in this connection."

16. The pilot judgment procedure is a very useful and flexible tool, or set of tools, allowing the Court to resolve with a single judgment a large number of applications that would be likely, if submitted, to prove admissible and even well-founded, thereby stemming the flow of future "clone-cases" and thus reducing its net workload over time. The Court should be encouraged to make full use of it in all appropriate categories of case. At present, it remains under development within the Court and is not yet susceptible to formal definition. In order to dispel uncertainty and possible reticence on the part of both States and other interested parties, therefore, it would be useful if the Court could explain what the procedure involves, with the eventual goal of issuing applicable rules.

17. The potential disadvantage, however, is that other applications are delayed and the applicants may eventually find themselves again involved in lengthy and uncertain domestic proceedings. To avoid this eventuality, it is essential to ensure prompt and effective implementation of the general measures identified in the pilot judgment; this helps avoid applicants whose cases have been frozen from being forced to request the Court to reconsider their cases in Strasbourg.

18. It is also important that the Council of Europe provide appropriate technical and cooperation assistance to member States in implementing the necessary general measures identified in a pilot judgment and that the necessary resources be made available for this purpose. As mentioned at the Stockholm Colloquy, the role of the Committee of Ministers in ensuring enforcement and implementation of judgments relating to systemic problems should also be strengthened.

19. Whilst there is not yet a need for formalisation of the pilot judgment procedure at inter-governmental level, the forthcoming seminar on the pilot judgment procedure (Warsaw, 14–15 May 2009) will represent an important opportunity to study the issue further. One possible outcome of this seminar could be preparation of a manual whereby States would share their various experiences of the pilot judgment procedure. Whilst this would in no way be binding on the Court's internal administration of a case, it would allow States and applicants better to understand and prepare for what may be required of them.

Unilateral declarations

20. Unilateral declarations by respondent States, allowing the Court to strike certain cases out of its list, could, in certain circumstances, usefully contribute to

decreasing the Court's caseload, in particular where it was not possible to reach a friendly settlement.

21. Where such unilateral declarations are made in connection with repetitive cases, it may be important to ensure that appropriate general measures are or have been taken in order to help stem the flow of such cases in future and thereby maximise the positive effect on the Court's workload. This could be a relevant consideration for the Court in reaching its decision to strike the case out of its list. Further thought may be required on the question of whether and how to supervise the execution of general measures proposed in such circumstances, bearing in mind that the Court may always restore a case to its list under Article 37(2).

Applications and admissibility

22. Lord Woolf, in his "Review of the working methods of the European Court of Human Rights," stated that "The Court should redefine what constitutes an application. It should only deal with properly completed application forms which contain all the information required for the Court to process the application. This would simplify the task of the Registry, as it would not have to register and store letters from potential applicants. It would also reduce the total number of applications dealt with by the Court, and would also make the processing of applications much simpler."

23. Since Lord Woolf's review, the Court has revised its practice so that an applicant who does not include a completed form in their initial correspondence with the Court will receive a letter from the Registry directing them to fill out and return the form within a period of 8 weeks. Failure to do so means that their first letter will not interrupt the running of the six-month time limit. This more rigorous practice is to be supported and encouraged.

Developing the Court's case-law ŕ droit constant

24. As the President of the Court has noted, the Court could itself contribute to relieving its own situation by developing its interpretation of certain articles of the Convention relating to procedure. For example, Article 37(1)(c), which deals with the circumstances in which the Court can strike cases out of its list, could be interpreted in such a way as to give effect to the rule *de minimis non curat praetor*, subject to the safeguard in the second part of Article 37(1).

Secondment of national judges to the Registry of the Court

25. The secondment of national judges to the Registry of the Court could be beneficial both to the Court and to domestic legal systems by improving mutual understanding. It would thus respond to the need for enhancing national judges' knowledge of Convention issues. The fact that an experienced national judge could work for a certain period at the Registry also has the potential to reinforce the operational efficiency of the latter. The secondment of national judges, as well as of other high-level independent lawyers, where appropriate, should therefore

be encouraged, notably by simplifying the administrative procedures at national level.

Enhancing States parties' understanding and application of the general principles of the Court's case-law contained in judgments of principle

26. The Ministers' Deputies, in their decision on follow-up to the Stockholm Colloquy, called on the CDDH to give priority attention to and report on "ways of raising states' awareness of judgments relevant to all Council of Europe member states, including through third-party interventions, and assisting states where necessary to take account of the relevant principles in their domestic law in order to avoid violations of the Convention".

27. It may be beneficial for greater use to be made of third party interventions by States as a means of assisting them better to understand and apply the general principles of the Court's case-law, by involving them in litigation on specific legal issues. This may allow them to identify and correct or remedy situations that could lead to successful applications being made against them before the Court, thereby reinforcing the subsidiary character of the system and reducing the Court's future work-load. Third party interventions can also help the Court in cases giving rise to judgments of principle, by providing information on the legal and factual situation in other States. This could contribute to the principles found in Court judgments being more frequently applied in States parties other than the respondent, thereby enhancing the authority and effect of the Court's judgments and helping to remedy similar problems at national level.

28. The Convention and the Rules of Court already set out the legal basis on which States may make third-party interventions. What is needed are practical measures to increase and facilitate the use of such interventions. States should investigate and pursue means for sharing information on communicated cases amongst themselves, with a view to identifying those cases suitable to third party interventions systematically and at the earliest possible stage. To this end, a "network of Agents" should be established, supported by an on-line discussion forum.

29. Third party interventions by national human rights institutions, non-governmental organisations and other civil society actors also play an important part in the Convention system. In order to ensure that such bodies are able to fulfil this role, they must be given an effective opportunity to request leave.

30. To this end, the Court should be encouraged to take appropriate practical steps to promote greater use of third party interventions, notably by taking a more pro-active approach to identifying suitable cases and inviting third party interventions and by exercising more flexibly the discretion to extend the time limits. In addition, the Court should be encouraged to issue prompt press releases whenever it invites or grants leave to make a third party intervention or a case has been identified as likely to lead to a judgment of principle.

Provision of information to potential applicants to the Court

31. The representative of the Registry of the Court provided information concerning the Warsaw pilot project. Devised in the context of the "upstream" problem of the large number of applications from Poland with no prospects of success, this project clearly responded to a need for information at national level among potential applicants, but also current applicants and those whose applications had been found inadmissible, as well as judges, lawyers, students and non-governmental organisations. The Court's conclusion was that the project achieved several worthwhile aims. It was also beneficial in reducing individuals' need to approach the Registry or the Polish agent for information.

32. The results of the project justify further investigation of the issue of provision of information to potential applicants. They also support the argument for provision of such information by other actors. Promotion of such activities would complement other awareness-raising activities, including notably those on publication and dissemination of the Convention and the Court's case-law and on the Convention in university education and professional training.

33. The Warsaw pilot project should be continued and consideration should be given to providing similar services in other Council of Europe information offices, operating under the auspices of the relevant Council of Europe departments. Further consideration should be given to the circumstances in which information is provided on the Convention and the Court, in particular the admissibility criteria and application procedures, to potential applicants by other actors, notably national human rights institutions, non-governmental organisations and other civil society actors.

Publication and dissemination of the Convention and the Court's case-law

34. The Group of Wise Persons had stated that "The dissemination of the Court's case-law and recognition of its authority above and beyond the judgment's binding effect on the parties would no doubt be important elements in ensuring the effectiveness of the Convention's judicial control mechanism. The Group recommends that judgments of principle and judgments that the Court considers particularly important be more widely disseminated in line with the recommendations of the Committee of Ministers."

35. The widest possible publication and dissemination of the Convention and the Court's case-law, including on awards of just satisfaction, is of vital importance in particular for increasing national authorities' awareness of applicable standards, thereby reinforcing the subsidiary character of the Convention system. It may also contribute to applicants and their legal representatives having more realistic expectations of the outcomes of their cases, thereby discouraging cases with no prospects of success and encouraging friendly settlements on the basis of appropriate offers by respondent States.

36. The CDDH has previously noted that there will be a need to come back to the national aspect of the reform. Committee of Ministers' Recommendation Rec(2002)13 to member States on the publication and dissemination in the member States of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights was not included in the previous review of the three "priority" recommendations but could be included in any future exercise, which should take into account related activities elsewhere in the organisation and at national level.

37. The Court should be invited to publish, including on its web-site, up-to-date information on its case-law on admissibility, with translations into non-official languages. Particular consideration should be given to translation into the languages of those countries for which the application form may be completed on-line and of those with the largest numbers of applications.

Role of the Council of Europe Commissioner for Human Rights

38. Following the Report of the Group of Wise Persons, the importance of the Commissioner's cooperation with Ombudsmen and national human rights institutions, notably via the network of contact persons within the offices of these structures established by the Commissioner, should be underlined. In particular, this cooperation has shown potential to disseminate appropriate information on human rights, assist in ensuring full and prompt execution of judgments of the Court and act as a preventive mechanism.

Just satisfaction

39. The Court should be encouraged to explain further the criteria by which it systematically calculates awards of just satisfaction; and then to proceed with the development of the HUDOC system so as to allow analysis of patterns in the Court's awards of just satisfaction. In particular, this can help in ensuring realistic expectations on the part of applicants and their legal representatives prior to application and can assist all parties during any later negotiations with a view to a friendly settlement and, in certain cases, subsequent unilateral declarations.

III. Proposals requiring amendment of the Convention

Filtering of applications

40. The Group of Wise Persons had concluded that "A judicial filtering body should be set up which would be attached to, but separate from, the Court, in order to guarantee, on the one hand, that individual applications result in a judicial decision and, on the other, that the Court can be relieved of a large number of cases and focus on its essential role."

41. At this stage, however, it is clear that certain results implied by the Group of Wise Persons' proposal, such as that creation of the "judicial committee" be followed by a reduction in the number of judges on the "senior" bench, are

unrealistic. It is nevertheless an interesting proposal, which could contribute to a (much) more effective treatment of applications, and one that should be examined further, including its budgetary implications.

Advisory opinions

42. The Group of Wise Persons had considered that "it would be useful to introduce a system under which national courts could apply to the Court for advisory opinions on legal questions relating to the interpretation of the Convention and the protocols thereto, in order to foster dialogue between courts and enhance the Court's "constitutional" role. Requests for an opinion, which would be submitted only by constitutional courts or courts of last instance, would always be optional and the opinions given by the Court would not be binding." This issue received some further support at the Stockholm Colloquy. Such a system could generate additional work. On the other hand, it could help decrease the Court's caseload by ensuring resolution of systemic problems at national level, depending on how it operated.

43. Although the effects of this proposal are uncertain, the possibility of extending the Court's competence to give advisory opinions merits further consideration. The Group of Wise Persons' proposal could be further refined so that the Court would only give advisory opinions on cases arising from situations involving systemic problems, thereby potentially achieving effects similar to those of the pilot judgment procedure and increasing the possibility of achieving a net decrease in the Court's caseload. Other questions – such as whether the right to request an advisory opinion should be limited to national courts of last instance; whether the Court should be obliged to respond positively to requests; whether applications to the Court should be considered inadmissible when the domestic proceedings had reflected an advisory opinion; whether parties to the domestic proceedings should have the right to intervene as third parties during advisory opinion proceedings; or whether advisory opinions should be binding on the courts requesting them – need not necessarily receive the same answers as those (if any) given by the Group of Wise Persons and should therefore remain open.

44. It might be appropriate to consider the question of advisory opinions in the wider context of general reform of the supervisory mechanism, for instance in connection with work on a possible Statute for the Court.

Statute for the Court

45. The Group of Wise Persons had suggested a need for "greater flexibility of the procedure for reforming the judicial machinery." Its proposal was to create a Statute for the Court in an instrument at a legal level between the Convention, a treaty whose amendment is subject to the normal rules of public international law, and the Rules of Court, which can be amended by the Court itself. The Statute, "whose content would need to be defined," would include "provisions relating to the operating procedures of the Court. The provisions of this statute could be amended by the Committee of Ministers with the Court's approval."

