

APPLYING AND SUPERVISING THE ECHR



The right to trial within a reasonable time and short-term reform of the European Court of Human Rights

Round table organised by the Slovenian chairmanship
of the Committee of Ministers of the Council of Europe

Bled, Slovenia, 21-22 September 2009



THE RIGHT TO TRIAL
WITHIN A REASONABLE TIME
AND SHORT-TERM REFORM
OF THE EUROPEAN COURT
OF HUMAN RIGHTS

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of the Committee of Ministers of the Council of Europe

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Directorate General of Human Rights and Legal Affairs
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**Ministry of Justice
Ministry of Foreign Affairs
Republic of Slovenia**

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FOREWORD

Aiming to contribute to the efforts to improve the efficiency of the European Court of Human Rights within the existing legal system, the Slovenian Chairmanship of the Committee of Ministers organised a Round Table in Bled, Slovenia on 21-22 September 2009.

Part One of the Round Table aimed to look at countries' experiences of ways of protection of the right to a trial within a reasonable time, in particular: national models of legal remedies for protection of the right to a trial within a reasonable time; best practices, including administrative ones, for the enforcement of these remedies; types of just satisfaction associated with them; and the institutional reactions of, for example, the judiciary, ombudsmen and others to the regulation and implementation of these remedies.

Part Two addressed the issue of the short-term reform of the European Court of Human Rights, including the identification of the aims of the new Protocol No. 14 bis to the European Convention on Human Rights and the Madrid agreement on the provisional application of certain provisions of Protocol No. 14, the assessment of the possible development of practices concerning class actions or collective applications in the context of the problem of repetitive applications and an exchange of views on ideas and goals for the short-term reform of the European Court of Human Rights.

The Round Table concluded with the adoption of general, non-binding conclusions on the various issues discussed.

WELCOME ADDRESS

Mr Aleš Zalar

Minister of Justice

Respected lecturers, representatives of institutions of the Council of Europe, representatives of the Ministries of Justice and Foreign Affairs and other bodies of the member states of the Council of Europe, and representatives of the judiciary, the State Attorney's Office and the Human Rights Ombudsman of the Republic of Slovenia:

As of 12 May 2009, Slovenia has had the honour of holding the presidency of the Committee of Ministers of the Council of Europe, i.e. the international organisation on a European level that has been striving for the provision and development of human rights and fundamental freedoms, the rule of law and democracy since 1949.

As the Minister of Justice of the Government of the Republic of Slovenia, I am honoured that the Ministry of Justice and the Ministry of Foreign Affairs, along with the Council of Europe, will organise the Round Table on Ways of Protection of the Right to a Trial Within a Reasonable Time and on Short-Term Reform of the European Court of Human Rights in Bled, Slovenia. I believe that this Round Table is one of the most important contributions to the development of the protection of human rights and fundamental freedoms in the field of judicial protection of rights and freedoms, especially in the field of protection of the right to a trial within a reasonable time.

The field of the protection of the right to a trial within a reasonable time is, unfortunately, one of the most exposed legal fields in Europe or in most of the member states of the Council of Europe. I deliberately use the word "unfortunately" because in the contemporary rule of law system, no recognised or systematic court backlogs should exist, and violation of the human right to a trial within a reasonable time should be an exception dealt within the framework of general measures of court management in courts. We are aware, however, that in some member states of the Council of Europe or in State Parties to the Euro-

pean Convention on Human Rights, this is not the case. They have court backlogs; cases of the parties to court proceedings are mostly not dealt with within a reasonable time. Therefore, we can assess that in most cases there is an actual occurrence or a subjective impression of the occurrence of “the denial of the right”.

From a national perspective, I can emphasise that in Slovenia we made an effort regarding the judgement in 2005 in the case of *Lukenda v. Slovenia* to define, by statute, effective legal remedies for the protection of the right to a trial within a reasonable time, i.e. through the Act on the Protection of the Right to a Trial without Undue Delay from 2006. In July 2009, we additionally amended and reinforced this Act so as to define additional protection of the rights of the parties to court proceedings and additional responsibilities or actions by the courts' presidents when deciding on legal remedies of the parties to court proceedings in order to accelerate the resolution of their cases.

Irrespective of the above statements and all the associated measures regarding the reduction of court backlogs that are relatively successful, I have to say that the Act on the Protection of the Right to a Trial without Undue Delay is not a *panacea*, i.e. a medicine that cures all diseases. This is not the case. Court backlogs in Slovenia have to be abolished in order to ensure that the Act on the Protection of the Right to a Trial without Undue Delay will only be applied as “an incident statute” in exceptional cases.

Now, eight years since the adoption of the first special national act regarding the protection of the right to a trial within a reasonable time, i.e. the “Pinto Act” of the Republic of Italy from 2001, a certain position should be drawn up on the criteria regarding what is an effective legal remedy for the protection of the right to a trial within a reasonable time. It seems that the case-law of the European Court of Human Rights in Strasbourg, regarding the question of what the effective national legal remedies are for the protection of the right to a trial within a reasonable time, has been developed in such a detail that the States Parties to the European Convention on Human Rights need time to adjust their national case-law. From this viewpoint, we should, in my opinion, support the efforts of the committees and the institutions of the Council of Europe to write down common and recommended good practice of the European Court of Human Rights and member states regarding the effective legal remedies in the form of an eventual recommendation, which could function as a type of “soft law”, i.e. essential guidance for these countries regarding the right to a trial within a reasonable time. I hope that these efforts will be presented next year at the conference in Interlaken on the future of the European Court of Human Rights, since the recommendation could contribute immensely to relieving the burden of the mentioned Court.

I suppose we can agree on the fact that the questions regarding the overload of the courts with numerous cases cannot be resolved only in the field of effective legal remedies and associated measures. In addition to the recommendations of the Committee of Ministers in the past 10 years, the Council of Europe has offered useful recommendations in the field of justice, especially through the European Commission for the Efficiency of Justice (CEPEJ), Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE). They are extremely useful opinions and recommendations, e.g. Opinion No. 6 of the CCJE on fair trial within a reasonable time or the Framework Programme of the CEPEJ on a new objective for judicial systems: the processing of each case within an optimum and foreseeable time frame. Eighteen years of working as a judge has made me aware of the fact that it is a rule that, no matter where you are, judges cannot resolve as many cases in one day as the attorneys and prosecutors can file. To ensure trial within a reasonable time, it is essential that the judges take full control over the procedure and ensure intervention in a dispute as soon as possible. However, effective case management is not sufficient if it is not supported by the concept of solving disputes in such a way that civil action is the last possibility used when everything else fails. Therefore, the “multi-door courthouse” model is rapidly advancing from the United States of America into Europe. The party coming to such a court receives a menu from which they can choose, on the basis of expert advice, an alternative procedure such as mediation, arbitration or early neutral assessment. In some member states of the Council of Europe, these procedures are relatively integrated in the regular business function of the courts. I note with satisfaction that the host of today’s deliberation is Slovenia, which is one of the leading European countries developing this “pluralist concept” of resolving disputes. Thus, there is more control over the procedure adjusted to the needs of the parties and over the result of this procedure, and at the same time, more responsibility for solving the problems is transposed onto the parties.

Allow me to say a few more words regarding the beginning of the presidency of the Committee of Ministers of the Council of Europe as of 12 May 2009, and accordingly return to a few months ago. Slovenia began its presidency with a very important event on 12 May 2009 in Madrid, when Protocol No. 14 bis to the European Convention on Human Rights was adopted with the purpose of introducing certain simplifications of procedures regarding judicial protection by the European Court of Human Rights, the Court that is unfortunately also a victim of its success and is overloaded with a large, barely manageable amount of cases. As a Minister of Justice of the Member State of the Council of Europe that currently holds the presidency of the Committee of Ministers, I am aware that, regarding the above Protocol, certain criticisms can be made. I will make an effort to make sure these criticisms are heard, since the mission of my function

is not only to enable the functioning of the judiciary, but also mainly to ensure that the parties to court proceedings exercise their rights quickly and efficiently and have access to effective judicial protection that protects their rights and fundamental freedoms. I expect that the development of the case-law of the European Court of Human Rights in the next few years will show which is the best regulatory way regarding access to judicial protection before the European Court of Human Rights.

On 12 May 2009, another important event occurred at the beginning of the presidency of Slovenia of the Committee of Ministers of the Council of Europe. On that day, as the Minister of Justice at the Supreme Court of the Republic of Slovenia, I solemnly presented the published version of the Slovene translation of the *Short Guide to the European Convention on Human Rights* by Mrs Donna Gomien. We have published a renewed version with the kind permission of the author and the Council of Europe publishing department; two independent experts supplemented it with the updated case-law and explanations of the European Court of Human Rights for the period up to April 2009. As the above book was delivered free of charge to all Slovene judges, state prosecutors, attorneys and similar judicial bodies, members of parliament, ministers of the government and even to the police, I believe that the information on the appropriate practice regarding human rights, fundamental freedoms and the rule of law will additionally contribute to the quality decision-making procedures of the judiciary and administrative authorities in Slovenia, a reduction of the number of court disputes and to the decision-making process of the courts within a reasonable time.

Respected participants of the Round Table, experts, representatives of the institutions of the Council of Europe, I wish you successful work and I am sure that you will contribute substantially to the protection of human rights and fundamental freedoms and to the development of the rule of law.

PART ONE: WAYS OF PROTECTION OF THE RIGHT TO A TRIAL WITHIN A REASONABLE TIME – COUNTRIES’ EXPERIENCES

THE ITALIAN MAZE TOWARDS TRIALS WITHIN REASONABLE TIME

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A short overview of the institutional setting of the Italian judiciary

The Italian judiciary has some peculiarities that makes it quite different from other European justice systems. In particular, in the Italian justice system public prosecutors are part of the judiciary and not part of the executive.¹ Both judges and prosecutors are part of the *magistratura*, as members of the same body they are called magistrates (*magistrati*).²

1. Prior to the Second World War, prosecutors were hierarchically subordinate to the Minister of Justice. The Italian Constitution enacted after the Fascist regime placed the public prosecutors in the judiciary setting.

2. As of September 2009, there is a statutory ceiling of 10,109 magistrates. In total, 8,548 of them perform some kind of judicial function. In particular, 6,439 are judges and 2,109 public prosecutors.

The Higher Council of the Magistracy is the institution charged with the recruitment, promotion, transfer of judicial positions, and a disciplinary system for judges and prosecutors.³ Established in 1959, it is composed of 27 members: 16 are judges and prosecutors elected by their colleagues, eight are law professors or attorneys elected by parliament, and three are members *ex officio*.⁴ Every Council sits for four years and members cannot be immediately reappointed.⁵ The Higher Council of the Magistracy does not have any formal power with regard to the budget of the judiciary, which is dealt with by the Ministry of Justice.

The Ministry of Justice is entrusted with the organisation and functioning of the judicial offices (procurement, information technology, administrative personnel, statistics, etc.), as well as with the budget.⁶ However, it is worth mentioning that within the Ministry of Justice almost all of the executive positions are held by magistrates.⁷

The Italian judicial offices are organised as follows. The first single judge court of limited jurisdiction is presided over by Justices of the Peace (*giudici di pace*).⁸ There are 848 Justices of the Peace offices nationwide; currently they have limited jurisdiction in both civil and criminal matters. The courts of first instance with general jurisdiction are the Tribunals (*tribunali*). There are 165 of them spread out all over the country, plus 222 detached offices.⁹ Attached to each of the 165 courts of general jurisdiction there are 165 public prosecutors' offices.¹⁰ Twenty-six out of 165 prosecutors' offices have a specialised anti-mafia unit called the *Direzione Distrettuale Antimafia*. These units are co-ordinated,

3. Italian Constitution, Article 105.

4. *Ex officio* members of the Higher Council of the Magistracy are: the President of the Republic, the President of the Court of Cassation, and the Chief of the Public Prosecutor's Office attached to the Court of Cassation.