46. This proposal is interesting and of value in its own right, although it would not help the Court with its workload in the short term. It could be given a more expansive sense than that contained in the Group of Wise Persons' proposal. It should be noted that elaboration of such a text would involve various challenges and its adoption would probably be a difficult and lengthy process, requiring a new amending protocol. Further work could be undertaken by the DH-PR, on the basis of the Reflection Group's conclusions on the possible content of a Statute.

Developing the Court into a "constitutional court"

47. This idea has a long history; it arose again recently at the Stockholm Colloquy. For current purposes, it can be taken to mean a Court with some degree of power to choose from amongst the applications it receives. The Court might ultimately one day develop in this direction, but the time is not yet ripe to discuss the proposal further. The situation in many member States means that particular emphasis at European level is still needed on the protection of rights through judicial determination of individual applications to the Court. The new admissibility criterion in Protocol No. 14 and the pilot judgment procedure are developments that could lead in the direction of a "constitutional court," but it is currently not possible fully to evaluate their effects.

IV. Conclusions and proposals for future activities

48. It is clear that the Court cannot continue with its current caseload and the overwhelming flow of new applications. No single judicial body, above all one whose role is intended as subsidiary to that of national authorities, could be expected to deal with the number of applications that the Court receives. The constantly widening gap between the Court's capacity and the demands made on it means that the effectiveness, credibility and stability of the entire system are at serious risk.

49. Protocol No. 14, even if intended by its drafters as an intermediate step in a longer process of reform, remains nevertheless indispensible and essential even to the short-term effectiveness of the Court. Already signed by all 47 member States, its non-ratification by one presents an obstacle to realising more far-reaching reforms that could be proposed or envisaged for the future. For these reasons, it remains indispensible that Protocol No. 14 enter into force without delay.

50. Whatever the adaptations or even reforms that may be made to the Convention system, radical improvements at national level are necessary. These should take various forms, as mentioned in this report. The Council of Europe can provide crucial assistance, both via the Court, as also mentioned above, and by way of inter-governmental activities, for example guidance in the form of Committee of Ministers' recommendations, technical assistance during the execution process and capacity-building projects, including the HELP programme. Sufficient resources should be allocated to these crucial functions. The Human Rights Trust

Fund can also help support national measures to improve implementation of the Convention.

51. Indeed, it is essential to the Convention system as a whole that any increases in Court funding should not come at the expense of the budget available for activities concerning human rights monitoring, cooperation programmes or standard-setting. This would be counter-productive to the overall aim of reducing the Court's case-load by avoiding violations and enhancing domestic remedies for when they occur; in other words, by reinforcing subsidiarity.

52. The following suggestions should be pursued:

1. MEASURES NOT REQUIRING AMENDMENT OF THE CONVENTION

Filtering of applications

- The Court could create a pool of judges within the existing Court devoted to filtering.

Improving domestic remedies

- A non-binding Committee of Ministers' instrument on domestic remedies for excessive length of proceedings should be drafted.

Pilot judgment procedure

- The Court could elaborate an explanation of what the pilot judgment procedure involves.
- Respondent States should promptly and effectively implement general measures identified in pilot judgments.
- A manual could be drafted whereby States would share their various experiences of the pilot judgment procedure.

Unilateral declarations

- Where appropriate, States should be encouraged to make unilateral declarations so as to allow the Court to strike certain cases out of its list.

Applications and admissibility

- The Court's more rigorous practice with respect to application of the six-month time-limit is to be supported.

Developing the Court's case-law ŕ droit constant

- The Court could develop its interpretation of certain articles of the Convention relating to procedure with a view to relieving its situation.

Secondment of national judges to the Registry of the Court

- More member States should be encouraged to second national judges to the Registry.

Enhancing States parties' understanding and application of the general principles of the Court's case-law contained in judgments of principle

- Greater use should be made of third party interventions.
- The Court could issue prompt press releases whenever it invites or grants leave to make a third party intervention or a case has been identified as likely to lead to a judgment of principle.
- The Court could exercise more flexibly the discretion to extend the time limits for requesting leave to intervene.

Provision of information to potential applicants to the Court

- The Warsaw pilot project should be continued and could be extended to other Council of Europe information offices.

Publication and dissemination of the Convention and the Court's case-law

- There could be a study of the implementation and impact of Recommendation Rec(2002)13.
- The Court could publish up-to-date information on its case-law on admissibility, with translations into non-official languages.

Role of the Council of Europe Commissioner for Human Rights

- The Commissioner for Human Rights should be supported in his contribution to guaranteeing the long-term effectiveness of the control system of the Convention.

Just satisfaction

- The Court could explain further the criteria by which it systematically calculates awards of just satisfaction.
- The Court could proceed with the development of the HUDOC system so as to allow analysis of patterns in the Court's awards of just satisfaction.

2. MEASURES REQUIRING AMENDMENT OF THE CONVENTION

Filtering of applications

- The creation of a judicial committee, including its budgetary implications, should be examined further.

Advisory opinions

- Consideration should be given to the possibility of extending the Court's competence to give advisory opinions.

Statute for the Court

- Further work should be undertaken on a Statute for the Court.

3. ACCOMPANYING MEASURES

Consultations at national level

- Further to Committee of Ministers' Declaration Dec(2007)1002, member States should be encouraged to take active steps to consult civil society and other stake-holders on the question of guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights.

Document 5:

Comments on Reflection Group Discussions on enhancing the long-term effectiveness of the Convention system

Amnesty International, the European Human Rights Advocacy Centre (EHRAC), Interights, Justice, Liberty, the International Commission of Jurists (ICJ) and the AIRE Centre welcome the opportunity of submitting the following comments on the proposals aiming to ensure the long-term effectiveness of the European Court of Human Rights, including those under discussion by the Reflection Group[1]the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights[2] and those set out in the Steering Committee for Human Rights' Interim Report to the Committee of Ministers on Enhancing the control system of the European Convention on Human Rights.[3]

Introduction

1. We believe that the European Court of Human Rights (hereafter "the Court") is a "pillar" in the European system for the protection of human rights.

2. The Court has ensured that applicants have obtained redress for violations of human rights when states have failed to provide an appropriate remedy. In doing so, it has played a crucial role in holding states accountable for these violations. Strengthened by the Committee of Ministers' supervision process, the implementation of the Court's judgments have led to human-rights-compliant changes in the law and practice in states which are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "the ECHR"

[1] See, eg: Report of the 4th meeting of the Reflection Group (DH-S-GDR), DH-S-GDR (2009)006, 30 January 2009.

[2] See, e.g. GT-DH-PR B(2008)005

[3] Steering Committee for Human rights (CDDH) Interim Report: enhancing the control system of the European convention on Human Rights, 3 April 2008 , CDDH(2008)008 Add II. http://www.respoint.se/itp/event/europaradet/content/File/20CDDH.doc.

or "the Convention"). The judgments of the Court have provided essential guidance to states of the Council of Europe and to other countries, on the steps necessary to respect and secure fundamental human rights. In the words of the Group of Wise Persons[4], the Court "lay[s] down common principles and standards relating to human rights and determines the minimum level of protection which states must observe."[5]

3. The right of individuals (and organizations) to submit an application directly to the European Court of Human Rights lies at the heart of the European regional system for the protection of human rights, and is part of the fundamental philosophy of the ECHR.[6] We consider that its essence is the right of individuals to receive a binding determination from the Court as to whether the facts presented in admissible cases constitute a violation of the rights enumerated in the ECHR. We agree with the Group of Wise Persons that future reform of the Court should not negatively affect the substance of the right of individual application.

4. We recognize that the enormous number of individual applications which are being lodged with the Court, coupled with the backlog of cases pending before it, in the context of the Court's current resources, jeopardize its functioning and consequently the right of individual application.

5. While addressing these issues was precisely the objective of the package of reforms adopted by the Council of Europe's Committee of Ministers in May 2004, including a series of recommendations of the Committee of Ministers to member states and the adoption of Protocol 14 to the ECHR, these measures have yet to be implemented. Furthermore, it is clear that more is needed.

6. We welcome the continuing commitment of the member states of the Council of Europe to ensure the long-term effectiveness of the Court. This commitment was evidenced, among other things, by the decision taken by the Heads of State and Government gathered at the 3rd Summit of the Council of Europe to establish a Group of Wise Persons to consider this issue and to mandate the CDDH and its Reflection Group to examine in depth concrete follow-up that could be given to the recommendations of the Group of Wise Persons.[7]

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[4] The Group of Wise Persons was mandated by the Council of Europe to make proposals aimed at ensuring the long-term effectiveness of the Court. They issued their Report to the Committee of Ministers on 15 November 2006. The Report is available at https://wcd.coe.int/ViewDoc.jsp?id=1063779&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

[5] Paragraph 24 of the Report of the Group of Wise Persons, 15 November 2006.

[6] See Warsaw Declaration at para 2 and Action Plan at para I(1) available at http://www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp; see also para 23 of the Report of the Group of Wise Persons, 15 November 2006.

[7] The mandate of the Group of Wise Persons is set out in the Decision on item 1.5 of the Committee of Ministers Deputies of 14 September 2005 and in paragraphs 1 and 3 of the Group of Wise Persons' Report of 15 November 2006. The mandate and terms of reference of the CDDH on this issue are set out in CM/Del/Dec(2007)1002 and Decision No. CM/873/11072007.

7. We understand that the Committee of Ministers is currently seeking input from the CDDH and the Committee of Legal on Public International Law (CAHDI) on a proposal to address the Court's current case load that would involve establishing the competence of a single judge to declare applications inadmissible or to strike them out and to empower Committees of three judges to declare admissible and rule on the merits of applications which relate to questions that are already the subject of well-established case law- in advance of ratification of Protocol 14 to the ECHR by the Russian Federation.

8. We consider it important that the Council of Europe carefully and transparently evaluate the impact on the Court of any reforms that are implemented – including those related to Protocol 14 if it enters into force – over a reasonable period of time. We urge the member states of the Council of Europe to ensure sufficient financial and expert resources to undertake such evaluations.

9. We consider that any reform should be designed to meet the following seven objectives:

a) Better implementation of the ECHR at national level, thereby reducing the need to apply to the Court for redress, bearing in mind that in the 10 year period between 1998-2008, in more than 83% of all judgments that the court has delivered, it has found at least one violation of the Convention by the respondent state;[8]

b) Preservation of the fundamental right of individual petition (the essence of which is the right of individuals to receive a binding determination on admissible cases from the European Court of Human Rights on whether the facts presented constitute a violation of rights secured in the ECHR);

c) Efficient, fair, consistent, transparent and effective screening of applications received, to weed out the very high proportion (around 90%) of applications that are inadmissible under the current criteria;[9]

d) The expeditious rendering of judgments, particularly in cases that raise repetitive issues concerning violations of the ECHR where the Court's case law is clear – which represent some 60% of the Court's judgments on the merits – and those that arise from systemic problems;

e) Effective execution of the Court's judgments by Council of Europe member states, including appropriate follow-up by the Committee of Ministers where individual member states are slow to act or respond inadequately to Court judgments;

f) Adequate financial and human resources for the Court, without drawing on the budgets of other Council of Europe human rights monitoring mechanisms and bodies;

[8] European Court of Human Rights: Some Facts and Figures, at pg 5; available at http://-www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAnd-FiguresENG10ansNov.pdf.

[9] Paragraph 27 of the Report of the Group of Wise Persons, November 2006.

g) Transparent expert monitoring and assessment of the impact on the workload of the Court of any reforms agreed, and their effect on the right of individual petition.

The following contains our current assessment of the proposals set out in CDDH's Interim Report to the Committee of Ministers and under discussion within the Reflection Group in the light of above enumerated objectives. It also includes additional recommendations.

Establishing a Statute for the Court

10. Subject to the reservations set out below, we consider, in principle, that transferring some provisions of Section II of the Convention setting out some of the Court's operating procedures to a Statute of the Court (which would occupy a position between the ECHR and the Rules of the Court) could obviate the need for the time consuming process of ratification of additional Protocols for such purposes.