5. Italian Constitution, Article 104.

6. Italian Constitution, Article 110. About 43,000 administrative personnel work in the judiciary (courts, prosecutors' offices, Ministry of Justice).

7. At the time of writing, about 90 magistrates occupy positions at the Ministry of Justice.

8. Justices of the Peace were introduced in the Italian justice system by Law no. 374, November 21, 1991, that came into force in May 1995. Justices of the Peace are lay judges appointed by the Higher Council of the Magistracy for a four-year term, while the Justices of the Peace statutory ceiling is 4,700, there about 3,000 justices of the peace in post.

9. In 93 tribunals there is a special section called *Corte di Assise* that has jurisdiction over the most serious criminal cases. These courts have two career judges and six lay judges, acting as jurors. Appeals from these courts are heard by special sections of the Court of Appeal (*Corti d'Assise d'Appello*).

10. In 26 prosecutors' offices there is a special anti-mafia unit called the *Direzione Distrettuale Antimafia* (District Anti-Mafia Bureau), established in 1992, which is in charge of all mafia cases within a specific appeal district. These 26 special units are co-ordinated by a central office located in Rome, called the *Direzione Nazionale Antimafia* (National Anti-Mafia Bureau).

but not hierarchically related, to a National Anti-Mafia Bureau (*Direzione Nazionale Antimafia*) located in Rome.

The Tribunals are appeal judges from the Justices of the Peace, while the 26 Courts of Appeal (*corti d'appello*) – plus three detached divisions – are appeal judges from the Tribunals. According to the so called “Pinto Law” (Law n. 89 of 24 March 2001), the Courts of Appeal also have jurisdiction over the cases related to the excessive length of judicial proceedings. The Courts of Appeal have a panel of three judges, and it is important to note that the appeal process is based on both factual and legal issues. Attached to each Court of Appeal there is a General Public Prosecutor’s Office.¹¹

The highest court is the Court of Cassation (*Corte di cassazione*), located in Rome, which deals with questions of law and reviews of all provisional orders relating to personal liberties. The Court of Cassation is supposed to guarantee the uniform jurisprudential interpretation of the law.¹² The court must consider all the pleadings filed; it does not have a *writ of certiorari* discretion. This feature has generated a huge case load and a giant court with more than 300 judges, which is very uncommon in comparison to the other highest European courts. Attached to the Court of Cassation there is a General Public Prosecutor’s Office.

Criminal cases with defendants under 18 years of age are handled by 29 Juvenile Courts (*Tribunale dei minorenni*), which also have a specialist prosecutor’s office. Members of the panel are two career judges and two social workers, one male and one female. Appeals lie to a special section of the Courts of Appeal.

Constitutional review is guaranteed by the Constitutional Court (*Corte Costituzionale*) which has 15 judges for a nine-year term. Five are appointed by the President of the Republic, five by the superior Italian courts (Court of Cassation, Council of State, and Court of Accounts), and five are elected by parliament. The Constitutional Court also hears conflicts which have arisen among the different branches of government.

The abyss and tentative “solutions”

In the last 20 years the Italian courts have been faced with a steady growth in the number and complexity of civil and criminal cases, with the resulting increasing length of proceedings. According to the President of the Court of Cassation¹³ and the Minister of Justice,¹⁴ in Italy there are about 5.5 million civil and

11. The judges and prosecutors who serve in the courts of appeal and in the attached public prosecutors’ offices amounted to 1,140 in 2000.

12. Although Italy is a country with a civil law tradition (so the *stare decisis* doctrine does not apply), precedents have always played a major role in sentencing. In particular, the sentences by the Supreme Court of Cassation have always affected the decision-making process in the trial courts.

3.2 million criminal cases still pending. There have been about 40,000 cases related to the excessive length of judicial proceedings before the Italian Courts of Appeals between 2001 and 2008, and the costs for the tax payer for compensation is about 118 million euros. Court performance may vary greatly from court to court, but the overall situation is embarrassing.

In an attempt to enhance the quality of the administration of justice, parliament and the government have embarked on several reforms, mainly procedural, and initiatives which have affected both the structure and the functioning of the Italian judiciary. Among the most important reforms and initiatives, there is the reform on criminal procedure in 1989, the establishment of Justices of the Peace in 1995, the unification of the court of first instance in 1999, a constitutional amendment in 1999 introducing the so called “right to a fair trial”, the Pinto Law in 2001, the civil procedure reform in 2003, 2006 and 2009, the development of information and communication technology (ICT) that traverses the whole justice system and has generated several expectations for a more efficient and effective administration of justice, but none of them have had a positive impact on the length of judicial proceedings so far.

The 1989 Code of Criminal Procedure superseded the 1930 Code that was originally drafted under the Fascist regime and which was amended several times after the Second World War to make it fit with the post-war Constitution. The structure of the first code was based on a non-adversarial or inquisitorial model and hierarchical officialdom.¹⁵ The 1989 Code was supposed to solve the problem of the huge criminal caseload by terminating approximately 80-85% of the cases before trial, by using primarily “Italian plea bargaining” (*applicazione della pena su richiesta della parti*) and other special proceedings.¹⁶

13. V. Carbone (2009), *Relazione sull'amministrazione della giustizia, nell'anno 2008*, Roma. Corte di Cassazione.

14. A. Alfano (2009), *Relazione sull'amministrazione della giustizia, nell'anno 2008*, Intervento del Ministro Angelino Alfano alla Camera e al Senato, Roma.

15. Damaska Mirjam R. (1986), *The Faces of Justice and State Authority*, New Haven, Yale University Press, p. 17.

16. The other special procedures are: the “direct trial” (*giudizio direttissimo*), the “abbreviated or summary trial” (*giudizio abbreviato*), the “immediate trial” (*giudizio immediato*) and the “penal decree” (*decreto penale*). For a description of such proceedings, see Pizzi W. and L. Marafioti (1992), “The new Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation”, *The Yale Journal of International Law*, vol. 17, no. 1, winter, pp. 1-40. Miller J. (1990), “Plea Bargaining and its Analogues Under the New Italian Criminal Procedure Code and in the United States: Towards a New Understanding of Comparative Criminal Procedure”, *New York Journal of International Law and Politics*, vol. 22, p.215-251. Amodio E. and E. Selvaggi (1989), “An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure”, *Temple Law Review*, vol. 62, no. 4, winter, p.1211-1224.

Twenty years since its implementation, it is possible to safely say that these goals have not been fulfilled and that the criminal process is still suffering from a deep crisis. In addition, during these years several Constitutional Court decisions¹⁷ reverted the Code back to a written process, heading towards what has been called counter-reform, creating a very complex set of rules, a hybrid model which is very difficult to manage.¹⁸

In an attempt to increase the productivity of the justice system a new “non-career full-time” (lay) judge, the Justice of the Peace, was introduced in 1995. Lay or non-career full-time judges, within the Italian judiciary are judges who serve on a temporary basis, and, on the contrast to “career” judges, they are not selected by means of written and oral exams but merely upon a consideration of the professional experience of the candidates by the Higher Council of the Magistracy. Justices of the Peace (JPs) must have a law degree, they must not be less than 30 years old or more than 70. They serve for four years and they can only be reappointed for one more term. Justices of the Peace do not receive a monthly salary but are paid on the basis of their actual work (i.e. they receive a certain amount of money for each written order or decision and for each hearing). There should be 4,700 of these JPs spread over in 848 offices but, at the time of writing, the actual figure is around 3,000. They have limited competence in both civil and criminal matters.¹⁹ The latter competence was only assigned in January 2002. Both the civil and the criminal procedures for the Justices of the Peace have been slightly simplified and the parties do not have to be represented by a lawyer in claims up to 1,000 euros. Appeals from decisions by Justices of the Peace lie at the Tribunal.

Among the goals to be attained with the establishment of the Justices of the Peace were a decrease in the caseload of the courts of general jurisdiction, a more clear-cut definition of civil proceedings, and a more informal way of dispensing justice. The establishment of the Justices of the Peace has resulted in a slight decrease in the overwhelming caseload of the courts of general jurisdiction, but the pace of litigation remains acceptable even if the growing caseload and the new criminal jurisdiction have dangerously increased the backlog and the pace

17. The Constitutional Court has played a major role in modifying the Code of Criminal Procedure, particularly at the beginning of its implementation. Actually, between 1989 and 1994, the Constitutional Court dealt with more than 40 provisions of the Code. Among the most important decisions that in some way reverted the accusatorial structure back towards an inquisitorial one, is decision no. 24 of 31 January 1992, decision no. 254 and no. 255 of 3 June 1992, and decision no. 361 of 2 November 1998.

18. M. Fabri (2008), “Criminal Procedure and Public Prosecution reform in Italy: a Flash Back,” *International Journal for Court Administration*, vol. 1, no. 1, pp. 3-15.

19. Justices of the Peace have jurisdiction in some kinds of misdemeanours and in small civil claims such as road traffic accidents, landlord and tenant disputes and a few other cases.

of litigation. Some problems have also arisen in the geographical distribution of the offices, which seem to be too spread out all over the country. As a consequence, the caseload is very different from city to city, and the allocation of resources is somewhat inefficient.

Some changes to the organisation and functioning of the Justices of the Peace are on the political agenda, but before they are implemented a comprehensive evaluation of the policy would be dramatically required. As may be seen throughout this paper, one critical aspect of the Italian justice system is the lack of any evaluation of the policies implemented, which tends to undermine the possibility to improve the policy through the necessary changes.

In an attempt to regain some efficiency through economy of scale and a better allocation of resources, in 1999 the government unified the first instance courts of general jurisdiction, as well as the attached prosecutors' offices. In actual fact, Italy has courts with more than 800 employees (e.g. Rome) and courts with less than five judges, along with more than 1,500 judicial offices all over the country. The reform was aimed at diminishing the number of courts, as well as having a more rational distribution of the caseload with the creation of detached offices and a partial redefinition of territorial jurisdiction. In addition, in order to increase court productivity, the jurisdiction of a single judge was increased so as to replace the usual panel of three. The policy relating to the unification of the trial courts has certainly been the most ambitious during the last 10 years. What is amazing is that the Italian judiciary seems not to have learnt from its own mistakes.²⁰ The lack of planning, organisational support, monitoring and ex-post evaluation, is the common trait that negatively affects any policy.

At the end of 1999 an amendment²¹ to Article 111 of the Constitution was introduced with reference to Article 6 of the European Convention on Human Rights: "the right to a fair trial" also embodied in Article 47 of the European Union Charter of Fundamental Rights approved by the European Parliament on 14 November 2000.²² The Constitutional amendment was also an attempt to reaffirm the adversarial model as the model to be used in Italian proceedings. Actually, the principle of "fair trial", now introduced in the Constitution,²³ is mainly entrusted in the adversary proceedings between two parts before an independent judge. Hearings must be of a reasonable length, even though there is no nationwide definition of what constitutes "reasonable".²⁴

The Pinto Law was introduced in 2001 to stop the flooding of cases for the excessive length of judicial proceedings to the European Court of Human Rights. As mentioned earlier, this new law has not solved any problem, but it has just increased both the caseload of the already suffering Courts of Appeal and the state budget deficit (about 118 million euros). There are already claims before

20. Crozier M. (1969), *Le phénomène bureaucratique*, Paris, Editions du Seuil, 1963.

the European Court of Human Rights because of the excessive length in dealing with these cases of the Courts of Appeal. The Pinto Law is an expensive and useless *placebo*,²⁵ which has just tried to sweep problems under the carpet.

During the last few years there has been a significant increase in both projects and organisational efforts to improve the “quality” of the Italian administration of justice through the use of information and communication technology (ICT).²⁶ This increase relates to the introduction of an independent Authority for Information Technology in the Public Administration (AIPA) by the Italian Government in 1993. Since the establishment of this Authority there has been an impressive growth in ICT projects in all the public sector, including the Ministry of Justice and the courts. The initiatives in information and communication technology in the Italian judiciary relate to the framework in which the projects are developed. Not many ICT projects that are currently under way would have occurred without a new government policy concerning technology in the public administration that led to the creation of the AIPA. The law that established the AIPA also provided for the creation of an “Office for Automated Information Systems” at each ministry (hereinafter, the ICT Department).²⁷ The goal was to

21. The first five points of Article 111 of the Constitution were amended by Constitutional Law no. 2 of 23 November 1999. 1. Jurisdiction is implemented through due process regulated by law. 2. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in a third party position. The law provides for the reasonable duration of trials. 3. In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defence. 4. The defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusations and to summon and examine persons for the defence in the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence. The defendant is entitled to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted. In criminal law proceedings, the formation of evidence is based on the principle of adversary hearings. The guilt of the defendant cannot be established on the basis of statements by persons who, out of their own free choice, have always voluntarily avoided undergoing cross-examination by the defendant or the defence counsel. 5. The law regulates the cases in which the formation of evidence does not occur in an adversary proceeding with the consent of the defendant or owing to reasons of ascertained objective impossibility or proven illicit conduct. See: <http://english.camera.it/> and <http://www.cortecostituzionale.it/>

22. Article 47 “Right to an effective remedy and to a fair trial” of the European Union Charter of Fundamental Rights states that: “1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. 2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. 3. Everyone shall have the possibility of being advised, defended and represented.”

23. With reference to this constitutional amendment, the Code has been amended as well, with Law no. 63 of 1 March 2001.

connect the single administrations with the Authority, also providing a new organisational structure to ICT departments within the public administration. ICT projects concerning the judicial process have certainly burst onto the scene within the Italian judicial system, but the main problem is still the implementation of these numerous projects that, in many cases, have become entrenched in a feasibility study or in an everlasting pilot stage.

In particular, as far as the management of the courts and the prosecutors' offices are concerned, several obstacles characterise the implementation of management information systems or workflow tools. Personnel inertia in monitoring activities is quite common in all organisations, and some difficulties in changing a sceptical attitude towards data analysis are inevitable, but within the Italian judiciary even only pointing out the performance of judges and prosecutors to their peers is considered to be a very sensitive issue within the Italian judicial "ivory tower". The circulation of data is generally perceived by the magistrates to be a threat to their independence because it could introduce a form of control over their activities.

In addition, the judicial statistics collected are a perfect example of how the implementation of the same case management system in the various courts and prosecutors' offices has not been sufficient to standardise internal procedures and data collection, so that the quality of judicial statistics is generally quite poor. The well known adage "garbage in, garbage out" is very appropriate to this case: the quality of the data entry at the courts and prosecutors' offices is still quite poor, and negatively affects any further data analysis, including any reliable data on the "quality" of the courts' performance, and also that of judges and prosecutors.

24. The "reasonable length" of a civil case at first instance has been defined by a decree by the Court of Appeal of Turin (north-west of Italy) as three years (decree no. 28/2001). It is a rule of practice of the European Court of Human Rights to consider as a reasonable length three years for a first-instance civil case and five years for an appeal. Interview with Vladimiro Zagrebelsky, judge at the European Court of Human Rights (Urbino, November 2002).

25. D. Carnevali (2006), "La violazione della ragionevole durata del processo: alcuni dati sull'applicazione della 'legge Pinto'" in C. Guarnieri e F. Zannotti (eds), *Giusto processo?*, Milano, Giuffrè pp. 289-314.

26. M. Fabri (2009), "E-justice in Finland and in Italy: enabling versus constraining models" in F. Contini and G.F. Lanzara (eds), *ICT and Innovation in the Public Sector*, Trowbridge, UK, Palgrave Mcmillan, pp. 115-146.

27. Since its establishment, the ICT Department of the Ministry of Justice has seen a huge increase in both its budget and its personnel. The department now has more than 800 employees such as administrative personnel, information technology specialists, and organisational analysts. It also has 12 regional offices (CISIA) spread throughout the country. It is noteworthy that this is the only department of the Ministry of Justice – which has its headquarters in Rome – to have regional branches.

At least in the Italian courts, ICT has not yet been the instigator of change that many policy makers expected it to be. It is a matter of fact that IT initiatives are facing the same problems resulting from the many judicial reforms that have taken place in Italy during the last decade. The judicial organisation does not seem to be able to enhance a learning process,²⁸ while it remains entrenched in old procedures, practices, routines, and an outdated power structure.

It is also undisputed that the several procedural civil reforms undertaken in the last years have not given the expected results. Among the reason for these failures is that the sole enactment of legal norms cannot be sufficient to make the judicial system more efficient and effective. Procedural law is merely one of several factors that can contribute to substantially changing the quality of justice and probably not the most important factor. In the case of Italy, the legal formalism that pervades the Italian legal community saddled these procedural reforms with rules that at times do not work in practice. Generally speaking, procedural reforms are not accompanied by other structural and organisational policies, and they tend to be detrimental to the functioning of the justice system.

A remarkable case: the Court of First Instance of Turin

In this distressing situation a remarkable hope comes from Turin (north-west of Italy). The First Instance Court of Turin is quite a large court with about 160 judges. In December 2001 the chief judge of the court promoted the so called “Strasbourg Programme”. The goal was to dramatically decrease the length of civil proceedings. In particular, the objective was zeroing the more than three-year-old pending cases in order to avoid the starting of compensation damages proceedings. The programme set a kind of handbook of clear rules and common practices, to be implemented by the judges and by the court personnel to fight the unnecessary delays. It is worth mentioning that these common court practices have also been developed and carried on with the fundamental consensus of the local legal community. Among them are worth mentioning the active role of the judge in case management, a strong policy against continuances or adjournments, a constant monitoring of the length of pending cases, practical indications about the interview of expert witnesses, the active involvement of the lawyers in the definition of the case scheduling, a priority attention for those cases close to lasting over three years. The Programme has been slightly amended during these years, but its design and implementation procedure has been the same. The most important thing is that the Programme has proved to be extremely effective. As of April 2009, the periodical report of the Turin court

28. Senge P. (1990), *The Fifth Discipline. The Art and Practice of the Learning Organization*, New York, NY, Doubleday Currency.

showed that less than 5% of all the civil cases still pending were more than three years old, and 85% of the civil caseload was not more than two years old.

It is worth mentioning that the remarkable success of this delay reduction programme is not the fruit of a major law or structural reform, but of a systematic and tenacious local initiative, which has followed most of the key factors already pointed out by the international literature to fight court delays.

In this respect, the work of the Commission for the Efficiency of Justice of the Council of Europe (CEPEJ)²⁹ and the empirical research conducted in several states worldwide on court delays refer to an “old conventional wisdom” *versus* a “new conventional wisdom” to reduce delays. In the “old conventional wisdom” delays were related to a chronic lack of resources, workload, and formal rules and procedures, but research evidence – and Turin is a perfect example – has proved that: “shortage of capacity is not the explanation for court delay, inefficiency in case processing seems the likely alternative”.³⁰ In the “new conventional wisdom”, these factors “operate through complex systems of practitioners’ attitudes and practices”.³¹ This is exactly what has been done with success by the chief judge and by the legal community in Turin.

Empirical research and the Turin case in Italy has showed that programmes of court delay reduction cannot be successful without a strong commitment from the judge and the chief judge in particular, and the involvement of the principal actors of the systems such as judicial personnel and lawyers. The importance of tackling court delay within a court must be promoted by the chief judge, setting a vision of change, showing leadership in promoting programmes to increase the timeliness of court decisions without diminishing their quality. Judges’ commitment is a key factor in the success of any initiative against court delay, they must build consensus around the need to include timeliness as a professional value for the judiciary. In addition, accountability mechanisms must be introduced to further stimulate both the adoption of policies and practices against court delay and the idea of a self-evaluating organisation.³²

29. CEPEJ (2006), *Length of court proceedings in the member states of the council of Europe based on the case-law of the European court of human rights*, Strasbourg, France; CEPEJ (2006), *Reducing judicial time in the Nordic countries*, Strasbourg, France; CEPEJ (2004), *A new objective for judicial systems: the processing of each case within an optimum and foreseeable time frame. Framework programme*, Strasbourg, France; P. Albers, I. Borzova, I., and Goth-Flemmisch, B. (2004), *Practical ways for combating delay in justice system*, Strasbourg, France, COE; Savvides, L. (2003), *Steps introduced by the Supreme Court of Cyprus for eliminating delays*, Strasbourg, France; Fabri, M., and Langbroek, P.M. (2003), *Delay in judicial proceedings in Europe: a preliminary inquiry*, Strasbourg, France.

30. D. Weatherburn and J. Baker (2000) “Delays in trial case processing: An empirical analysis of delay in the New South Wales District Criminal Court”, *Journal of Judicial Administration*, Australian Institute of Judicial Administration, vol.10, no. 1 August, p.11.

The court must supervise the case progress, and it should be fully responsible for the movement of the cases from filing to disposition,³³ implying a firm policy to avoid unnecessary continuances and adjournments, and a firm trial date. These factors have been recognised as useful to strengthen the concept of fighting against court delay among lawyers and to stimulate a pre-trial settlement between parties. Managing the case through a case management system is of paramount importance to decreasing court delay. A case management system approach is, in synthesis, the active management by the court of the case progress from filing to disposition.³⁴

In this regard, Lord Woolf's report³⁵ to the Lord Chancellor of England and Wales (1995, section II, chapter 5) stresses that: "there is no alternative to a fundamental shift in the responsibility for the management of civil litigation in this country from litigants and their legal advisers to the courts (...) In the absence of any effective control by the court itself, (...) the lack of firm supervision enables the parties to exploit the rules to their own advantage. (...) the complexity of civil procedure itself enables the financially stronger or more experienced party to spin out proceedings and escalate costs, by litigating on technical procedural points or peripheral issues instead of focusing on the real substance of the case.

31. Home Office (2002) *Justice for All, Criminal Justice White Paper*, England and Wales Home Office, London, http://cjsonline.org/publications/whitepaper_2002_cjs_white_paper.html; Home Office (2002) *The Manual of Guidance for the Preparation, Processing and Submission of Files*, London, England and Wales Home Office, <http://www.homeoffice.gov.uk/justice/legalprocess/courts/guidance.html>; B.J. Ostrom and R. Hanson (1999), *Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts*, Williamsburg, VA., National Centre for State Courts; Home Office (1997) *Reducing Delay in Criminal Justice Systems*, London, England and Wales Home Office; Mahoney B. (1988) *Changing Times in Trial Courts*, Williamsburg, VA., National Center for State Courts, p. 45; E. Buscaglia and J. Guerrero-Cusumano (1997), "Benchmarking procedural times: a quality control approach to court delays", *Benchmarking for Quality Management & Technology*, Vol. 4, n. 2, pp. 84-95; Solomon, M., and Somerlot. (1987). *Case-flow Management in the Trial Court*. Chicago, IL, American Bar Association; J. Goerdts (1986), *Examining Court Delay. The Pace of Litigation in 26 Urban Trial Courts*, Williamsburg, VA., National Center for State Courts; B. Mahoney B. and L. Sipes (1985), "Zeroing in on Court Delay: The Powerful Tools of Time Standards and Managed Information", *Court Management Journal*, 8; T. Church (1982), "The Old and the New Conventional Wisdom of Court Delay", *The Justice System Journal*, 7, pp.395-408.

32. Wildavsky A. (1972) *Evaluation as an Organisational Problem*, London, Centre for Environmental Studies.

33. American Bar Association (1992) *Standard Relating to Trial Court*, Chicago, IL., ABA.

34. D. Steelman and M. Fabri (2008), "Can an Italian Court Use the American Approach to Delay Reduction?", *The State Justice System Journal*, vol. 29, no. 1, pp.1-23.