11. We believe that the content of a Statute of the Court, if established, should be amendable at the instigation of the Court as well as of member states and only:

a) on the agreement of the members of the Court and

b) after a transparent consultation process, with comments sought and considered from the Parliamentary Assembly of the Council of Europe and other Council of Europe bodies and mechanisms[10], National Institutions for the Promotion and Protection of Human Rights; NGOs and lawyers who regularly practice before the Court; and thereafter

c) upon a vote of a majority of two-thirds of the Committee of Ministers.

12. We would oppose any proposal for the inclusion in the Statute any Article of the Convention which is fundamental to the right of individual petition to the Court and the Court's capacity to protect Convention rights.

13. We agree with the Group of Wise Persons that the Statute should exclude from simplified amendment procedures "provisions defining key institutional, structural and organisational elements of the judicial system of the Convention, namely the establishment of the Court, its jurisdiction and the status of its judges."[11]

14. We agree with the Group of Wise Persons that Articles 19, 20, 21, 22, 23, 24, 32, 33, 34, 35, 46, 47, and 51 should remain in the Convention and should not be subject to any simplified amendment procedure nor included in any Statute of the Court.[12]

[10] For example, amendment of the Statute of the European Court of Justice requires consultation with the European Parliament and Commission. (if the Proposal for amendment has not been initiated by the Commission) as well as with the Court (if the proposed amendment is not at the initiative of the Court) except in relation to Title I and Article 64 of the Statute. Treaty on European Union, Article 281.

[11] Report of the Group of Wise Persons to the Committee of Ministers, CM (2006) 2-3, 15 November 2006, para. 50.

[12] Ibidem, para. 49.

15. We also consider that the following provisions of the Convention should remain in the Convention and should not be subject to modification by any simplified amendment procedure:

a) **Article 28** (Declarations of inadmissibility by committees) and **Article 29** (decisions by Chambers on admissibility and merits). It is important that these provisions remain in the Convention to secure judicial as opposed to administrative decisions at crucial early stages in the Court's consideration of cases.[13]

b) **Article 37** (Striking out applications) should remain in the Convention since the terms of this provision are fundamental to the right of individual petition. We consider that the inclusion of Article 37 among the Articles which could be subject to amendment though a simplified procedure could potentially lead to the striking out of applications without the judicial consideration necessary to protect the right of individual petition and respect for the Convention rights.

c) **Article 36**, (Third party intervention), **Article 45** (Reasons for judgments and decisions) and **Article 49** (Reasons for advisory opinions) should also remain in the Convention. Third party interventions have become an important feature of the system; this is acknowledged by the fact that the Reflection Group has considered how to encourage additional interventions. The provisions in both Articles 45 and 49 that judges may deliver separate opinions should not be alterable by simplified procedure, as they significantly contribute to the Convention jurisprudence.

16. We are concerned at proposals that certain of the Rules of Court, which have particular importance of the Convention system, should be included in the Statute in recognition of their significance. We would oppose the inclusion of the Rules of Court, in particular, **Rule 39**, in any Statute. Rule 39 has been used effectively by the Court in ways essential to ensure the effective protection of Convention rights, for example to prevent the removal of an individual from a member state pending a decision by the Court on respect for the prohibition of torture and other ill-treatment. Since the Grand Chamber of the Court has recognized the binding nature of interim measures under Rule 39 and their vital role in allowing the Court to secure the effective protection of Convention rights to applications in certain cases,[14] the adoption of a simplified procedure for the amendment of Rule 39 could significantly impair the Court's authority.

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[13] In addition, if Protocol 14 were to enter into force, we consider in addition that the new Article 27 (as would be amended by Article 7 of Protocol 14) and the new Article 28 (as would be amended by Article 8 of Protocol 14) should also be excluded from any simplified amendment procedure since, it is at this stage of the scrutiny of applications, that vulnerable applicants may risk losing the protection of the Convention organs if the rigor of the single judge and Committee procedures were to be significantly reduced.

[14] *Mamatkulov and Askarov v Turkey*, judgment of the Grand Chamber of the European Court of Human Rights, 4 February 2005 available at http://cmiskp.echr.coe.int////tkp-197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&-key=9835&sessionId=20040294&skin=hudoc-en&attachment=true.

Advisory Opinions

17. We note the discussion of the Reflection Group about the Group of Wise Persons' proposal to empower the Court to give Advisory Opinions at the request of national courts, including on the basis of a paper submitted by the governments of Norway and the Netherlands.[15] We consider that Advisory Opinions from the Court could have the potential of assisting national courts in ensuring better implementation of the ECHR at the national level and reducing the number of applications submitted to the Court on the issue concerned.

18. While our commentary on the Group of Wise Persons' Interim Report endorsed the proposal, on further reflection we consider that the concept raises a number of important issues that require its further elaboration and development. First, it is currently unclear in what circumstances an Advisory Opinion could be sought.

19. Second, we suggest that the questions posed by the referring court would have to be sufficiently precise to ensure that the process of giving an Advisory Opinion is meaningful and consistent with the overall approach of the Court.

20. Third, it is vital that would-be applicants be given the opportunity to participate effectively in the process of seeking an Advisory Opinion. We would therefore propose that legal aid before the Strasbourg Court should be available to would-be applicants whose cases are submitted for such and Opinion by a national court.

21. Fourth, we also consider that it would be necessary to ensure that third parties are allowed to intervene in such cases, whether or not they had previously intervened in the domestic proceedings.

22. Fifth, we would recommend that an Advisory Opinion should be binding as to the interpretation of the Convention on all Member States. Otherwise there is a substantial risk that Member States might choose not to follow the Court's opinion and thereby undermine its authority.

23. Finally, we would be concerned if the new admissibility criteria set out in Protocol 14 to the ECHR were to be applied to any applications arising following a national court's receipt of such an Advisory Opinion; we would consider that such applications would merit a full review by the Court of the manner in which the national court had applied the Advisory Opinion in the case at issue.

Encouraging the Court to develop its case law on Article 37(1)(c) (Striking out Applications)

24. We consider that that the drafting of a Recommendation or Resolution by the Committee of Ministers' on the interpretation of Article 37§1(c) would represent an unacceptable interference with the Court's exclusive jurisdiction to interpret and apply the Convention. We would therefore oppose any proposal to draft

[15] See: Paragraphs 81–86 of the Report of the Group of Wise Persons, November 2006; Report of the 4th meeting of the Reflection Group Dh-S-GDR(2009)00 at paras 20–26.

such a Resolution or Recommendation, whether it concerned the application of the Protocol 14 admissibility criteria or unilateral offers of settlement.

25. We are concerned about the striking out of otherwise admissible applications under Article 37(1)(c) based on unilateral declaration filed by a respondent State. The Convention itself precludes such a measure, if "respect for human rights" requires that the Court continue examination of the application. In this regard, we are concerned at the inconsistent application by the Court of the criteria set out by the Grand Chamber in the case of *Tahsin Acar v. Turkey*.

26. We consider that the expeditious disposal of otherwise admissible repetitive cases through the application of Article 37(1)(c) may in fact not be an effective measure to address the Court's workload, in the absence of an undertaking by the respondent state to implement general measures. Unless Court requires that the state's unilateral declaration include an undertaking to implement specific general measures which address the underlying causes of the repetitive violation, it is likely that the Court will be faced with more applications highlighting the same systemic problem.

Pilot Judgments[16]

27. We welcome the continuing development of the Court's "pilot judgment procedure" as having significant potential to encourage Council of Europe states to resolve human rights violations which arise from systemic problems. A pilot judgment should be issued as soon as possible once a particular systemic issue has been identified – with the aim of ensuring that the violations of the Convention in question cease immediately and the systemic problem is solved by legislative or other means. Furthermore, appropriate redress should promptly be provided to all victims of the systemic violation, either at the national level or in the course of proceedings before the Court. We recall that the Group of Wise Persons encouraged the Court to use this procedure "as far as possible in future" and note that the plenary of the Court has recently called on the Court's Sections to make more frequent use of this procedure.[17]

28. Where a pilot judgment has been issued, we would emphasise the need for both the Court and the Committee of Ministers to ensure that the respondent State takes the requisite steps to solve the systemic issue and provide adequate redress. We recall that in September 2008 the Court formally closed the pilot judgment procedure with regard to the *Broniowski* case, on the basis that the applicants (and other victims) could utilize a new domestic compensation scheme which had been established in Poland.[18] In its earlier decisions in *Wolkenberg and*

[16] See further: *NGO Comments on the Group of Wise Persons Interim Report Further Observations on the Enforcement of European Court Judgments and Just satisfaction*, European Human Rights Advocacy Centre, Interights and the AIRE Centre, July 28, 2006.

[17] *The Pilot Judgment Procedure – Memorandum prepared by the Registry of the Court*, DH-S-GDR(2009)010, 24 February 2009, p. 2.

[18] See: E.G v Poland No. 50425/99 and 175 other Bug River applications, 23.9.08 (the 176 cases were struck out).

Others and *Witkowska-Toboła*,[19] the Court decided that the new compensation scheme provided the applicants (and the other claimants) with relief at the domestic level "which made its further examination of their applications and of other similar applications no longer justified". In order to make such a decision, the Court had had to carry out an evaluation of the implementation of the scheme *in practice*. The Court took note, for example, of the total number of claimants, the number of decisions made by the authorities confirming entitlement to compensation, the number of persons whose files had been referred to the State Economy Bank in order for payments to be made, and the number of payments which had actually been made.

29. We would emphasise that an effective evaluation of the implementation *in practice* of a new system purportedly providing redress at the national level is critical for the productive development of the pilot judgment procedure. This evaluation must include consideration of the time taken to provide redress.[20]

30. However, we are concerned that a sufficient evaluation of the implementation of new domestic schemes in practice is not always being carried out. For example, following the Court's judgment in *Lukenda v Slovenia*, concerning the excessive length of legal proceedings in domestic courts in Slovenia, the Court evaluated the respondent Government's compliance merely by reviewing the text of new legislation which was enacted in order to solve the problem. Thus in *Korenjak v Slovenia*,[21] the Court found that the new domestic scheme was "effective in the sense that the remedies are **in principle** capable of both preventing the continuation of the alleged violation of the right to a hearing without undue delay and of providing adequate redress for any violation that has already occurred" (emphasis added). Furthermore, following the Court's judgment in *Hutten-Czapska v Poland*[22] (concerning the inadequacies of housing legislation), the Court was prepared to give its seal of approval to a subsequent settlement of the case on the basis that "the Government have demonstrated an active commitment to take measures aimed at resolving the systemic problem identified in the principal judgment and will rely on their actual and promised remedial action...".[23]

31. We note that concerns about the Court's evaluation were expressed by Judges Zagrebelsky and Jaeger in their separate opinion in *Hutten-Czapska* (2008):

> *"The Court is not competent (and does not have the necessary knowledge) to express a view in the abstract and in advance on the consequences of the reforms already introduced in Poland and to give a vague positive assessment of a legislative development whose practical application might subsequently be challenged by new applicants..."*

[19] Cfr. *Wolkenberg and others v Poland*, No. 50003/99, dec. 4.12.07 & *Witkowska-Tobola v Poland*, No. 11208/02, dec. 4.12.07.

[20] See: *E.G v Poland No. 50425/99 and 175 other Bug River applications*, 23.9.08, para. 28.

[21] No. 463/03, 15 May 2007.

[22] Cfr. *Hutten-Czapska v Poland*, No. 35014/97, 19.6.06.

[23] Cfr. *Hutten-Czapska v Poland*, No. 35014/97, 28.4.08, para. 43.

In her concurring opinion in *Hutten-Czapska* (2008), Judge Ziemele also expressed concerns: "In my view the Court has to be very careful and it has to base its reasoning on the compliance of such an approach with the underlying principle of individual justice in the European Convention system...".