35. Woolf H. (1995) *Access to Justice: Interim Report*, London, Lord Chancellor Office, www.lcd.gov.uk/civil/interim/contents.htm. Woolf H. (1996) *Access to Justice: Final Report*, London, Lord Chancellor Office, www.lcd.gov.uk/civil/final/contents.htm.

All too often, such tactics are used to intimidate the weaker party and produce a resolution of the case which is either unfair or is achieved at a grossly disproportionate cost or after unreasonable delay”.

The definition of goals and standards is strictly related to the case supervision, since it is a useful tool to monitor activities and adopt necessary changes in accordance within the outcomes. The process of setting goals and standards is also important to the sharing of knowledge and best practices among the different actors of the justice systems. The monitoring of the cases through a good information system is strictly related to the definition of standards and accountability mechanisms. This is also what has been carried out in Turin through their Strasbourg Programme.

As stated in the *Compendium of best practices of CEPEJ*,³⁶ “the setting of timeframes is a *condition sine qua non* to start measuring and comparing case processing delays, which will be the difference between the actual situation and the expected timeframes, and to assess the policies implemented to reduce the lengths of case processing. From a policy making, as well as from a managerial perspective, having timeframes is a prerequisite for evaluating the results of the efforts made to improve the lengths of judicial proceedings”.

Education and training of judges and lawyers are considered necessary to implement a delay reduction programme, but they are also of paramount importance to bringing the concept of case-flow management, delay reduction, and court management into the courts’ personnel and the legal profession.

In the Italian maze towards trial within a reasonable time, the Turin Court has effectively shown a realistic solution and a pragmatic approach, which seems to be the path to be followed, instead of running after a plethora of useless procedural reforms.

36. CEPEJ (2006), *Compendium of best practices on time management of judicial proceedings*, Strasbourg, Council of Europe. Available at: www.coe.int/t/dghl/cooperation/cepej/Delais/default_en.asp.

THE POLISH EXPERIENCE OF THE ESTABLISHMENT OF AN EFFECTIVE REMEDY AGAINST THE EXCESSIVE LENGTH OF PROCEEDINGS

Mr Jakub Wołásiewicz

Ambassador of the Republic of Poland, Government Agent of the Republic of Poland before the European Court of Human Rights

I would like to thank the organisers of this event for inviting me to Slovenia again. I have visited this fascinating country several times and enjoyed its warm hospitality. I have participated in seminars and round tables devoted to the problem of an effective remedy against the excessive length of proceedings. It was always a privilege for me to visit my Slovenian friends.

Poland was the second state to introduce such a domestic remedy. We took into account the experience of our Italian colleagues who had earlier implemented the Pinto Law. In creating our remedy we took the best elements of the Italian law and made corrections to those elements that did not work properly. Slovenia was the next state to follow our example.

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

In the case of *Kudła v. Poland* the European Court of Human Rights underlined that if the national legal system did not provide an effective remedy for an alleged breach of the requirement laid down in Article 6, paragraph 1, to hear a case within a reasonable time there had been a violation of Article 13 of the Convention. This also means that if a contracting state has established its own procedure for claiming damages caused by an undue delay in the domestic proceedings an applicant has to exhaust the domestic remedies before lodging with the Court a complaint concerning the excessive length of proceedings and a breach

of 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.

In order to implement the recommendations that the Court had made in the aforementioned case of *Kudła v. Poland* the Codification Commission on Civil Law of the Ministry of Justice prepared a draft act concerning 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 situations of undue delay in court proceedings, as well as 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.

According to the Act, a party is entitled to file a complaint, seeking ascertainment of the fact that the proceedings which are the object of the complaint involve an infringement of the party’s right to have a case examined without undue delay, where the proceedings are pending longer than needed to clarify the 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).

The criteria for evaluating if the case was examined without undue delay are based on the case-law of the Court.

As a rule the complaint is examined by a court superior to the court conducting the main 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 being 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 which the first act was performed.

According to the Act complaints about a breach of the right to a trial within a reasonable time may be lodged only if the proceedings are still pending. However, it must be emphasised that the law provides that a party who suffered any damages resulting from undue delay of the proceedings may claim compensation for pecuniary and non-pecuniary damage under the Civil Code after the proceedings have been concluded.

The Act established proceedings for complaints about a breach of the right to a trial within a reasonable time as incidental proceedings within the main proceedings. There is no requirement that an applicant should be represented by a

qualified lawyer in those proceedings (except for proceedings conducted before the Supreme Court).

The requirement that a decision be adopted within two months from the date of lodging the complaint constitutes a guarantee that the complaint shall be considered without undue delay.

When considering a complaint the court shall ascertain the undue delay in the proceedings that are the object of the complaint. Acting at the request of the party, the court may make recommendations to the court examining the case as to its substance to carry out 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, when allowing a complaint, if it is requested by the complainant, the court might order the State Treasury, or – when the complaint concerns the undue delay in proceedings conducted by a court enforcement officer – the relevant court enforcement officer, to pay a sum of money not exceeding PLN 10,000. The applicant may obtain further redress by bringing a civil action under the provisions of the Civil Code.

According to the 2004 Act a party can lodge a new complaint in the same case after 12 months have lapsed since the date of the court decision concerning undue delay.

Between 17 September 2004, which is the date when the Act came into force, and 31 December 2008 common courts received 15,040 complaints concerning the excessive length of judicial and executory proceedings. Civil cases were the most frequently complained of category of complained cases and they amounted to 61.03% of all cases (9,185 complaints).

The average redress afforded by the courts in a single case was PLN 2,000.

The Court has generally found the Act to be an effective national remedy for the excessive length of judicial proceedings according to Article 13 of the Convention (see *Charzyński v. Poland*, no. 15212/03). However, there are some rulings of the Court in which an improper application of the Act of 17 June 2004 by national courts and as a result a breach of Article 13 of the European Convention on Human Rights were found.

The Court pointed out that in some cases where the 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. the situation where limits were imposed on the re-examination of proceedings before the court of first instance as a result of the repeal of the ruling and where only the proceedings which had been conducted after the 2004 Act had come into force were considered, that is after 17 September 2004.

Despite the training of judges and the dissemination of the case-law of the Court concerning the excessive length of proceedings, the government was

forced to take legislative action to improve the national legal system. I would like to point out here the great role that the Registry of the Court has paid in this respect. In a spirit of mutual understanding we were able to find all the problems and decide on a revitalisation of the relevant law by introducing an amendment to the Act. This amendment came into force on 1 May 2009.

The main assumption of the new legislation refers to the possibility of lodging complaints about a breach of the right to a trial within a reasonable time in the preparatory proceedings, if the right to have a case examined without undue delay has been infringed due to an action or lack of action on the part of the prosecutor conducting or supervising the preparatory proceedings. The new amendment establishes also:

- ▶ the obligation for courts to instruct the court before which the main proceedings are being conducted or the prosecutor conducting or supervising the preparatory proceedings to carry out appropriate measures within a fixed time-limit. The recommendations may be given by the court examining the complaint also *ex officio*;
- ▶ the obligation to grant the complainant just satisfaction of between PLN 2,000 and PLN 20,000;
- ▶ the obligation imposed on 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; and finally:
- ▶ if the complaint concerns undue delay in proceedings before a district and regional court or proceedings before a regional and appellate court it shall be examined, in its entirety, by an appellate court.

Importantly, the new amendment provides that within six months of its entry into force persons that have lodged an application with the European Court of Human Rights before that date, alleging an infringement of the right to have their case heard within a reasonable time in preparatory proceedings, may lodge a complaint under the new Act concerning the undue delay in proceedings, if the application to the Court has been lodged in the course of the preparatory proceedings that are the subject of that application, provided the Court has not yet ruled as to the admissibility of the application.

In my opinion the remedy existing in Poland could be a good example for other states. In the case of an excessive delay of proceedings everyone affected by this situation can easily and quickly pursue the enforcement of their rights before an independent judicial body. If this body finds a violation the complainant can receive prompt just satisfaction and even more – in another set of civil proceedings the applicant can seek further compensation for the consequences of such delay.

THE EXPERIENCES OF THE NETHERLANDS

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Introduction

The Council of Europe, more specifically the European Commission for the Efficiency of Justice, has drawn over the past years much attention to the important topic of the right to a fair trial within reasonable time. First of all by publishing the evaluation reports on European judicial systems, where an overview is given on the composition and functioning of judicial systems. One of the topics that is described in these report, is connected with the duration of proceedings, the caseload and the capacity of courts. When you take a closer look in the reports it is obvious that – at a European level – there seems to be no uniformity in the measurement of the duration of proceedings and that only a limited number of countries are able to provide figures.

In addition to the evaluation reports of the European Commission for the Efficiency of Justice (CEPEJ) a separate line of activities have been developed in the area of reducing delays and backlog in courts. Several studies have been initiated in this respect. For example the report on time frames from the researchers Fabri and Langbroek (2003) indicated that many factors may reduce the length of proceedings by judicial commitment, the involvement of different actors in the system, court supervision of case progress, the monitoring of cases, etc. This study was used by the CEPEJ to develop a framework programme (2004) which may be used by the member states as a source of inspiration for implementing measures in the area of reducing delays. In 2005 the time management checklist of the CEPEJ was published. Also in this checklist five important indicators were mentioned for reducing delays:

- ▶ the ability to assess the overall length of proceedings;
- ▶ the establishment of standards for the duration of proceedings;
- ▶ a sufficiently elaborated typology of cases;
- ▶ the ability to monitor the course of proceedings;

▶ means to promptly diagnose delays and mitigate their consequences.

In practice the checklist is used in several countries, especially to draw attention to courts to take appropriate measures to avoid lengthy court proceedings.

More recent information on the issue of the duration of proceedings can be found in the publications of SATURN of the CEPEJ. Also this Centre gives a good impression of the current state of play with respect to “a reasonable duration of proceedings”. What about the experiences of the Netherlands with regard to the application of the “right to a fair trial principle within a reasonable time”? In this article a short overview is given on the measures that over the past 10 years have been introduced in the Dutch judiciary, aiming at improving the quality and efficiency of justice.

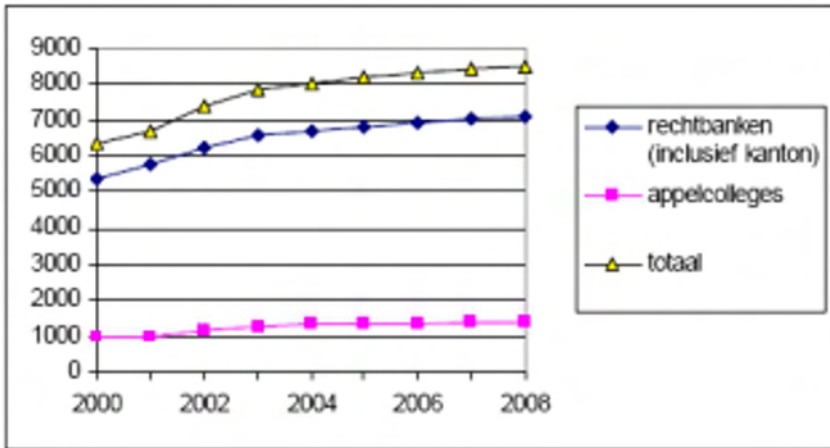
The reform of the Dutch judiciary 1998-2002 (*Rechtspraak 21ste eeuw*)

As the result of critics in the society and an increase of the backlog of cases at the courts in the period 1998-2002 a substantial reform programme of the Dutch judiciary was launched. The implementation was quiet unique because there were two lines of reform activities. Firstly, there where the reform plans initiated by the ministry of Justice and secondly there where the innovation projects developed by the judiciary itself (this under the name of the “Project Reinforcement Judiciary” (PVRO).