32. Concerns have also been expressed as to the lack of clarity in the respective roles of the Court and the Committee of Ministers as regards the evaluation of compliance with pilot judgments at the national level. We consider that clear rules and procedures should be adopted so that there is much greater clarity as to their respective roles, and so that, as a result of their combined efforts, effective evaluations are carried out.

33. At the Stockholm Colloquy in June 2008, Erik Fribergh, the Court Registrar, placed important emphasis on the need for a strengthening of the enforcement process as regards pilot judgments.[24] We consider that he was right to do so, and we call on the Council of Europe to re-assess this aspect of the pilot judgment procedure.

34. In our earlier submissions,[25] we supported the Group of Wise Persons' recommendation that time limits should be laid down, to be supervised by the Court, to ensure that "victims who have already applied to the Court, [whose applications remain "frozen" while the pilot case is heard and the resulting judgment implemented] do not have to wait indefinitely for just satisfaction".[26] We welcome the fact that in its most recent pilot judgment – *Burdov v Russia* (No. 2)[27] – the Court has laid down a specific timetable for the implementation of various steps by the respondent state, including:

a) a period of six months (from the date on which the judgment becomes final) to establish an effective domestic remedy (or combination of remedies) which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments, in line with the Convention principles; and

b) a period of one year (from the date on which the judgment becomes final) to grant redress to all victims of non-payment (or unreasonably delayed payment) by State authorities of a judgment debt in their favour (who

[24] He said, inter alia: "Enforcement issues are becoming more and more judicial and it would seem to me that in the future reform work, one issue that could be taken up is whether the enforcement issues should not be entrusted to a more quasi-judicial organ. This could be a separate body, or one operating under the auspices of the CM. I think a lot could be achieved to solve many enforcement issues if for instance a Panel of five to seven legal/judicial experts were entrusted with that duty", E. Fribergh, *Pilot Judgments from the Court's perspective*, Stockholm Colloquy, 9–10 June 2008.

[25] See *Council of Europe: Ensuring the long-term effectiveness of the European Court of Human Rights – NGO Comments on the Group of Wise Persons' Report*, 16 January 2007, http://www.amnesty.org/en/library/info/IOR61/002/2007; and *European Court of Human Rights: NGO Comments on the Group of Wise Persons' Interim Report*, 1 August 2006, http://www.amnesty.org/en/library/info/IOR61/019/2006.

[26] Paragraph 105 of the Report of the Group of Wise Persons.

[27] No. 33509/04, 15.1.09.

lodged their applications with the Court before the delivery of the *Burdov No. 2* judgment and whose applications were communicated to the Government).

35. Without commenting on the specific timetable laid down by the Court in *Burdov No. 2*, we consider that the imposition of specific time periods is a very important aspect of the pilot judgment procedure, and it is crucial that both the Committee of Ministers and the Court should take adequate steps to enforce such deadlines.

36. In our earlier submissions, we recommended that the Council of Europe should carry out comprehensive monitoring on the adequacy and timeliness of compliance with "pilot judgments." It should include consideration of the steps taken by the Committee of Ministers under its "priority supervision"[28] and those taken by the respondent state, as well as the impact of such judgments. We maintain those recommendations, and welcome the fact that the Registry of the Court has recently underlined the importance of the need for a rigorous evaluation of the impact of the pilot judgment procedure.[29]

37. The monitoring process should seek to answer the following questions:

a) In what circumstances should the Court issue a pilot judgment?

b) What steps should be taken by a respondent state to implement a pilot judgment?

c) To what extent has a respondent state introduced measures that effectively address the systemic problem, as well as providing a remedy for the applicant?

d) What is the effect on similarly situated persons who have already lodged applications with the Court?

e) Within the domestic arena, what obstacles exist which may hamper effective implementation?

f) What measures can be taken by the Committee of Ministers to encourage or facilitate implementation of pilot judgments?

g) What assistance can be provided by other Council of Europe bodies, such as the Council of Europe's Commissioner for Human Rights[30] and the

[28] Rule 4 of the Rules of the Committee of Ministers for the supervision of the execution of Judgments and the Terms of Friendly Settlements, adopted on 10 May 2006.

[29] Cfr. *The Pilot Judgment Procedure – Memorandum prepared by the Registry of the Court*, DH-S-GDR(2009)010, 24 February 2009, p. 5.

[30] The Commissioner has said: "I believe that, with the assistance of NHRSs, the Commissioner could assist the Court in identifying cases that should give rise to a pilot judgment, in defining the domestic measures required by the execution of a judgment in such a pilot case and in understanding the difficulties preventing the national authorities from taking such measures. The Commissioner and his partners could help the Court to formulate realistic, inventive and precise prescriptions of the measures expected from the States concerned, not only the States party to the proceedings but also third States concerned by the substance of the judgment" – Thomas Hammarberg, Council of Europe Colloquy, San

Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE)?

h) What are the appropriate time limits for implementing pilot judgments?

Third Party Interventions

38. We note the discussion in Stockholm Colloquy in June 2008 and at the October 2008 meeting of the Reflection Group (DH-S-GDR) of a proposal aimed at encouraging third party interventions by governments in major cases of principle in order to increase implementation of such judgments. This development could increase the number of government interventions in such cases, and make it all the more important for civil society organizations to be able to intervene where appropriate in a timely manner.

39. While we welcome the fact the Court will publish on its website information about its decisions to accept requests for third party intervention, we remain concerned that under this arrangement, civil society organizations may learn of a third party intervention by a state too late to be able to intervene within the (12 week from communication) time limit, as was the case in *Saadi v Italy*.

40. We therefore recommend that the Court make available on the Court's website a list of all requests and invitations for third-party intervention, alongside the list of communicated cases.

Advice and Information to Applicants:

41. We regret the view expressed by the CDDH and DH-PR that there would be no real value added by the preparation of a draft recommendation of the Committee of Ministers to member States on information and advice to potential applicants to the European Court of Human Rights.[31]

42. Based on experience of some of our organizations, we can state emphatically that making high quality informed expertise available to would-be applicants has both discouraged individuals from filing unmeritorious applications and increased the quality of meritorious ones.

43. We acknowledge that provision of funds by states for qualified independent legal experts to provide advice to would-be applicants about the merits of a claim under the Convention has budget implications. We categorically reject the view expressed by some members of the DH-PR that such a scheme would require the involvement of state agents' in the assessment of the merits of the potential application.

Marino, March 2007.

[31] Report of the 67th meeting of CDDH, 25–28 November 2008, CDDH(2008)014, 15 December 2008 at para 16.

Filtering

44. It is widely agreed that the main challenges facing the Court are: (1) screening quickly and effectively the very high proportion (90% or more) of applications received which are already inadmissible under the current criteria, and (2) handling in an effective and efficient manner the more than 60% of admissible applications that raise issues about which the Court's case law is clear, (known as "repetitive cases").

45. We concur with the suggestion of the Group of Wise Persons that the effective and efficient screening of individual applications received by the court could be facilitated through the creation of a screening body, within the Court. If the establishment of such a body were to involve additional Judges, then we agree with the Wise Persons that such Judges should: be elected by the Parliamentary Assembly of the Council of Europe; be independent; be of high moral character and possess the requisite qualifications for appointment to judicial office. We also agree with the Group of Wise Person's recommendation that the composition of such a screening body should be geographically-balanced and gender-balanced.[32] We also welcome the safeguard proposed by the Group of Wise Persons that would ensure that the Court could assume jurisdiction to review any decision of such a screening body, on its own motion.[33]

46. We look forward with interest to participating in further discussions about the creation of a filtering mechanism.

Recommendation on Excessive Length of Domestic Proceedings

47. We welcome the view of the Reflection Group that a Recommendation, accompanied by examples of Good Practice on effective domestic remedies to address cases in which domestic proceedings fail to be completed within a reasonable time, could be of real practical added value. [34]

48. We consider that such cases, which represent some 28.9% of all judgments in which the Court has found a Convention violation in the ten years between 1998-2008, are of grave concern, as they hinder the right to access to justice and thus undermine the rule of law.

49. We consider that effective remedies for excessive length of domestic proceedings must include not only a compensatory scheme, but also must result in the restructuring of the administration of justice (accompanied by any necessary budgetary implications) to ensure that Convention compliant proceedings are concluded within a reasonable time.

[32] Paragraphs 53 and 54 of the Report of the Group of Wise Persons, 15 November 2006.
[33] Paragraph 64 of the Report of the Group of Wise Persons, 15 November 2006.
[34] See Report of 4th Meeting of the Reflection Group, DH-S-GDR(2009)006, 30 January, at paras 9–14.

Budget

50. We consider that the Court has been hampered by a lack of sufficient human and financial resources. This is true despite the fact that "no other international court is confronted with a workload of such magnitude while having at the same time such a demanding responsibility for setting the standard of conduct required to comply with the Convention."[35] While we note that the budget of the Court has been increased, we are concerned that this sum was taken from the existing budget of the Council of Europe which reportedly had zero real growth in recent years. This has meant that the increase of the Court's budget has come at the expense of funding for other Council of Europe activities, including intergovernmental and targeted cooperation activities. We consider that implementing cuts in one part of the Council of Europe's human rights budget to finance improvements in the performance of the Court is short-sighted, since a reduction on other human rights activities (for example awareness raising, training, dissemination about Convention standards etc.) is likely to increase the burden on the Court in the long run. We therefore call on the Council of Europe member states to increase the budget of the Council of Europe overall, including the budget allocated to the Court.

Consultation

51. We warmly welcome the fact that the Committee of Ministers, in its Decision Dec(2007)1002 has encouraged member states to conduct national consultations with civil society about possible future reform of the Convention system and to report the results of such consultations to the CDDH.

52. As members of civil society that have years of experience representing applicants before the Court and submitting third party interventions to the Court in pending cases, we are grateful to have been invited to a hearing before the Reflection Group on 4 March 2009 to express our views. We consider this hearing, as well as the Stockholm Colloquy to be first steps in what we hope will be much broader consultations, both at the national level in all 47 member states and within the Council of Europe, which will involve not only our organizations, but also other NGOs, lawyers who have experience representing applicants before the Court, academics, and representatives of National Institutions for the Promotion and the Protection of Human Rights.

53. We consider that future applicants to the Court, have an interest at least equal to that of the states in ensuring the Court's long term effectiveness. Representatives of civil society across the Council of Europe region should be consulted, and their views taken into account before any further reforms to the Court are made.

[35] Paragraph 37 of the Report of the Group of Wise Persons, 15 November 2006.

Document 6:

The Parliamentary Assembly's involvement in the supervision of the judgments of the Strasbourg Court

by Andrew Drzemczewski,
Head of the Secretariat of the Committee
on Legal Affairs and Human Rights,
Parliamentary Assembly of the Council of Europe

Outline:

I. Background

"[It is necessary] *to draw attention to the critical importance of the implementation of the Court's judgments. If the Court's long-term viability is to be ensured, it is essential that Member States take appropriate measures to implement the Court's judgments and prevent repeat violations.*"[1]

[1] Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*,

Most observers rightly underline the alarming situation of the continuous increase in the volume of individual applications lodged with the Strasbourg Court: at the end of 2008, there were 97 300 applications pending before the judicial formations (including 57% against four countries, ie Romania, Russia, Turkey and Ukraine), a 23% increase on 2007. 1 880 judgments and 30 163 decisions on admissibility were delivered in 2008, while 21 450 registered applications have not yet been before any judicial formation. This situation, combined with the substantial increase in the Court's operational "costs"[2], threatens to undermine the effective operation of the Convention system and hence also the viability of the Council of Europe.