More judges and staff

As a part of the reform plans developed by the Ministry of Justice in the period 1998-2002 more financial resources were available for the courts. This resulted also in additional possibilities to recruit judges and court staff. See figure 1. As can be seen from this figure, even after the reform programme more judges and staff have been recruited. Between 2006 and 2008 the numbers concerning the human resources of the courts are more stable.

Figure 1: Development of human resources in the courts (full time equivalents for the period 2000-2008)



Project flying brigade

Another measure that has been introduced during the period of reform was specifically related to the huge backlog of civil cases at the district courts (“the Flying Brigade”). In 2000 a special staff unit was created to reduce the backlog of civil cases. Judicial advisors worked, under the supervision of six judges, on the drafting of concept-decisions of delayed court cases. The civil cases/files were delivered by several district courts in the Netherlands, who were confronted with a high backlog of cases. From the period 2000-2004, 7,500 decisions were prepared by this unit. A production comparable with a civil department of a large district court.

As a result of the reform programme a Council for the Judiciary was also created (in 2002), with broad competencies varying from the allocation of financial resources to the courts, to policy development for courts.

Common policy measures for fair and efficient court proceedings

Irrespective of the reforms that have taken place in the period 1998-2002, other common policies to stimulate a fair and efficient court proceeding have been introduced. One might think of the following measures:

- ▶ promoting a single judge at the district courts for a majority of cases;
- ▶ the use of an objective workload model for judges (LAMICIE);
- ▶ methods for measuring the duration of proceedings;
- ▶ a nomination policy of judges with a maximum flexibility of duty stations.

The single-sitting judge at the district courts

The general policy for the courts at first instance (district courts) is that, as much as possible, cases are treated by single-sitting judges. As a result of this measure more cases can be handled, then in a situation where a panel of (three) judges is used. Especially for relatively simple civil-law cases and also for criminal-law cases (police judge cases) this is a common practice. However, it must be noted that for certain categories of cases it is prescribed by the law that these cases are treated by a panel of judges. Examples are complex civil and administrative law cases and severe criminal law cases. The drawback of the intensive use of the “single-sitting judge” principle is that there are at the level of the courts fewer possibilities for the training and education of young judges and there are fewer possibilities for collegial intervention.

The use of an objective workload model (LAMICIE model) and a specific system for the allocation of financial resources to the courts

In the Dutch judiciary an objective workload model is applied (LAMICIE). This model contains 49 case categories. For each case category the time that is needed to prepare and finalise a case by a judge and his/her court staff is described. This model is in 2005 used for introducing a new method of financing the courts. The main aim of this new financial model was to provide courts more incentives related to the produced output. For eleven so-called “product groups” (based on the 49 case categories) the costs per case are determined. Every three years the height of the costs per case are reviewed and – when necessary – increased or decreased. The courts are funded on the basis of this principle, where the costs per case are related to the expected input and output. In situations where courts have produced more (in terms of output) than was expected (and described in their annual plans), they are financially awarded. However in situations where courts have produced less than the expected output norms they will be “punished”. These courts have to transfer a certain amount of budget to their “exploitation reserve fund”.

Methods for measuring the length of proceedings

The Dutch judiciary has invested over the past years much in the improvement of the measurement of the length of proceedings. This has resulted in more reliable data regarding how long a specific case takes to finalise. Simple criminal cases treated by a police judge (with a maximum prison sentence of one year) are handled in a period of five weeks. For complex criminal cases this is 15 weeks (2008). Civil non-litigious cases are finished within a period of 6 weeks, whilst civil litigious cases are finalised in 61 weeks (in 2005 this was 82 weeks). Administrative law cases are mostly finished within 46 weeks. In Table 1 the results are summarised.

Table 1: Average length of proceedings in weeks, 2005 and 2008

	2005	2008	Norm	% within the norm	Norm 2010: % within the norm
District court: municipal court department					
Civil litigious cases	16	19	6 months	81	75
Civil non-litigious cases	1	1	15 days	92	90
Family law cases	4	5			
Criminal law (offence)	8	7	1 month	90	80
District court: civil department					
Civil litigious case	82	61	1 year	62	70
Civil non-litigious case	5	6	2 months	70	90
Divorce case	17	16	2 months	61	50
Request to the child judge	7	8	3 months	90	90
Police judge (criminal law case)	5	5	5 weeks	86	90
Severe criminal law case	14	15	6 months	86	90
District court: admin. Law dep.					
Standard admin. law procedure	43	46	9 months	46	70

Nomination of judges

According to the Dutch law on the judiciary judges are nominated for life. Their independence is guaranteed by this law and the Constitution. Regarding the duty stations of judges, Dutch judges are, in contrast with judges in certain other countries, not only nominated at a specific district court or court of appeal, but can also act as “deputy judges” in other courts as well. This means that in situations where there is extra capacity in certain courts, necessary judges can work temporarily at other court locations too. By creating this possibility there is another measure available that can help in the “fight against long lasting proceedings”.

Balance between “reasonable duration of proceedings” and quality: *Rechtspraak*

The right to a fair trial within a reasonable time implies not only that several measures are taken aimed at reducing the length of proceedings. Since it is not only the principle of “justice delayed is justice denied”, but one must also avoid a situation where “justice hurried, justice is buried”. In other words, for proper judicial proceedings it is necessary that there is a balance between “efficiency” and “quality”. As a result of the fact that there was already a growing awareness in the Dutch judiciary for the need to pay sufficient attention to quality at the end of the last decennium, a comprehensive quality system – *Rechtspraak* – has been developed. The main aim of this system is to provide courts appropriate measures/instruments to assess and improve their quality of services.

The system is composed of three elements: a normative framework, several measurement instruments and other tools. The normative framework includes “quality statutes” and a measurement system judicial operation. Quality statutes are guidelines for the management of courts to implement certain actions in the field of quality. The general quality of the court is assessed by making use of the measurement system. As a part of this system five areas of the work of courts are measured: impartiality and integrity, expertise, treatment of the parties, unity of law and timeliness of proceedings. Every two years a court has to assess their state of play regarding court quality. On the basis of this assessment, the management of the courts has to develop an action plan. In addition to this court user satisfaction surveys and court employee satisfaction surveys are conducted in a four year cycle. On top of that, an independent national “visitation” commission is responsible for the drafting of a general report about the state of affairs of the quality of the Dutch judiciary.

Future developments initiated by the judiciary: the agenda for the judiciary

In a four year cycle the Dutch Council for the Judiciary publishes a strategic agenda. This agenda must be seen as the future policy guidelines for the courts. One of the important goals for the period 2008-2011 is related to the realisation of effective judicial proceedings. Several measures have or will be introduced. I will describe the five most important ones:

- ▶ The development of *norms for duration of proceedings*. It is expected that within a short period norms will be created to describe the time period in which a majority of the cases needs to be finalised. It is important to add in this respect the fact that there should be a balance between “quality and timeliness” of cases. In practice this may mean that a short duration of proceedings is not the final aim for all categories of cases. One concrete example where short proceedings are necessary is the field of youth law. In is in the interest of a child that these types of proceedings are finalised within a short period. For civil cases in general, a certain degree of flexibility will be introduced in the norms, since certain parties prefer short proceedings with fewer exchanges of documents and court sessions, whilst other parties may prefer the opposite.
- ▶ *Prioritisation*. In addition to the realisation of norms for the duration of proceedings, it is necessary that a list of priorities in the treatment of cases is used (especially from the perspective of the effects for the society as a whole and the individual court user). This means that cases with a higher priority will be treated earlier (and more expeditious) than cases that are put lower on the priority list.
- ▶ *Differentiation of the treatment of cases*. For the different areas of law (civil, criminal and administrative law) a differentiation of the treatment of cases will be introduced: simple, regular and complex cases. As a result of applying a differentiation, more time will be available for the treatment of cases at a court hearing for those cases where it is absolutely necessary.
- ▶ *Co-ordination in the judicial chain*. For a proper and efficient treatment of certain cases (especially in the field of criminal law and youth) a good logistical co-ordination of these cases between different actors is necessary. This means that (criminal) cases must be swiftly prepared by the public prosecution, with the intervention of probation offices, the police and other relevant organisations and – as soon as possible – transferred to the courts.
- ▶ *Digital access to courts and proceedings*. Within the coming years a secure exchange of information will become available for professional parties of the court. Where possible, for citizens, there will be a facility created for submitting cases digitally. In addition to this, parties will have the opportunity to fol-

low their cases online. To make this process more feasible the traditional paper-based court files will be replaced by digital files.

Policy plans initiated at the Ministry of Justice: the influence of the financial crisis

The minister of justice aims to realise an effective and efficient legal system. To do so, several actions will be undertaken. Firstly, alternative dispute resolution (mediation, arbitration and conciliation boards) as the first path in a conflict resolution process will be further promoted. The general idea is that citizens and companies are responsible for solving their own disputes. For an optimal functioning of the legal system it is necessary that disputes are resolved in a very early stage and that going to court must be seen as one of the “last resort” options. Improving access to alternative dispute resolution measures will be taken to guarantee an optimal fit between ADR, legal representation and the judiciary.

Secondly, the infrastructure for the legal system will be strengthened. The central focus will be the realisation of an efficient legal system, where the different actors are closely connected with each other. Efficiency gains within the system will be achieved with three measures:

- ▶ a review of the judicial map and modernisation;
- ▶ a better (digital) access to courts;
and:
- ▶ a stimulation of the use of new information technology.

Modernisation and a review of the judicial map

As a part of the ongoing modernisation activities the possibilities of co-operation between courts will be stimulated, as well as specialisation and concentration of courts. Access to justice will be improved by increasing the amount of the financial claim of the dispute, which determines in a civil court proceeding if legal representation is mandatory or not. In the near future, it will be possible that parties can start a legal proceeding without mandatory legal representation if a claim does not exceed 25,000 euros.

To make it possible for courts to specialise more easily and to reduce the vulnerability of smaller courts, the judicial map will be reviewed. It is expected that the legal-geographical areas will be reduced (from 19 *arrondissementen* to 11 regions) and that in each of those areas more possibilities will be introduced for specialisation and concentration of courts (see Figure 2).

Figure 2: Proposed new judicial map (district courts)

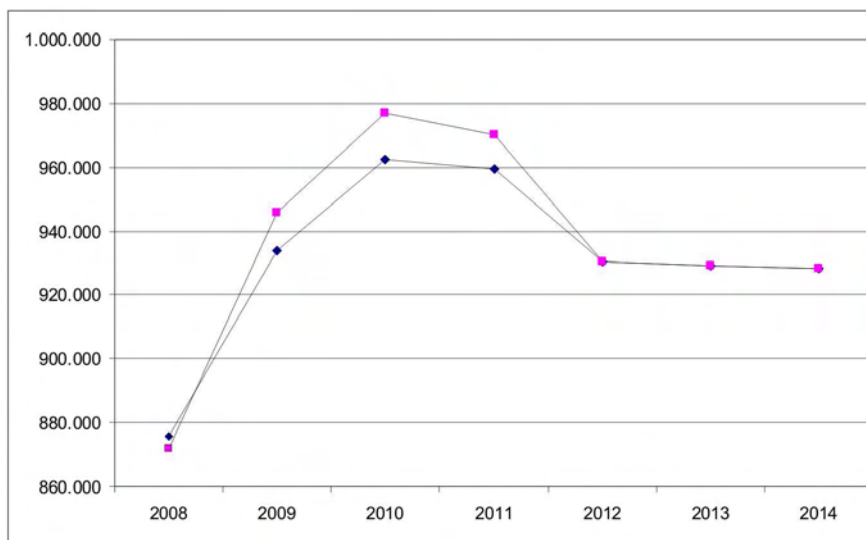


A better digital access to courts and a further stimulation of the use of new information technology

For this reason a special programme has been developed under the name “e-justice”. Important results will be expected in the field of the application of video-conferencing, the use of the electronic police reports and the introduction of an e-justice portal at a European level.

As one may read between the lines, under the influence of the financial crisis, it is expected that no large additional financial means will be available for the judiciary. Efficiency improvements in the courts and stimulation of out-of-court dispute resolution are the key words. Whether all these measures to solve the problems of the courts are sufficient is unclear, since a drastic rise in the number of incoming case will be expected. In particular, in the field of bankruptcy cases, debt cases, labour and social security cases there will be an increase. This may have a negative impact on the backlog of cases and the duration of proceedings.

Graph 1: Development of the court budget (figures in x € 1000) and costs of the court budget



For the short-term period, the Dutch judiciary will recruit 82 additional judges. This to take some actions against backlogs and the long duration of proceedings. The Dutch judiciary has presented in its budget proposal for the year 2010 forecast figures with respect to the development of the pending cases in the courts. These figures are presented in Table 2. If no additional measures are taken (for example to reduce the number of incoming cases) it is expected that, in the near future the number of pending cases will increase drastically in all areas of law. Of course, this will have a negative effect on the principle of a “right to a fair trial within reasonable time”.

Table 2: Development of pending cases in the courts

	2009	2010	2011	2012	2013	2014
Appeal courts						
Civil law	607	3495	6972	11309	16375	22222
Criminal law	0	0	6042	14042	22667	31863
Fiscal cases	0	675	1557	2795	4147	5647
District courts						
Civil law	0	19772	47044	89173	14127 3	203475
Criminal law	0	0	0	6038	14780	26167
Administrative law	347	5667	20706	38875	60833	87000
Municipal court cases	89629	32850 6	60377 3	96634 5	13924 96	1887368
Fiscal cases	0	721	2794	5825	9834	14942

REMEDIES AGAINST EXCESSIVE LENGTH OF JUDICIAL PROCEEDINGS IN THE CZECH REPUBLIC

Dr Vít A. Schorm

Government Agent of the Czech Republic before the European Court of Human Rights

In connection with the length of judicial proceedings, the Czech Republic has a system for expediting proceedings in abeyance and for compensating damages arising out of procedural delays. It should be noted that such remedies were developed in response to the Court's case-law, notably the judgment *Hartman v. Czech Republic* of 10 July 2003, application no. 53341/99, in which the Court ruled ineffective, within the judicial administration, the ordinary appeal procedure (the litigant was unable to compel the state to exercise its supervisory powers), constitutional appeals (the Constitutional Court failed to sanction the non-observance of the reasonable time requirement) and action for damages (the legislator failed to provide for a right to compensation for non-material damage).

Preventive appeal (or the “miracle solution” to the problem of delays in proceedings)

An appeal aimed at expediting proceedings is officially entitled a “request to establish a deadline for reaching a procedural decision”. It is provided for in Article 174a of Law no. 6/2002 on courts and judges. This provision came into force on 1 July 2004. Its original content is quoted verbatim in the Court's decision in the case of *Vokurka v. Czech Republic*, application no. 40552/02, 16 October 2007, paragraph 15.

In summary, a litigant who is dissatisfied with the outcome of a complaint submitted to the president of the trial court can ask the higher court to set a deadline for a specific procedural measure to be taken by the trial court. This remedy is modelled on a similar facility in Austrian law which the Court declared effec-

tive in its judgment *Holzinger v. Austria* (no. 1), application no. 23459/94, 30 January 2001.

The Court conducted an examination of the *in abstracto* conformity of this remedy, as incorporated into Czech law, to Article 13 of the Convention in the aforementioned decision *Vokurka v. Czech Republic*, concluding that it was ineffective because the request only constituted an extension of the ordinary appeal, which it had deemed ineffective.

This response from the Court, which is surprising both from the procedural angle (the government did not advance the non-exhaustion argument based on Article 174a of the Law on Courts and Judges because it was inapplicable to the instant case) and in substantive terms (the ordinary appeal, which had been ruled ineffective, had first to be exhausted, whereas the Slovenian system, despite being fairly similar, “seems more elaborate and tangible”), prompted a legislative amendment to the provision in question under Law no. 7/2009, which came into force on 1 July 2009. Two series of changes were made. First of all, the obligation of prior exhaustion of the ordinary appeal procedure was not explicitly abolished, and secondly the possibility was established for the court appealed against to deal with the appeal itself without having to transfer the case file to the higher court (thus causing further delays in the trial proceedings), unless the appellant was dissatisfied with the action taken by the court in question.

It should be noted that this remedy is not often used (some 200 to 250 times per year nationwide) and that Article 174a of the Law on Courts and Judges was declared constitutional under the Constitutional Court judgement of 28 April 2005 (also quoted in the aforementioned decision *Vokurka v. Czech Republic*).

The Justice Minister is currently considering the possibility of expanding the purely preventive remedy by adding a compensatory element in order to lighten the workload of the system for dealing with claims for compensation for non-pecuniary damage (see below). However, it would seem premature to go into further detail on this matter because the discussions are still at the early stages.

Claims for compensation (or the solution which the public decision-makers do not like)

Claims for compensation for non-pecuniary damage (pecuniary damage being already covered) were established under Law no. 160/2006 amending Law no. 82/1998 on liability for damage caused in the exercise of public duties, which came into force on 27 April 2006.

The relevant provisions of Law no. 82/1998 are reproduced in the aforementioned decision *Vokurka v. Czech Republic* and may be summarised as follows. Excessive length of judicial proceedings is considered as an improper official procedure for which the state is responsible. All claims for compensation must

be first of all submitted to the Ministry of Justice. The applicant can lodge a civil-law claim for damages with a court if his/her claim was not fully satisfied during the previous phase or if the Ministry has not reacted within six months. The compensation awarded must be consonant with the whole period of the proceedings, the complexity of the case, the claimant's conduct, the approach adopted by the public authorities and the procedural point at issue for the person concerned. Law no. 160/2006 also comprises transitional provisions concerning repatriation of cases pending before the Court.

In the aforementioned decision *Vokurka v. Czech Republic*, the Court recognised the *a priori* effectiveness of this remedy, while expressing a reservation regarding the possible length of the decision-making process at the national level. The *Vokurka* case-law is being upheld for the moment, and in declaring applications inadmissible the Court refers either to non-exhaustion of domestic remedies (failure to refer the case to the Ministry or the courts) or to the adequacy of the sums granted as compensation for non-pecuniary damage at the national level. The problem of the length of claims proceedings (or of the cumbersome civil-law procedure applicable to such cases) was once again raised in the decision *Najvar v. Czech Republic*, application no. 8302/06 of 3 March 2009, as delivered in the communication of the application to the Czech Government, in which the Court exempted the applicant from submitting his complaint to any judicial authorities above the appellate level.

Where the submission of claims for compensation is concerned, we might mention that between 27 April 2006, when Law no. 160/2006 came into force, and 31 August 2009, i.e. during the first three-and-a quarter years of the operation of this remedy, the Ministry of Justice received some 4,750 claims, 4,050 of which were dealt with, and 1,290 lawsuits. It has to be admitted that these figures exceed ministerial capacities and that a number of claims remain unanswered beyond the legal six-month deadline (although this does not prevent claimants from applying to a court, as noted above). On the other hand, there have been no major difficulties with the payment of the compensation awarded.

Amendments to Law no. 82/1998 are currently under consideration so that the harmonious implementation of the remedy in question can continue to be guaranteed; the ongoing discussions have not yet led to the preparation of draft legislation or even of the underlying principles.

Tentative conclusion

I suppose there would little difficulty in agreeing on one point, namely that it is virtually impossible to foresee all the eventualities, regardless of the open-ended nature of the contractual requirements as interpreted by the Court, which explains why it is more than likely that a remedy will one day have to be re-exam-

ined at the national level, since it may prove ineffective in a specific category of case or even more generally defective, e.g. vis-à-vis the amounts awarded in compensation. Moreover, the legal construction of remedies must take place within the existing law-based state, which is why these constructions vary from one state to another, although this also presents certain obstacles which may be difficult to overcome and may one day be pleaded in defence against states submitting applications.

I would also add that it is important to ensure that the bodies responsible for implementing the new remedy are appropriately trained. In order to avoid the pitfall of awarding insufficient amounts in respect of claims for compensation, the Czech Republic decided to entrust the preliminary stage in processing the claims to the Ministry of Justice, even though this system had been abolished in 1998 in respect of improper official procedures (it had been included in previous legislation), unlike the system applicable to compensation for an unlawful decision. It was deemed eminently possible to apprise the competent Ministry department of the scales for compensation for non-pecuniary damage arising from excessive length of judicial proceedings, which would be an extremely difficult exercise where the courts are concerned. This led to the publication of a handbook on the application of certain principles of Law no. 82/1998 as amended by Law no. 160/2006 in the light of the requirements of the Court's case-law (including the Grand Chamber judgments of 29 March 2006 in the cases against Italy). While the Ministry's practice is not completely uniform, the handbook, which takes the form of an ordinary ministerial internal instruction, has indubitably helped achieve the goal of awarding appropriate sums, thus eliminating the victim status of potential applicants to the Court.

Lastly, we must bear in mind that excessive length of proceedings is a multifaceted phenomenon which goes beyond disproportionate length of civil or criminal proceedings leading to substantive judicial decisions. One of the problems is that delays, typically in the substantive enforcement phase, may have negative effects on the family lives of parties to proceedings relating to custody of under-age children. The Court has been reluctant to consider that a claim for compensation could, in principle, remedy a violation of Article 8 of the Convention, whereas on the other hand it has readily accepted that such a claim must be exhausted in connection with any complaint of excessive length of proceedings based on Article 6 of the Convention, which is fairly similar. The argument is not yet over, and complaints of violation of Article 13 in conjunction with Article 8 of the Convention, which can justifiably be advanced, have not yet received an adequate response. As an illustration, we would refer to the judgment *Andělová v. Czech Republic*, application no. 995/06, 28 February 2008, and the decision *Jedličková and Jedlička v. Czech Republic*, applications nos. 32415/06 and 32216/07, 3 June 2008.

IN THE QUEST FOR THE HOLY GRAIL OF EFFECTIVENESS

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Introduction

In this text we will present Croatian experiences of the protection of the right to a trial within a reasonable time guaranteed by Article 6 of the European Convention on Human Rights (the Convention). Although the right to a prompt and effective legal protection was a part of the human rights instruments that were in force for several decades,¹ the right to a trial within a reasonable time only became an issue since Croatia became member of the Council of Europe in 1997. The submission to the jurisdiction of the European Court of Human Rights (the Strasbourg Court) that is implied in the membership of the Council of Europe swiftly led to a number of cases in which the Strasbourg Court found violations of the reasonable time requirement in an ever-growing number of cases.

The surfacing of the judgments finding human rights violations at the international level required an action by the national authorities. Of course, the attempts to reform national judiciary and accelerate judicial proceedings were an important element of such reactions.² However, even irrespective of their appropriateness and speed, such attempts could only secure significant progress in the long run. As every member state has to ensure that the rights guaranteed by the Convention are effectively protected within its own national system, it was necessary to establish a domestic mechanism that would enable all under

1. For example, in Article 10 of the Universal Declaration of Human Rights or in Article 14 of the International Covenant on Civil and Political Rights.