However, there is a tendency to overlook another equally worrying situation, namely the fact that 7,328 cases were pending before the Committee of Ministers at the end of 2008 (6,248 in 2007, 5,636 in 2006), with many rulings going without being implemented for many years. This problem was recently highlighted in two annual reports on "Supervision of the execution of judgments of the European Court of Human Rights" published by the Committee of Ministers in March 2008 and April 2009.[3]

In other words, it is vital that member states honour their formal undertaking under Article 46 (1) of the European Convention on Human Rights (ECHR) and comply as quickly as possible with the Court's final judgments in cases in which they are parties.[4]

The main body responsible for supervising compliance with this fundamental commitment by member states is the Committee of Ministers, the executive organ of the Council of Europe[5]. Article 46 (2) of the Convention provides that: *The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.*

December 2005, p. 61.

[2] The Court's budget has grown from 35.4 million euros in 2003 to 57 million euros in 2009. In 2003, the Court accounted for 19% of the Ordinary Budget of the Council of Europe, compared with 26.3% in 2009. In terms of permanent posts, the Court has grown from 382 posts as at 1 January 2004 to 629 as at 1 January 2009 (out of a total of 1,523 permanent posts at the Council of Europe in 2004 and 1,764 in 2009).

[3] The two reports published by the Council of Europe can be found at: http://www.coe.int/T/E/Human_Rights/execution/.

[4] In this connection, see, in particular, Recommendation Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights.

[5] For more detailed studies on the matter, see J. Polakiewicz, *The Execution of Judgments of the European Court of Human Rights*, in R. Blackburn & J. Polakiewicz, *Fundamental Rights in Europe*, 2001, Oxford University Press, pp. 55-76; F. Sundberg, *Le contrôle de l'exécution des arrets de la Cour européenne des Droits de l'Homme*, in *Libertés, Justice, Tolérance*, Volume II: *Mélanges en hommage au doyen*, Gérard Cohen-Jonathan, 2004, Bruylant, pp. 1515-1535, and E. Lambert-Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2008, Council of Europe Publishing, passim.

This does not, however, rule out the involvement of other bodies such as the Commissioner for Human Rights[6] and the Parliamentary Assembly. Being made up of members of national parliaments, the Assembly is particularly well placed to help facilitate the implementation of the judgments of the Strasbourg Court.[7]

But how can or should parliamentarians become more closely involved in this task of supervising the implementation of the Court's judgments – both nationally and as members of the Assembly? I will try to outline some initial replies here. After briefly going over details of the Parliamentary Assembly's increased involvement in supervising the Strasbourg Court's judgments, I will explain the increasingly proactive approach of the Assembly's Committee on Legal Affairs and Human Rights (AS/Jur)[8] in this area and, in particular, its growing concern about some Council of Europe member countries' slowness in executing and/or failure to execute the Court's judgments.

I will also digress slightly to highlight a 'regrettable incident' which occurred before the finalisation of a text by the Committee of Ministers on the implementation at national level of the rapid execution of the judgments of the Strasbourg Court and give an unflattering picture of the way in which most parliaments monitor – or, rather, fail to monitor sufficiently thoroughly – the implementation of the judgments, before setting out a more optimistic vision for the future...

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[6] See, for instance, the Commissioner's annual reports (website: http://www.coe.int/t/commissioner/default_EN.asp?) and his recent report (16 April 2009) following his visit to Italy from 13 to 15 January 2009, in particular Part IV, Foreign nationals' forced returns and compliance with the Rule 39 requests of the European Court of Human Rights, doc. CommDH (2009)16, an issue which the Parliamentary Assembly also addressed in Resolution 1571 (2007) and Recommendation 1809 (2007) on Member states' duty to co-operate with the European Court of Human Rights (based on the report by Mr C. Pourgourides, Doc. 11183 and addendum).

[7] See P. Leach, *The effectiveness of the Committee of Ministers in supervising the enforcement of judgments of the European Court of Human Rights*, in: *Public Law* (2006), pp. 443–456, and A. Drzemczewski, *Quelques observations sur le rôle de la Commission des questions juridiques et des droits de l'homme de l'Assemblée parlementaire dans l'exécution des arrêts de la Cour de Strasbourg*, in: *Trente ans de droit européen des droits de l'homme. Etudes à la mémoire de Wolfgang Strasser*, (Bruylant, 2007), pp. 55–63.

[8] For an overview of the Committee's work and its priorities, see the Assembly website: http://assembly.coe.int/Mainf.asp?link=/Committee/JUR/role_E.htm. Although this study is confined to the work done by AS/Jur, it should be noted that other Assembly committees are also involved in supervising the execution of the Strasbourg Court's judgments on a more occasional basis, in particular the Monitoring Committee in its reports on the honouring of obligations and commitments by members states (see, for instance, Doc. 11214 of 30 March 2007 (Rapporteur: E. Lintner) and Doc. 11628 of 9 June 2008 (Rapporteur: S. Holovaty), and the recent information memoranda prepared in the context of post-monitoring dialogue concerning Bulgaria and Turkey, documents AS/Mon (2008) 35 rev. and AS/Mon (2009) 10 rev, both dated 7 April 2009 and published by the Committee on 31 March 2009).

* * *

In the view of the Legal Affairs Committee, it is vital that states execute the Court's judgments in full and as rapidly as possible. The Committee acts on the basis of the Assembly's decision in October 2006 *to further its involvement in the need to resolve the most important problems*[9], focusing on cases which involve major structural difficulties and cases in which the delays in execution are unacceptable. This therefore explains its recent decision in January 2009 to authorise its new rapporteur on the subject, and first Vice-Chair, Mr Christos Pourgourides, to make fact-finding visits in 2009 and 2010 to eight countries (Bulgaria, Greece, Italy, Moldova, Romania, Russia, Turkey and Ukraine) where slowness of execution and/or difficult issues of non-execution of judgments need to be addressed most urgently.[10]

II. States' responsibility: a reminder

Above all, it falls to national authorities to guarantee the rights and freedoms enshrined in the Convention: *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention* (Article 1 of the Convention).[11]

It should therefore be borne in mind that the Strasbourg control mechanism is "subsidiary" in nature. States are responsible for the effective implementation of the Convention and it is the shared duty of all state organs (the executive, the courts and the legislature) to prevent or remedy human rights violations at the national level. This is principally, but not exclusively, the responsibility of the judiciary.[12] In so far as the legislature is concerned, it involves carefully examining whether draft legislation is compatible with the Convention and its protocols, as interpreted by the Court. Only when the domestic system fails should the Strasbourg Court step in. Subsequently, if and when there is an adverse finding by the Strasbourg Court, the emphasis shifts back to the domestic arena and the state is required to execute the judgment under the supervision of the Committee of Ministers (Article 46 of the Convention). At this stage, too, parliamentary

[9] Resolution 1516 (2006) on Implementation of judgments of the European Court of Human Rights, § 4 (set out in full in the appendix).

[10] See synopsis AS/Jur No 2009/01 of the meetings held in Strasbourg from 26 to 29 January 2009. Mr Pourgourides was appointed new rapporteur on lmplementation of judgments of the European Court of Human Rights on 13 June 2007 in place of Mr Erik Jurgens, his outstanding predecessor, who presented the previous six reports on the subject. See also Appendix, Resolution 1516 (2006), §§ 5 and 6.

[11] See here P.-H. Imbert, *Follow-up to the Committee of Ministers' Recommendations on the implementation of the Convention at the domestic level ...*, in: *Reform of the European Human Rights system*, (2004), Council of Europe, pp. 33–44.

[12] There is much literature on the subject. See, for instance, *Law of the European Convention on Human Rights*, (D.J. Harris, C. Buckley, E. Bates, C. Warbrick, M. O'Boyle, 2009), Oxford University Press, passim.

involvement may be necessary, as the (rapid) adoption of legislative measures may be required to ensure compliance with the Court's judgments.

III. Involvement of the Assembly in supervision of the Court's judgments

A. Development over time

The Parliamentary Assembly, which comprises 636 members (318 full members and 318 substitutes) from the national parliaments of the 47 member states, is a statutory organ of the Council of Europe. Like the Committee of Ministers, it is responsible for protecting the Council of Europe's values and ensuring that member states honour their commitments.[13] Yet the Assembly was never actually intended to be a body for monitoring the execution of judgments. It does, however, take an interest in the matter, given its general powers. Although a number of parliamentary questions concerning specific cases were put following the entry into force of the Convention in 1953, supervision of the execution of judgments only began formally in 1993, when the Assembly instructed the relevant committee (AS/Jur) to report to it *when problems arise on the situation of human rights in member states, including their compliance with judgments by the European Court of Human Rights*[14], and was stepped up with the introduction of the new monitoring procedure (monitoring of the honouring of commitments entered into by new member states) in 1993, which was extended to the honouring of obligations and commitments by all Council of Europe member states in April 1995.[15]

However, the subject of the "execution of judgments" of the Strasbourg Court remained a relatively secondary aspect of the Legal Affairs Committee's work until the unanimous adoption by the Committee, on 27 June 2000, of the first report on the matter by Mr Erik Jurgens.[16] The report set out the responsibilities of the Council of Europe's various organs (such as the Parliamentary Assembly) and the member states in terms of execution of the Court's judgments. It also indicated the problems which prevented states from executing judgments. These included political, legislative and budgetary problems, problems involving public opinion, unclear judgments and interference with other international commitments.

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[13] See *The Parliamentary Assembly – Practice and Procedure*, (2008, 10th edition), Council of Europe, and the studies published in honour of H Klebes, *Law in Greater Europe: Towards a Common Legal Area*, (B. Haller, H.-C. Krüger and H. Petzold, eds, 2000), Kluwer International, for more information.

[14] Order No 485 (1993) on the general policy of the Council of Europe, § 2.

[15] Order No 488 (1993) of 29 June 1993 (applicable to new member states), extended by Order No 508 (1995), § 2, to all member states on 26 April 1995.

[16] Assembly Doc. 8808 of 12 July 2000 (prepared on the basis of a motion for a resolution on the execution of judgments of the Court and the monitoring of the case-law of the European Court and Commission of Human Rights, Doc. 7777 of 13 March 1997, presented by Mr Georges Clerfayt and others).

On the basis of the report, the Assembly adopted Resolution 1226 (2000).[17] In the resolution, the Assembly advocated a number of steps to ensure the execution of judgments, which were to be taken by member states and their various institutions, the Court and the Committee of Ministers, and underlined the importance of effective synergy between the Court, the Committee of Ministers and national authorities. The Assembly also undertook to play a larger role itself in supervising judgments of the Court.

Thereafter, the Legal Affairs Committee was assigned open-ended terms of reference to continue its work in this area: under Resolution 1268 (2002), the Assembly asked it to continue the exercise, instructing it *to continue to update the record of the execution of judgments and to report to it when it considers appropriate*. In other words, the committee is not bound by Rule 25.3 of the Assembly's Rules of Procedure, which provides that references to committees lapse in two years. This is a key exemption which underlines the importance of the subject and enables the current rapporteur, Mr Christos Pourgourides (who is carrying on from his predecessor, Mr Erik Jurgens) to work on the implementation of judgments of the European Court of Human Rights on an open-ended basis.

Since 2000, the Assembly has adopted six reports[18] and resolutions[19] and five recommendations[20] on the subject (all based on reports prepared by the Legal Affairs Committee's rapporteur, ***Mr Erik Jurgens) to help states overcome structural***

[17] Execution of judgments of the European Court of Human Rights, text adopted by the Assembly on 28 September 2000. See also Recommendation 1477 (2000) and the reply from the Committee of Ministers, Doc. 9311 (All texts available on the Assembly's website: http://assembly.coe.int.).

[18] Reports on the execution/implementation of judgments of the European Court of Human Rights: PACE Doc 8808, *Execution of judgments of the European Court of Human Rights*, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, 12.7.2000; PACE Doc 9307, *Implementation of decisions of the European Court of Human Rights*, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, 21.12.2001; PACE Doc 9537, *Implementation of decisions of the European Court of Human Rights by Turkey*, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, 5.9.2002; PACE Doc 10192, *Implementation of decisions of the European Court of Human Rights by Turkey*, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, 1.6.2004; PACE Doc 10351, *Implementation of decisions of the European Court of Human Rights*, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, 21.10.2004; PACE Doc 11020, *Implementation of judgments of the European Court of Human Rights*, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jurgens, 18.9.2006. All of these texts are available on the Assembly website: http://assembly.coe.int.