2. See, *inter alia*, Uzelac, Alan, Accelerating Civil Proceedings in Croatia – A History of Attempts to Improve the Efficiency of Civil Litigation, in: C.H. van Rhee (ed.), *History of Delays in Civil Procedure*, Maastricht, 2004, pp. 283-313.

national jurisdiction to complain about the violations of their right to a trial within a reasonable time. This requirement became even more pronounced since the Strasbourg Court issued the ground-breaking judgment in the *Kudła* case³ that emphasised the obligation of the states to act at domestic level to address problems of excessive length of proceedings. After that case, the Strasbourg Court started to systematically insist on the need to establish effective national remedies for the length of proceedings, applying Article 13 of the Convention to all length of proceedings cases in which such remedies did not exist. This development of the jurisprudence of the Strasbourg Court was greatly affected by the significant growth of the caseload of the Court which was largely due to cases complaining of violations of Article 6 of the Convention (in particular from the new members of the Council of Europe from eastern and southern Europe).⁴

This paper presents the development of the Croatian national remedies for the length of proceedings, as well as their current status and functioning. Firstly, we will outline a short history of trials and tribulations regarding the legal means of complaining of the length of proceedings at constitutional and statutory level. These mechanisms were changed and further elaborated several times, partly because of the negative echo coming from the Strasbourg Court cases, partly because of the expansive domestic use of the available remedies, which raised fears of overfilled dockets. The national remedies will be described at the three levels – at the constitutional level (the remedy established by the Constitutional Act on the Constitutional Court in 1999, amended in 2002), at the statutory level (the remedy established by the Courts Act in 2005, abbreviated hereinafter as RPRTT), as well as at the administrative level (requests and appeals based on “silence of administration” under the Administrative Procedure Act and the Administrative Disputes Act). The impact of the aggregate of these remedies on the current situation with respect to length of proceedings will be analysed from the two perspectives: from the external perspective (perspective of the Strasbourg Court), and from the internal (national) perspective. Both perspectives will include the currently available statistical data on the number of cases and their outcome. Based on these findings, in the last part of this text we will give some synthetic conclusions and assessments regarding the current status and the future of the right to a trial within a reasonable time.

3. See *Kudła v. Poland*, application no. 30210/96, judgment of 26 October 2000.

4. The Strasbourg Court expressly stated that if states failed to react by establishing effective national remedies “individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise (...) have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened”. *Kudła*, cit. *supra* (note 3), para. 155.

Development of legal remedies for the length of proceedings (2000-2005)

General

Croatia became a member of the Council of Europe on 5 November 1997. This moment almost coincided with the coming into effect of the new procedural rules provided by Protocol 11 to the Convention. In any case, as there were no decisions or judgments prior to 1999,⁵ all Croatian cases were decided according to Protocol 11 mechanisms.

The very first case that found a human right violation regarding Croatia was a length of proceedings case. In the *Rajak* case,⁶ the proceedings lasted 22 years prior to the entry into force of the Convention, and were still pending some four years later when the Strasbourg Court made its judgment. Consequently, it was not difficult to find that the length of proceedings in that case was excessive. Since the *Rajak* case, there was a long line of various cases in which unreasonable length was established, as well as a number of cases in which friendly settlement was concluded. In spite of the introduction of the various national remedies (described *infra*), the line of cases finding the length of proceedings violations extended to the present day.⁷

According to governmental sources, 92% of the human rights violations found before the Strasbourg Court regarding Croatia involved violations of Article 6, paragraph 1, of the Convention either alone or in conjunction with other human rights violations.⁸ All in all, the Court statistics for the 1998-2008 period show that out of 151 judgments issued in respect of Croatia during that period, 66 judgments concerned length of proceedings violations and 21 judgments were violations of the right to an effective remedy (large majority of the latter dealt with the lack of effective remedy for the length of proceedings). Therefore, it was only natural that both legislative and practical interventions in this area have high political weight and priority.

5. The first decision regarding Croatia was the admissibility decision in *Očić v. Croatia*, application no. 46306/99, decision of 25 November 1999.

6. See *Rajak v. Croatia*, application no. 49706/99, judgment of 28 June 2001.

7. See e.g. *Plazonić v. Croatia*, application no. 26455/04, judgment of 6 March 2008; *Vidas v. Croatia*, application no. 40383/04, judgment of 3 July 2008; *Kaić and Others v. Croatia*, application no. 22014/04, judgment of 17 July 2008; *Krnić v. Croatia*, application no. 8854/04, judgment of 31 July 2008; *Oreb v. Croatia*, application no. 9951/06, judgment of 23 October 2008.

8. Vlada RH i Ured za ljudska prava, *Nacionalni program zaštite i promicanja ljudskih prava od 2008 do 2011. godine*, Zagreb, 2007, p. 9.

Constitutional Act on the Constitutional Court 1999, Article 59(4)

The first attempt to create a remedy that could address the length of proceedings within the domestic system of protection of constitutional rights happened in 1999 when the new Constitutional Act on the Constitutional Court was enacted (Constitutional Act 1999).⁹ *Inter alia*, the new Act reformed the provisions on the constitutional complaint, which were prior to those changes practically useless as a remedy for the length of proceedings.¹⁰ Therefore, “to end the period without the appropriate protection of the right to a trial within a reasonable time”,¹¹ the Constitutional Act 1999 inserted a new paragraph which had to address specifically the “failures to act within a reasonable time”, which read:

Article 59 (4)

“The Constitutional Court may, exceptionally, examine a constitutional complaint prior to exhaustion of other available remedies, if it is satisfied that a contested act, or failure to act within a reasonable time, grossly violates a party’s constitutional rights and freedoms and that, if it does not act a party will risk serious and irreparable consequences.”

The issue of whether the new constitutional complaint was an effective remedy for the length of proceedings soon arose before the Strasbourg Court. In the *Horvat* case¹² the Court held that the new remedy was not satisfactory, and that, therefore, no “true legal remedy enabling a person to complain of the excessive length of proceedings” existed in Croatia.¹³ Explaining this finding, the Strasbourg Court in particular relied on several arguments. As first, it noted that the new remedy depends on the discretionary powers of the Constitutional Court to admit it, after a preliminary examination of the complaint. Second, it noted that the two conditions that had to be cumulatively satisfied – “gross violation of the constitutional rights” and the “risk of serious and irreparable consequences for the applicant” are both “susceptible to various and wide interpretation”.¹⁴ Finally, the Strasbourg Court came to conclusion that only one case offered by the government as proof indicates the uncertainty of the remedy in

9. See *Ustavni zakon o Ustavnom sudu RH*, NN (Off. Gaz.) 99/99.

10. The old Act provided that every person who considers that his or her constitutional rights were violated by the decision of any public authorities may launch a constitutional complaint (see Constitutional Act on the Constitutional Court, NN 13/1991). However, this complaint could be launched only after a final decision was delivered, and the only remedy was the quashing of the decision and the remittal of the case to the respective authority (Articles 29 and 30).

11. Iva Perin Tomičić, *Zaštita prava na suđenje u razumnom roku u Republici Hrvatskoj s osobitim osvrtom na problem okončanih predmeta*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 28/2:2007, p. 1357.

12. See *Horvat v. Croatia*, application no. 51585/99, judgment of 26 July 2001.

13. *Horvat*, *ibid.*, para. 48.

14. *Horvat*, *ibid.*, para. 43.

practical terms and does not amount to conclusive proof of the settled case-law which demonstrates the effectiveness of the new remedy.¹⁵

The Strasbourg Court did not even need to enter in this case into the examination of the possible redress that could be offered in the case of success of the complaint, although it might have been another reason for the same conclusions. Namely, even if the complaint under Article 59(4) was granted, how the Constitutional Court should react was still problematic since the available means of reaction to a violation had not changed – they were still limited to annulment of the impugned decision and the remittal of the case to the relevant body for retrial.¹⁶

Request for administrative supervision as a remedy for the length of proceedings

In the *Horvat* case, the government also objected to the non-exhaustion of other legal remedies, such as the request for speeding up the proceedings that could allegedly be brought to the attention of the president of the competent court (in the said case, the Zagreb Municipal Court), or the Ministry of Justice. Dismissing those objections, the Strasbourg Court noted that these requests for acceleration of the proceedings “represent a hierarchical appeal that is, in fact, no more than information submitted to the supervisory organ with the suggestion to make use of its powers if it sees fit to do so”. The applicant does not have the status of party in such proceedings and might eventually only be informed of whether and how the supervisory organ dealt with such requests.¹⁷

Petition for constitutional review as a remedy for the length of proceedings

In some cases the government attempted another pretty far-fetched avenue of objecting to non-exhaustion of domestic remedies, which still deserves attention for the sake of completeness. In *Crnojević*,¹⁸ *Varičak*¹⁹ and *Freimann*²⁰ the government argued that the applicants failed to exhaust domestic remedies because they had not filed a constitutional claim challenging the constitutionally

15. *Horvat*, *ibid.*, para. 44.

16. See Article 72 of the Constitutional Act 1999, which was quoted in the admissibility decision in the *Horvat* case (see decision of 16 November 2000), but omitted in the final judgment.

17. *Horvat*, *ibid.*, para. 47.

18. *Crnojević v. Croatia*, application no. 71614/01, decision of 29 April 2003.

19. *Varičak v. Croatia*, application no. 78008/01, decision of 11 December 2003.

20. *Freimann v. Croatia*, application no. 5266/02, judgment of 24 June 2004, paras. 19-21.

of the legislation in question (so-called *inicijativa za ispitivanje ustavnosti zakona*), and in *Aćimović*²¹ it was argued that the remedies were not exhausted because the applicant's abstract challenge of the constitutionality was still pending with the Constitutional Court. The Strasbourg Court observed that the rule of exhaustion of domestic remedies requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. In all of these cases, the Strasbourg Court came to conclusion that a possible positive decision by the Constitutional Court would only lead to annulment of the questioned legislation and enactment of the new legislation, what would not directly prevent or remedy the excessive length of proceedings.²² Therefore, the claims to examine constitutionality with the Constitutional Court were not regarded as effective remedy for the length of proceedings, and, consequently, they need not be exhausted prior to applying to the Strasbourg Court.

Constitutional Act on Constitutional Court after 2002 Amendments, Article 63

As a direct consequence of the Strasbourg Court's jurisprudence, the government decided to change the legislative provisions on the constitutional complaint as the special remedy for the length of proceedings. The amendments to the Constitutional Act on the Constitutional Court were enacted in March 2002,²³ revising a number of provisions of that act, *inter alia*, also Article 59(4), which became Article 63 in the revised 2002 text of the Act.

The new Article 63 reads as follows:

- (1) The Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted in cases when a competent court has not decided within a reasonable time a claim concerning the applicant's rights and obligations or a criminal charge against him (...).
- (2) If the constitutional complaint (...) under paragraph 1 of this Section is accepted, the Constitutional Court shall determine a time-limit within which a competent court shall decide the case on the merits (...).
- (3) In a decision under paragraph 2 of this Article, the Constitutional Court shall fix appropriate compensation for the applicant in respect of the violation found concerning his constitutional rights (...) The compensation shall be

21. *Aćimović v. Croatia*, application no. 61237/00, ECHR 2003/XI, decision of 7 November 2002.

22. *Crnojević*, cit. *supra* (note 18).

23. Amendments 2002 are published in the Official Gazette. (NN) 29/02. They came into force on 15 March 2002. Subsequently, a revised text with re-numerated articles of the Constitutional Act on the Constitutional Court was published in NN 49/02.

paid from the State budget within a term of three months from the date when the party lodged a request for its payment.”

The most important novelties of the Article 63 constitutional complaint were, firstly, the elimination of the discretionary power to admit the complaint by the Constitutional Court; secondly, the elimination of the vague language and the conditions of “gross violation” and “serious and irreparable consequences”; and thirdly, the introduction of the combination of the two types of remedies, one designed to expedite the proceedings and the other to afford compensation.