[19] Resolutions on the execution/implementation of judgments of the European Court of Human Rights: PACE Resolution 1226 (2000); PACE Resolution 1268 (2002); PACE Resolution 1297 (2002); PACE Resolution 1381 (2004); PACE Resolution 1411 (2004); PACE Resolution 1516 (2006).

[20] Recommendations on the execution/implementation of judgments of the European Court of Human Rights: PACE Recommendation 1477 (2000); PACE Recommendation 1546 (2002); PACE Recommendation 1576 (2002); PACE Recommendation 1684 (2004); PACE Recommendation 1764 (2006).

deficiencies and fully comply with the Court's judgments. The second report dated 21 December 2001, the fifth report dated 14 September 2004 and the sixth report dated 18 September 2006 focused on execution difficulties on a country-by-country basis. The cases were selected according to three criteria: the time lapse since the Court's decision, the existence of a Committee of Ministers interim resolution and the importance of the issue raised by the case (as will be explained below, the rapporteurs slightly amended the criteria for the sixth and seventh reports). The third criterion gave rise to two specific reports (the third report of 5 September 2002 and the fourth of 1 May 2004) on Turkey.

B. Changes as from the sixth report in 2006

For the preparation of his sixth report, which was issued in 2006, Mr Jurgens decided to make some changes. According to the criteria which the Parliamentary Assembly applies to the exercise, his report focused on Convention member states with judgments that had not been fully implemented more than five years after their delivery or other judgments which raised important implementation issues, whether individual or general. He therefore conducted a country-by-country assessment so as to ensure a non-discriminatory approach. The report covered both older member states, which are regarded as stronger democracies, and new member states, which are faced with greater difficulties.

When preparing the report, the rapporteur – through the committee and with its authorisation – began a dialogue with 13 states by written procedure, which was followed by visits to five countries during 2006.[21] The committee was thus able to adopt a proactive approach, agreeing to the idea that the rapporteur visit countries with major structural problems and where the delays in the execution of judgments were unacceptable. The countries concerned were Italy, Russia, Turkey, Ukraine and the United Kingdom. The difficulties in eight other countries (Bulgaria, France, Germany, Greece, Latvia, Moldova, Poland and Romania) were also analysed on the basis of the written replies from the countries' parliamentary delegations.

It was the first time that *in situ* visits had been made on the Assembly's initiative specifically for the purpose of supervising execution of the Strasbourg Court's judgments. During the visits, the rapporteur discussed the reasons for the failure to execute the judgments with members of the national parliaments and government representatives and underlined the urgent need to find solutions to the problems raised. It should be pointed out here that the Committee of Ministers has never exercised such supervision, although the Department for the Execution of Judgments of the Court has in recent years held discussions with some countries' authorities in their own capitals. This initiative by the Legal Affairs Committee, which was approved by the Assembly, was based on the conviction that many key points could be resolved through the increasingly active involvement of the Parliamentary Assembly in close co-operation with national parliaments,

[21] Mr Jurgens suggested the visits on 7 November 2005 and the Committee agreed to this on the same day.

working through their national delegations.[22] The aim of the visits was to see how, with the aid of parliamentarians in the relevant countries, the national authorities could be encouraged to speed up the implementation of the reforms and measures needed for the execution of the judgments that concerned them.

Another point is worth mentioning here. Since 2005, most of the documents on this subject have been in the public domain. Better access to information may mean that organisations and authorities concerned are and will be encouraged to respond more quickly and take steps so that the judgments in question are executed.

C. Preparation of the 7th report by the new rapporteur

As indicated above, a new rapporteur, Mr Christos Pourgourides, was appointed in June 2007 to take over from Mr Jurgens, who had withdrawn from active politics at the age of 72.[23] Mr Pourgourides decided to continue with his predecessor's working method.

He prepared a memorandum giving an update on the situation in May 2008, focusing on *judgments (...) which have not been fully implemented more than five years after their delivery* [and] *(...) other judgments (...) raising important implementation issues, whether individual or general, as highlighted notably in the Committee of Ministers' Interim Resolutions or other documents*.[24]

In a general overview of the situation in the 14 states parties dealt with by his predecessor, Mr Pourgourides noted that the difficulties had been overcome in a number of cases but that problems remained in 11 contracting states – some of which were serious.[25] He then proposed that the national (parliamentary) delegations of all 11 states in question provide comments on the information contained in the memorandum. Subsequently, on the basis of the replies (or lack of replies) received, he sought authorisation to make on-the-spot visits to the following eight states: Bulgaria, Greece, Italy, Moldova, Romania, Russia, Turkey and Ukraine. In January 2009, the Legal Affairs Committee authorised him to make the visits. He intends beginning the visits from May 2009.[26]

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[22] A key point to be noted is the composition of each country's parliamentary delegation: national delegations are always composed in such a way as to ensure fair representation of the political parties or groups in their respective parliaments.

[23] See footnote 10 above.

[24] "Implementation of judgments of the European Court of Human Rights", document AS/Jur (2008) 24, of 26 May 2008 (declassified by the committee on 2 June 2008), § 6.

[25] The states concerned were Bulgaria, Germany, Greece, Italy, Moldova, Poland, Romania, Russia, Turkey, Ukraine and the United Kingdom. He also indicated that, since the adoption of the 6th report, the Strasbourg Court had delivered a number of important judgments with respect to, inter alia, Albania, Armenia, Azerbaijan, Bosnia and Herzegovina and Serbia, which were now pending before the Committee of Ministers (and stressed that the five countries should ensure rapid and full execution of the relevant judgments).

[26] See synopsis AS/Jur No 2009/01 of the meetings held in Strasbourg from 26 to 29 January 2009.

IV. Parliamentary supervision of states' compliance with judgments of the Strasbourg Court

A. General overview

The dual role of national parliamentarians – as members of their respective national parliaments and of the PACE – is important here. In view, for instance, of the goal of substantially reducing the need for individuals to apply to the Court in Strasbourg and the key role of national institutions, legislative bodies can play a part in systematically verifying the compatibility of draft and existing legislation with ECHR standards, as well as ensuring the existence of effective domestic remedies.[27] As regards draft legislation, its compatibility with the ECHR can be systematically verified by the legal services of parliament and/or the relevant parliamentary committees. The compatibility of existing laws with the ECHR can also be verified in the course of parliamentary debates. Likewise, oral or written questions can be put to the executive regarding the execution of a Strasbourg Court judgment so as to increase the pressure on the executive authorities.

Although the specific issue of the implementation of the Court's judgments is a matter for the Committee of Ministers under Article 46 of the Convention, Assembly members and hence also national parliamentarians can (and therefore should?) play a more active role in this area. Unfortunately, however, the situation is far from satisfactory at national level, in spite of the recent efforts by the Assembly and its President.[28]

Even though the situation – at present – is not good, there are signs of a clear improvement, especially given the fact that the majority of parliamentary initiatives in the area are relatively recent. That is the finding of a survey conducted in 2008.[29]

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[27] See working document by Ms Bemelmans-Videc on "The effectiveness of the European Convention on Human Rights at national level" (document AS/Jur (2007) 35 rev. 2, declassified by the committee on 26 June 2007), and document CM (2008) 52 of 4 April 2008, "Steering Committee for Human Rights (CDDH) – Activity report – Sustained action to ensure the effectiveness of the implementation of the ECHR at national and European levels", in particular Appendix IV (on the improvement of domestic remedies; parliamentary mechanisms), §§ 11–19, and Appendix VI (on the verification, in particular by parliaments, of the compatibility of draft laws and existing laws with the Convention), §§ 13–18.

[28] See, for instance, § 22 of Resolution 1516 (2006) (appended) and the conclusions presented by Mr de Puig, President of the Assembly, to the European Conference of Presidents of Parliament (Strasbourg, 22 and 23 May 2008), which can be consulted at the following address: http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=779.

[29] By the European Centre for Parliamentary Research and Documentation. For more details, see doc. AS/Jur (2008) 32 rev., "Stockholm Colloquy: Towards stronger implementation of the European Convention on Human Rights at national level", 9–10 June 2008, selected texts, pp. 8-51. (Available at: http://assembly.coe.int/CommitteeDocs/2008/20080623_ajdoc32_2008_rev.pdf).

The United Kingdom's Joint Committee on Human Rights, which is appointed by the House of Lords and the House of Commons and mandated to consider matters relating to human rights, appears to be a rare example of a special parliamentary body with a specific mandate to verify and monitor the compatibility of a country's law and practice with the ECHR.[30] In fact, only six parliaments indicated that they possess such a special body for supervising implementation of judgments of the Strasbourg Court: Croatia, Finland, Hungary, Romania, Ukraine and the United Kingdom. Most other replies made reference to recourse to so-called "traditional means", such as work undertaken by parliamentary (standing) committees whose mandate encompasses – if and when the need arises – verification of the compatibility of national law with international obligations, including the ECHR, or verification by means of written or oral questions.

As regards the existence of parliamentary procedures to ensure that parliamentarians are at least informed of adverse findings by the Strasbourg Court, twelve states indicated that they possess such information procedures, namely Austria, Bosnia and Herzegovina, Croatia, Cyprus, Germany, Hungary, Italy, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom.[31] It would appear that the Finnish, Dutch, Swedish and United Kingdom parliaments possess the most effective procedures for monitoring implementation of Strasbourg Court judgments[32]. The Italian authorities (executive and parliament) have also recently set up a "permanent committee" for examining judgments of the Court with two main tasks: collecting data about the specific requirements of the Convention and making them available to parliament during the legislative process, and drawing parliament's attention to the need to amend or adopt specific laws in order to comply with the requirements of the Convention, as interpreted by the Court.[33]

In spite of the examples quoted, it would appear that only very few national parliaments exercise regular control over the effective implementation of the Strasbourg Court's judgments.

B. The regrettable incident

As explained above, the "dual mandate" of parliamentarians – as members of the Parliamentary Assembly and of their respective national parliaments – can be of fundamental importance, in particular when legislative action is necessary in order to ensure the effective execution of the Strasbourg Court's judgments. After

[30] See 6th report by Mr Jurgens (Doc. 11020, § 95).

[31] It is not clear from the Russian Federation's reply whether such a mechanism exists in the Russian Parliament. In addition, two member states have indicated that the introduction of such a procedure is under consideration: Liechtenstein and "the former Yugoslav Republic of Macedonia".

[32] Ukraine would also appear to have an effective procedure, although it is unclear to what extent the law of February 2006 has been put into effect. The text of the law is available in Mr Jurgens' report (Doc. 11020, pp. 49–56).

[33] See document CM (2008) 52, Appendix VI, § 14 (footnote 27 above), and information available in the report by Mr Jurgens (Doc. 11020 – implementation of Law No. 12, known as "the Azzolini law").

all, the rapid and full execution of the judgments of the Strasbourg Court is naturally an obligation for all States Parties to the ECHR, and remains a decisive factor in safeguarding the operation of the Convention mechanism. Hence the importance of Committee of Ministers Recommendation Rec(2008)2 of 6 February 2008 to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights. Persistent long delays and/or failure fully to execute the Court's judgments by a not insignificant number of member states can undermine the whole system and the credibility of the Court.

The "disappointment" of the Dutch parliamentarian, Ms M.-L. Bemelmans-Videc, concerning an incident which took place at the end of 2007, just before the adoption of the said recommendation, is therefore understandable. In this connection, I would like to quote in full the comments she made in a speech in Stockholm on 9 June 2008:[34]

> *I am disappointed by the fact that the Committee of Ministers (in effect, the Steering Committee for Human Rights, the CDDH) has not taken sufficient account of the importance of the "parliamentary dimension" in its recent Recommendation on the efficient domestic capacity for rapid execution of judgments of the Strasbourg Court. Here, I have in mind the outcome of discussions Mr Jurgens (one of the most active members of the Assembly's Legal Affairs & Human Rights Committee & recently retired colleague of mine in the Dutch Senate) had with the CDDH in November 2007 when the CDDH proposed – despite Mr Jurgens' strong objections – that national parliaments be informed – "as appropriate" – of measures taken to execute Strasbourg Court judgments. In other words, national parliaments are to be informed if and when the state's (administrative? executive?) authorities feel like doing so. There is something fundamentally wrong in this approach, as I will illustrate to you later on in the specific context of the Dutch experience.* [For further information about this rather unfortunate development, I refer you to a text prepared by Mr Jurgens on this subject at the end of last year.[35]]

[34] "The effectiveness of the European Convention on Human Rights at national level: the parliamentary dimension" in Towards stronger implementation of the European Convention on Human Rights at national level, Colloquy held under the aegis of the Swedish Chairmanship of the Committee of Ministers of the Council of Europe, Stockholm, 9-10 June 2008 (2008), Council of Europe, pp. 43-49, in particular p. 47, which can also be accessed via the Legal Affairs Committee's website:http://assembly.coe.int/Mainf.asp?-link=/Committee/JUR/role_E.htm and at: http://www.sweden.gov.se/rightswork.

[35] This concerns § 9 of Committee of Ministers Recommendation CM/Rec (2008) 2, to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, adopted on 6 February 2008. See, in particular, §§ 12-18 of the Assembly's Legal Affairs & Human Rights Committee (AS/Jur) working document "Implementation of judgments of the ECtHR – issues currently under consideration" presented by E. Jurgens, doc. AS/Jur (2007) 49 rev, and Appendix III thereof (declassified

In spite of this entirely understandable criticism, Ms Bemelmans-Videc, Chair of the Netherlands national delegation to the Parliamentary Assembly, continued her speech by describing a parliamentary procedure introduced in her country a few years earlier. In my view, this procedure is worth citing as a model for other parliaments to follow. In the Netherlands, the Government Agent to the Court makes a yearly report to the government on all cases brought and judgments delivered against the Netherlands. In 2006, the Senate requested that the report also be transmitted to parliament – a proposal which was accepted. The government now therefore submits the report every year to the legal affairs (justice) committees of the two houses of parliament, which analyse it, put questions and make proposals if they are not satisfied with the government's actions. It is worth noting here that the reports now include not only judgments against the Netherlands, but all judgments with respect to other states which could have a direct or indirect effect on the Dutch legal system.[36]

V. Overall assessment

Although the Assembly was not designed as a body for monitoring the execution of judgments (except, perhaps, in the context of the specific monitoring performed by the Monitoring Committee[37]), the Assembly and member states' national parliaments can – and do – make a major contribution to the rapid and effective execution of the Court's judgments. Nevertheless, the Legal Affairs Committee remains *gravely concerned with the continuing existence of a number of major structural deficiencies and/or a lack of effective domestic mechanisms in several countries*.[38]

Experience shows that the Assembly is playing a growing role in proposing solutions for resolving cases involving delays in execution and issues of non-compliance with Court judgments. There are many examples here, the most striking of which have involved the non-payment of just satisfaction[39], the reopening of domestic proceedings[40] and the passing of far-reaching legal and constitutional reforms designed to prevent the recurrence of breaches similar to those found by the Court[41]. The Assembly's action here involves adopting reports,

by the Committee on 11 September 2007).

[36] Supra p. 48. In her speech, Ms Bemelmans-Videc also mentioned other good parliamentary practices in countries such as Belgium and Finland and recent initiatives by Luxembourg and Romania (as a direct response to the call made by the Parliamentary Assembly in Resolution 1516 (2006)).

[37] See footnote 8 above and, more generally, B. Haller, *L'Assemblée parlementaire et les conditions d'adhésion au Conseil de l'Europe* and C. Schneider, *Le contrôle des engagements du Conseil de l'Europe revisité par l'histoire*, in: B. Haller, H.-C. Krüger and H. Petzold (eds), *Law in Greater Europe: Towards a Common Legal Area*, Studies in honour of H Klebes, (1999), pp. 22–79 and pp. 131–161 respectively.

[38] Excerpt from the cover page summary, Doc. 11020, footnote 18 above.

[39] Cases of *Stran v. Greece* of 9 December 1994 and *Loizidou v. Turkey* of 18 December 1996.

[40] Cases of *Hakkar v. France* of 8 October 2002 and *Zana v. Turkey* of 25 November 1997.

[41] In particular, cases involving the action of the security forces and violations of the right

resolutions and recommendations, holding public debates and putting oral or written parliamentary questions concerning specific cases.

While government representatives sit on the Committee of Ministers, the Parliamentary Assembly is made up of representatives of national parliaments. The greater the interest the Assembly takes in the execution of judgments, the greater will be the impact in national parliaments (and vice versa). Debates and reports serve to inform national delegations to the Parliamentary Assembly about problems concerning the execution of judgments in their countries. When they return home, members are therefore able to raise the relevant issues in their own parliaments. They have mechanisms and powers to promote, or indeed initiate, the adoption of new legislation or changes in existing legislation and put pressure on the relevant authorities so that they amend practices which are not compatible with the Convention as interpreted by the Court.

One recent development demonstrates the desire of national parliaments to take the matter seriously. In the United Kingdom, the Joint Committee on Human Rights mentioned above does very thorough work concerning the execution of judgments and exercises considerable influence over the government.[42] This approach in the United Kingdom parliament can be seen as a model for other national parliaments.

While the political impact of the Parliamentary Assembly is clear, it is not limited to naming and shaming. The Assembly can sometimes have greater freedom of action than the Committee of Ministers. That can be seen clearly with its on-the-spot visits, which can have a significant impact. There can be no doubt that these visits will increase the Assembly's ability to engage directly with decision-makers at parliamentary, governmental and administrative level and hence also to hold constructive discussions on possible solutions for unresolved issues.

It is also important to remember the role of national parliaments, which are well placed to promote human rights and raise public awareness. As democratically elected representatives, members of parliament hold governments to account concerning the implementation of legislation, approve the ratification of treaties, are involved in passing budgets (in particular for foreign ministries which include the contributions their governments pay to intergovernmental organisations of which they are members), can influence the direction and priority of legislative initiatives and, if need be, channel the funds needed for ensuring the implementation of the Strasbourg Court's judgments.

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to freedom of expression in Turkey, even though the latter have not all been resolved. See, in this context, Parliamentary Assembly Resolutions 1380 (2004) and 1381 (2004) and the reports on the implementation of judgments of the European Court of Human Rights by Turkey, Doc 9537 of 21 September 2002, and Doc 10192 of 1 June 2004.

[42] See the reports of the Joint Committee on Human Rights (JCHR): Thirteenth Report of Session 2005-06, *Implementation of Strasbourg Judgments*: First Progress Report, HL Paper 133, HC 954, and *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, Sixteenth Report of Session 2006–07, HL Paper 128, HC 728, of 28 June 2007.

A final thought: On taking over from his predecessor, the current rapporteur on the implementation of the Court's judgments, Christos Pourgourides, also stressed how parliamentarians' dual capacity as members of the Assembly and national legislators meant they could help in him his difficult task. He fully endorsed what Mr Jurgens wrote back in June 2005:

> *The Assembly should continue, and indeed have a more prominent role, in promoting compliance with the Court's judgments. By helping to ensure that member states rapidly comply with judgments, it provides tangible assistance to victims of human rights violations. It also helps the Committee of Ministers to discharge more speedily and effectively its responsibilities in this respect (...) rapid compliance with judgments, especially those requiring legislative action, to which the Assembly is best placed to contribute, helps the Strasbourg Court cope with the avalanche of applications by attacking the root causes for repetitive applications.*[43]

[43] Document AS/Jur (2005) 35, "Implementation of judgments of the European Court of Human Rights – Introductory memorandum", § 6. See also analysis by P. Leach "The effectiveness of the Committee of Ministers in supervising the enforcement of judgments of the European Court of Human Rights" in Public Law (2006), pp. 443-456, at pp. 449-451.

DOCUMENT 7:

List of participants of the Informal Seminar for Government Agents and Other Institutions on Pilot Judgments Procedures in the European Court of Human Rights and the future development of human rights' standards and procedures

COUNCIL OF EUROPE

Mrs Corinne Amat
Head of Divison, Department for execution of judgments of the ECHR
Dept. of execution of judgements of the ECHR
Tel: 0033 338 41 27 93
e-mail: corinne.amat@coe.int

Mr John Darcy
Registry – European Court of Human Rights
Tel: 0033 338 41 31 56
e-mail: john.darcy@echr.coe.int

Mr Andrew Drzemczewski
Szef Sekretariatu
Legal Affairs and Human Rights Committee – PACE
Tel: 0033 388 41 23 26
e-mail: Andrew.drzemczewski@coe.int

Mrs Irene Kitsou-Milonas
Office of the Comissioner for Human Rights
Tel: 0033 390 21 51 22
e-mail: irene.kitsou-milonas@coe.int

Mrs Genevieve Meyer
Head of Department for execution of judgments of the ECHR
Dept. of execution of judgements of the ECHR
Tel: 0033 338 41 23 37
e-mail: genevieve.mayer@coe.int

Mr David Milner
Secretary of the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights, Secretary of the Reflection Group
Directorate-General of Human Rights and Legal Affairs
Tel: 0033 390 21 53 27
e-mail: david.milner@coe.int

AMNESTY INTERNATIONAL

Mrs Jill Heine
Legal Adviser
International Legal and Organizations Program
Amnesty International
Easton Street
London WCIX ODW
United Kingdom
44 207 413 5886
e-mail: jheine@amnesty.org

ANDORRA

Maria Antonia Benitez
Co-Agent before the ECHR, Andorra
Andorrian Government
Tel: 0037 687 57 09
e-mail: evalopez@andorra.ad

Eva Lopez Herrero
Government Agent before the ECHR, Andorra
Andorrian Government
Tel: 0037 6875 668
e-mail: goretti_lopez@govern.ad

AUSTRIA

Dr Brigitte Ohms
Deputy Government Agent, Division for International Affairs and General Administrative Affairs, Bundeskanzleramt – Verfassungsdienst
Tel: 0043 1 53115 24 62
e-mail: brigitte.ohms@bka.gv.at

Mr Dominik Heider
dominik.heider@univie.ac.at
University of Vienna
Tel: 0043 1 4277 35424
e-mail: dominik

AZERBAIJAN

Mr Chingiz ASKAROV,
Government Agent before the ECHR, Azerbaijan
Administration of the President of the Republic of Azerbaijan
Tel: 00994 124 923 920
e-mail: agent@apparat.gov.az

BELGIUM

Dr Alexander Hoefmans
Co-Agent
Belgian Ministry of Justice
Tel: 0032 2442 67 90
e-mail: aleksander.hoefmans@just.fgov.be

Mrs Isabelle Niedlispacher
Attaché (jurist)
Belgian Ministry of Justice
Tel: 0032 2542 71 21
e-mail: Isabelle.niedlichspacher@just.fgov.be

BOSNIA AND HERZEGOVINA

Ms Zikreta Ibrahimovic
Deputy Government Agent before the ECHR, Bosnia and Herzegovina
Office of the Agent of the Coucil of Ministers before the ECHR
Tel: 00387 33 554 725
e-mail: zikreta.ibrahimovic@mhrr.gov.bh

Ms Monika MIJIĆ
Government Agent before the ECHR, Bosnia and Herzegovina
Office of the Agent of the Council of Ministers before ECHR
Tel: 00387 33 554 725
e-mail: monika.mijic@mhrr.gov.ba

Mrs Belma Skalović
Assistant Government Agent before the ECHR, Bosnia and Herzegovina
Office of the Agent of the Council of Ministers before the ECHR
Tel: 00387 33 554 725
e-mail: belma.skalovic@mhrr.gov.bh

CROATIA

Ms Stefica Staznik
Government Agent before the ECHR, Croatia
Tel: 00385 1 4878 100
e-mail: sstaznik@zastupnikvlade.htnet.hr

CYPRUS

Mr Costas Paraskeva
Student Lellos Demetriades Law Office, Cyprus
Tel: 0035 722 676 060
e-mail: Coparaskeva@yahoo.com

CZECH REPUBLIC

Mr Vit Alexander Schorm
Government Agent before the ECHR, the Czech Republic
Ministry of Justice
Tel: 00420 221 997 442
e-mail: vschorm@msp.justice.cz

ESTONIA

Ms Maris Kuurberg
Governmet Agent before the ECHR, Estonia
Ministry of Foreign Affaris of Estonia
Tel: 00372 63 77 400
e-mail: maris.kuurerg@mfa.ee

FRANCE

Mrs Marie Sirinelli
Redactrice
Ministry of Foreign Affairs, France
Tel: 0033 1 53 69 36 22
e-mail: marie.sirinelli@diplomatie.gouv.fr

GEORGIA

Mr Levan Meskhoradze
Government Agent of Georgia befor the European Court of Human Rights
Head of Department of the State Representation
to the International Courts of Human Rights
Ministry of Justice of Georgia
Gorgasali 24, Tbilisi 0146, Georgia
Tel/Fax: /995 32/ 40 51 41
Mob: /995 99/ 76 77 11
e-mail: lmeskhoradze@justice.gov.

INTERIGHTS

Mr Constantin Cojocariu
Interights
Tel: 0044 20 7278 3230
e-mail: ccojocariu@interights.org

THE NETHERLANDS

Mrs Liselot Egmond
Deputy Government Agent before the ECHR, Netherlands
Ministry of Foreign Affairs
Tel: 0031 70 348 6856
e-mail: liselot.egmond@minbuza.nl

POLAND

Dr Michał Balcerzak
Nicolas Copernicus Univeristy of Toruń
e-mail: michal.balcerzak@law.uni.torun.pl

Maciej Bernatt
Helsinki Foundation for Human Rights

Dr Adam Bodnar
Helsinki Foundation for Human Rights

Mr Jacek Buga
Department of Records, Reprivatization and Compensation
Ministry of the Treasury

Ms Justyna Chrzanowska
Ministry of Foreign Affairs RP
e-mail: justyna.chranowska@msz.gov.pl

Prof. Krzysztof Drzewicki
University of Gdańsk

Dominika Dychawska
Helsinki Foundation for Human Rights

Mr Igor Dzialuk
Deputy Minister
Polish Ministry of Justice

Dr Paweł Filipek
Centre for European Studies of the Jagiellonian University, Cracow
Tel: 0048 609200705
e-mail: pawel.filipek@uj.edu.pl

Dr Magdalena Forowicz
Universitat Zurich, Rechtswissenschaftliches Institut
Tel: 0041 011 0634 4185
e-mail: magdalena.forowicz@rwi.uzh.ch

Mgr Aleksandra Gliszczyńska
Research Assistant
Poznań Human Rights Centre, Poland
Tel: 0048 61 85 20 260
e-mail: a.gliszczynska@poczta.onet.pl

Mrs Ewa Januszewicz
Information Office of the CoE
Tel: 0048 22 853 57 74
e-mail: ewa.januszewicz@coe.int

Dr Wojciech Jasiński
University of Wrocław
Tel: 0048 71 375 2351
e-mail: wjasinski@prawo.uni.wroc.pl

Paweł Jaworski
Ministry of Foreign Affairs
e-mail: pawel.jaworski@msz.gov.pl

Marta Kaczmarska
Ministry of Foreign Affairs
e-mail: marta.kaczmarska@msz.gov.pl

Dr Marta Kłopocka-Jasińska
Wyższa Szkoła Menedżerska w Legnicy
Tel: 0048 603 777 105
e-mail: mklopocka@prawo.uni.wroc.pl

Łukasz Knurowski
Ministry of Foreign Affairs
e-mail: lukasz.knurowski@msz.gov.pl

Ms Agata Koczorowska
Tel: 0048 692 750 958
e-mail: agata.koczorowska@wp.pl

Mrs Katarzyna Kowalska
Head of Human Rights Unit
Ministry of Justice, Poland
Tel: 0048 220 521 2865, 0048 608 423 769
e-mail: kowalska@ms.gov.pl

Ms Agnieszka Kozińska
Ministry of Foreign Affairs
e-mail: Agnieszka.kozinska@msz.gov.pl

Mr Kamil Krzysiak
Department of Records, Reprivatization and Compensation
Ministry of the Treasury

Mr Grzegorz Lewocki
Ministry of Justice
Tel: 0048 225 212 297
e-mail: lewocki@ms.gov.pl

Ms Katarzyna Łakoma
Ombudsman's Office, Poland
Tel: 69473203
e-mail: katlakoma@yahoo.com

Mrs Hanna Machińska
Information Office of the CoE
Tel: 0048 22 853 57 73
e-mail: hanna.machinska@coe.int

Mrs Aleksandra Mężykowska
Ministry of Foreign Affairs
Aleksandra.mezykowska@msz.gov.pl

Dr Przemysław Mikłaszewicz
Constitutional Tribunal

Dr Witold Mikułowski
Poland's National School of Public Adminstration

Prof. Artur Nowak-Far
Poland's National School of Public Adminstration

Dr hab. Lech Paprzycki
President of the Supreme Court
Criminal Chamber of the Supreme Court

Mrs Anna Paszka
National School of Public Adminsitration
anna.paszka@ksap.gov.pl

Dorota Pudzianowska
Helsinki Foundation of Human Rights

Agata Rogalska-Piechota
Ministry of Foreign Affairs
agata.rogalska-piechota@msz.gov.pl

Dr Wojciech Sadowski
Assistant Professor
Institute of Legal Studies, Polish Academy of Science
(Instytut Nauk Prawnych PAN)
Tel: 0048 607 914 798
e-mail: saskiw@o2.pl

Dr Anna Natalia Schulz
Institute of Legal Studies Polish Academy of Science
(Instytut Nauk Prawnych PAN)
Tel: 0048 61 861 41 88
e-mail: schulzan@icpnet.pl

Mgr Katarzyna Sękowska-Kozłowska
Research Assistant
Polish Academy of Sciences
Tel: 0048 506 762 269
e-mail: kasia.seko@intera.pl

Mr Piotr Siurnicki
Ministry of Foreign Affairs
Piotr.siurnicki@msz.gov.pl

Ms Anna Stożek
Jagiellonian University, Poland
Tel: 0048 663 486 348
e-mail: mstozek@llm10.law.harvard.edu

Piotr Styczeń
Deputy Minister
Ministry of Infrastructure

Mrs Agnieszka Torres de Oliveira
Ministry of Foreign Affaires
Agnieszka.torresdeoliveira@msz.gov.pl

Dr Karolina Wierczyńska
Polish Academy of Sciences
Tel: 0048 609 169 134
e-mail: Wierczynscy@wirt.pl

Prof. Roman Wieruszewski
Professor
Poznań Human Rights Centre
Tel: 0048 61 85 20 260
e-mail: wierom@sylaba.poznan.pl

Mrs Agnieszka Wilk
Supreme Administrative Court

Mr Jakub Wolasiewicz
Government Agent before the ECHR, Poland
Ministry of Foreign Affairs
Tel: 0048 22 523 99 81
e-mail: jakub.wolasiewicz@msz.gov.pl

Mr Mirosław Wróblewski
Ombudsman's Office

ROMANIA

Mr Razvan Horatiu Radu
Government Agent before the ECHR, Romania
Ministry of Forreign Affairs
Tel: 0040 726 243 588
e-mail: horatiu.radu@mae.ro

RUSSIAN FEDERATION

Mrs Natalia Kortovenkova
Head of Division of Case Law Analysis
Office of the Russian Representative to the ECHR
Tel: 007 495 677 06 94, mob. 007 903 722 26 98
e-mail: kortovenkova@mail.ru

Maria Molodtsova
First Secretary
Ministry of Forreign Affairs
e-mail: m.molodtsova@mail.ru

SLOVENIA

Mr Peter Pavlin
Ministry of Justice, Slovenia
Peter.Pavlin@gov.si

Mrs Andreja Vran
State Attorney's Office, Slovenia
Tel: 00386 1244 10 67
e-mail: andreja.vran@dp-rs.si

SPAIN

M. Ignacio Blasco Lozano,
Government Agent before the ECHR, Spain
Ministry of Justice
Tel: 0034 91 102 64 50
e-mail: i.blasco@dsje.mju.es

SWITZERLAND

Mr Frank Schoermann
Goverment Agent before the ECHR, Switzerland
Swiss Ministry of Justice
Tel: 0041 31 322 41 50, mob. 0041 79 345 09 67
e-mail: frank.schuermann@bj.admin.ch

UNITED KINGDOM

Dr Helen Hardman
Research Assistant
London Metropolitan University
Tel: 0044 207 133 51 32
e-mail: h.hardman@londonmet.ac.uk

Prof. Philip Leach
Director, Human Rights and Social Justice Research Institute
London Metropolitan University
Tel: 00 44 207 133 5111
e-mail: p.leach@londonmet.ac.uk

Mr Derek Walton
Government Agent before the ECHR, the United Kingdom
Foreign and Commonwealth Office
Tel: 0044 207 270 37 85
e-mail: derek.walton@fco.gov.uk

The students of the National School of Public Administration

Mr Kamil Bobek

Mr Mikołaj Cholewicz

Ms Agnieszka Choynowska

Ms Agnieszka Czarnik

Ms Dobrochna Dolecka

Ms Monika Deszczka

Ms Dominika Hasińska

Mr Łukasz Jachimowicz

Mr Konrad Kiedrzyński

Mr Kornel Konarewicz

Mr Michał Koprowski

Mr Wojciech Kuraszyk

Ms Magdalena Libuda

Ms Monika Marczuk

Ms Weronika Motylewska

Ms Marta Pietrzak

Mr Grzegorze Pniewski

Ms Małgorzata Radwan

Mr Michał Reczek

Mr Michał Rzeźnikiewicz
Mr Bartosz Staszewski
Mr Michał Stępowski
Mr Dominik Sybilski
Mr Krzysztof Szymański
Ms Katarzyna Tomczak
Mr Marcin Wiatrów
Ms Marzena Wiśniewska
Ms Magdalena Woźniewska
Mr Wojciech Zapiec
Mr Jakub Zdybel
Mr Wojciech Augustowski
Mr Bartłomiej Bartos
Ms Małgorzata Borysiuk
Ms Patrycja Brudnicka
Ms Agnieszka Burda
Ms Magdalena Chrobak
Mr Aleksander Cichy
Mr Paweł Czaja
Mr Krzysztof Danecki
Mr Krzysztof Denko
Mr Paweł Hoffner
Mr Jakub Jabłoński
Ms Izabela Kaczmarska
Mr Adam Kańtoch
Mr Andrzej Kindziuk
Mr Maciej Klimowicz
Ms Agnieszka Kłapeć
Ms Karolina Konarzewska
Mr Paweł Ksenycz
Ms Barbara Kumor
Ms Jagienka Lisiak
Mr Michał Markocki
Mr Łukasz Mieszkowski

Mr Sławomir Mosór
Mr Michał Naruszewicz
Mr Wojcewich Nowak
Mr Tomasz Ozimek
Ms Anna Paczkowska
Mr Zbigniew Pałka
Ms Anna Paradowska
Mr Maciej Pękalski
Mr Krzysztof Pierzchała
Mr Paweł Piotrowski
Mr Daniel Pławiński
Mr Andrzej Radniecki
Ms Anna Rojek
Mr Michał Rybiński
Ms Alicja Sakowicz
Mr Daniel Staniszewski
Mr Andrzej Stolarek
Mr Jarosław Szajner
Ms Magdalena Szuber
Mr Jakub Wąsowicz
Mr Bartosz Wielgo
Mr Łukasz Wielocha
Ms Jolanta Wiśniewska
Mr Łukasz Wolin
Ms Agnieszka Zabłocka
Ms Agnieszka Żak