In the first cases that occurred after the introduction of the new remedy, the reaction of the Strasbourg Court was generally affirmative. As a matter of principle, the constitutional complaint under Article 63 was recognised as effective remedy for the length of proceedings. In the *Slaviček* case,²⁴ the Court noted that the new legislation is “clear and specifically designed to address the issue of the excessive length of proceedings before the domestic authorities”. As such, it “removed the obstacles that were decisive when the Court found that [former remedy] did not comply with all the requirements to represent an effective remedy”. Thus – even prior to any existing jurisprudence in which the Constitutional Court would effectively deal with the concrete length cases – the Strasbourg Court decided that the applicants further on have to exhaust this remedy prior to turning to this Court, as required by Article 35, paragraph 1, of the Convention.

Deciding on the admissibility of the pending Croatian length cases, the Strasbourg Court extended its new approach even to the cases which were lodged with it prior to the entry into force of Article 63. In the *Nogolica* admissibility decision,²⁵ it was stated that normal rules on the availability of domestic remedies in the moment of applying to the Strasbourg Court may be subject to exceptions justified by specific circumstances,²⁶ and therefore declared the application as inadmissible, applying the precedents from Italian cases lodged prior to enactment of the Pinto Law.²⁷

The Croatian model of the constitutional complaint as a combined remedy that unites compensatory and expediting relief was often cited in a positive context along with examples from Austria, Spain, Poland and Slovakia in a number of Italian cases, most notably in *Cocchiarella*²⁸ and *Apicella*.²⁹ The Strasbourg Court argued that “a remedy designed to expedite the proceedings in

24. See *Slaviček v. Croatia*, application no. 20862/02, decision of 4 July 2002.

25. *Nogolica v. Croatia*, application no. 77784/01, decision of 5 September 2002.

26. The Court here cited *Baumann v. France*, application no. 33592/96, judgment of 22 May 2001, para 47.

27. See *Brusco v. Italy*, (dec.), application no. 69789/01, European Convention on Human Rights 2001-IX.

28. *Cocchiarella v. Italy*, application no. 64886/01, GC judgment of 29 March 2006.

order to prevent them from becoming excessively lengthy is the most effective solution”, especially in the countries whose judicial systems suffer from systemic deficiencies in ensuring that courts hear cases within a reasonable time. In particular, the Strasbourg Court noted that such remedy does not only afford the compensation *a posteriori*, but also “prevents a finding of successive violations in respect of the same set of proceedings”.³⁰ As such, when criticising the simple and unilateral mechanisms of some countries, the Strasbourg Court listed Croatia among the states “that have understood the situation perfectly”.³¹

The issue of already concluded cases in the practice of the Constitutional Court under Article 63

After *Slaviček*, most of the Croatian cases concerning length of proceedings were declared inadmissible if the constitutional complaint for length of proceedings was not lodged. But, in certain cases the practice of the Constitutional Court exhibited certain limitations and difficulties. So, in the *Šoć*³² and *Debelić*³³ cases, it was noted that under the jurisprudence of the Constitutional Court the constitutional complaints under Article 63 have to be rejected if the proceedings, the length of which is being complained about, were concluded before the Constitutional Court made the decision on the complaint.³⁴ *A fortiori*, the Constitutional Court also had not left open any chance for the success of the constitutional complaints that would be launched only after the (excessively long) proceedings were finally concluded.³⁵

Such practice by the Constitutional Court led the Strasbourg Court to infer that, for the cases that had already been concluded, Article 63 did not represent an appropriate remedy for the length of proceedings.³⁶

The judgments of the Strasbourg Court convinced the Constitutional Court to change its approach, at least partially. It reversed its earlier jurisprudence and

29. *Apicella v. Italy*, application no. 64890/01, GC judgment of 29 March 2006 (see paras. 63-105).

30. *Cocchiarella*, cit., para. 74.

31. *Cocchiarella*, cit., para. 77.

32. See *Šoć v. Croatia*, application no. 47863/99, judgment of 9 August 2003.

33. *Debelić v. Croatia*, application no. 2448/03, judgment of 26 May 2005.

34. Decision of the Constitutional Court of 20 November 2002, no. U IIIA-1535/2002.

35. See *Camasso v. Croatia*, application no. 15733/02, judgment of 13 January 2005. In the same case, the government claimed that the applicant had failed to complain to the Constitutional Court about the length of the proceedings under Article 62 of the Constitutional Court Act, but the Court did not find any evidence that an Article 62 complaint might result in prevention of excessive delay or in an award of damages for delay which had already occurred. *Camasso*, cit. para 24.

36. *Šoć*, cit., para 94.

started to examine on merit the constitutional cases which had been initiated while the respective judicial proceedings were pending, irrespective of the fact that the courts in the meantime rendered their final decisions.³⁷ Explaining this twist in its practice, the Constitutional Court referred to the fact that in an ever growing number of cases the courts react and make their decisions only after communication of the constitutional complaints.³⁸ Still, if the proceedings were completed prior to launching the constitutional complaint, as in the *Šoć* case, the applications were (and still are) continually rejected by the Constitutional Court.³⁹

The issue of the length of the enforcement proceedings

In spite of the well-established practice of the Strasbourg Court according to which, for the purposes of the Article 6, the enforcement proceedings have to be viewed as an integral part of the “trial”,⁴⁰ the Constitutional Court refused to apply Article 63 to the enforcement proceedings in the first two years of application of the Constitutional Act 2002.

According to its interpretation given in a 2003 decision,⁴¹ Article 63 would be applicable only in cases where the court has not decided within a reasonable time on the merits of the rights and obligations of the complainant. This opinion was repeated in the subsequent decisions of the Constitutional Court on the same issue in the next year.⁴²

In the *Pibernik* case,⁴³ the Strasbourg Court raised for the first time the issue of non-applicability of Article 63 proceedings to the excessive length of enforcement proceedings. *In passim*, the applicability of Article 6 guaranteed the enforcement proceedings were affirmed in *Cvijetić*⁴⁴ and *Kvartuč*⁴⁵ cases. Later, in *Karadžić*⁴⁶ and *Majski*,⁴⁷ the Strasbourg Court noted the practice of the Con-

37. This was the factual setting in the *Debelić* case, which, as opposed to the *Šoć* case, would be taken into consideration under the new approach of the Constitutional Court.

38. Constitutional Court Decision U-III A-905/2003 of 5 May 2004.

39. See, for example, Constitutional Court Decision U-III A-1270/2003 of 18 June 2004 (for the early practice) and U-III A-3521/2005 of 19 November 2008 (for continuing applicability of this approach). See also Perin Tomičić, op. cit. *supra*, p. 1365-1366.

40. *Hornsby v. Greece*, judgment of 19 March 1997, Reports of Judgments and Decisions 1997 II, p. 511, para. 41.

41. Constitutional Court Decision U-III A/1165/2003 of 12 September 2003.

42. Constitutional Court Decision U-III A/781/2003 of 14 May 2004.

43. *Pibernik v. Croatia* application no. 75139/01, decision of 4 September 2003.

44. *Cvijetić v. Croatia*, application no. 71549/01, judgment of 26 February 2004, para. 43.

45. *Kvartuč v. Croatia*, application no. 4899/02, judgment of 18 November 2004, para. 36.

46. *Karadžić v. Croatia*, application no. 35030/04, judgment of 15 December 2005, para. 38.

47. *Majski v. Croatia*, application no. 33593/03, judgment of 1 June 2006, para. 24.

stitutional Court, recognising however that its jurisprudence had changed since a decision rendered in 2005.⁴⁸ In conclusion, it found that “before 2 February 2005, a constitutional complaint under section 63 of the Constitutional Court Act could not be regarded as an effective remedy” in cases in which the length of enforcement proceedings was complained.⁴⁹ The change of the Constitutional Court’s jurisprudence was effected with an express reference to the wish to harmonise its practice with the Strasbourg Court’s case-law, and the *Hornsby* case in particular was expressly quoted in the text of the decision on constitutional complaint of 2 February 2005.⁵⁰

The sufficiency of the amount of compensation

The amount of compensation that the states should afford to the victims of the violations of the right to a trial within a reasonable time is not strictly determined in the jurisprudence of the Strasbourg Court. Generally, it is accepted that the member states enjoy a certain discretion in setting the level of the compensation, which has to be in line with the general economic conditions and standard of living in the respective country. The amount of compensation can also depend on the availability of the domestic remedies that could accelerate the proceedings, in which case the Strasbourg Court was allowing that the compensation awarded under domestic remedy (if this remedy was a combined remedy) would be somewhat lower than the usual compensation awarded before it. However, the compensation given in the domestic proceedings was subject to the assessment of the Strasbourg Court which considered whether the amount awarded was adequate and sufficient in the light of the principles established under its case-law, as pronounced in *Scordino*.⁵¹

In the Croatian cases, the compensation awarded to the successful claimants in the Article 63 proceedings was rarely questioned by the Strasbourg Court. However, since 2007 the issue of its appropriateness has been raised in several cases.⁵² In *Jakupović* the Constitutional Court awarded the applicant 4,400 Croatian kunas (approximately 600 euros) and in *Kaić* 4,000 Croatian kunas (approximately 530 euros) in compensation for the proceedings that lasted about nine-and-a-half and seven years respectively. The Strasbourg Court held

48. Constitutional Court Decision U-III/A/1128/2004 of 2 February 2005.

49. *Majski v. Croatia*, *ibid*.

50. *Cit. supra* (note 48).

51. *Scordino v. Italy (No. 1)*, application no. 36813/97, Grand Chamber judgment of 29 March 2006, para. 206.

52. *Jakupović v. Croatia*, application no. 12419/04, judgment of 31 July 2007; *Kaić and Others v. Croatia*, application no. 22014/04, judgment of 17 July 2008; *Oreb v. Croatia*, application no. 9951/06, judgment of 23 October 2008 (referred to the GC).

that such a amount is “manifestly unreasonable having regard to the Court’s case-law”⁵³ and found it to be “approximately 20% of what the Court generally awards in similar Croatian cases.”⁵⁴ Accordingly, the applicant could still claim to be a victim, and therefore his application was admitted and decided (affirmatively) on the merits.⁵⁵ In both cases, regard was given to the time that elapsed since the Constitutional Court issued its decision to accelerate the proceedings (see *infra*).

Effectiveness of the orders to expedite proceedings

In the *Oreb* case,⁵⁶ the facts were similar to *Jakupović* and *Kaić* insofar as the compensation awarded by the Constitutional Court was regarded to be inadequate (although it was the highest amount among all of the cases in which the adequacy was assessed).⁵⁷ The most important element of this case was related to the manifest lack of compliance of the lower court with the order to end the proceedings. Namely, after the Constitutional Court found the violation of the right to a trial within a reasonable time, it ordered the Split Municipal Court to adopt its decision in the shortest time, but no later than 10 months from the publication of its decision. However, the case was still pending in the court of first instance more than three years after the receipt of the acceleratory order.

In such circumstances, the Strasbourg Court considered “that the obligation of the States under Article 13 encompasses also the duty to ensure that the competent authorities enforce remedies when granted” noting that “it has already found violations on account of a State’s failure to observe that requirement.”⁵⁸ The Court explained that “the cessation of an ongoing violation is for the Court

53. *Kaić*, cit. *supra* (note 8), para. 20.

54. *Jakupović*, cit. *supra* (note 51), para. 17.

55. In *Kaić* case the Strasbourg Court awarded additional 1,350 euros to each of the applicants, whereas in *Jakupović* the additional compensation was 5,900 euros. In *Jakupović* the alleged violation of Article 13 was dismissed as manifestly ill-founded, noting that, [t]he mere fact that the just compensation awarded to the applicants at the domestic level does not correspond to the amounts awarded by the Court in comparable cases does not render the remedy ineffective (para. 28). In *Kaić*, a year later, a violation of Article 13 was found. More extensive explanation of this shift in the Strasbourg Court’s case-law in Croatian cases can be found in *Oreb* (see *infra*, at i.).

56. *Oreb*, cit. *supra* (note 52).

57. Each applicant was awarded 8,600 Croatian kunas (about 1,200 euros) after 7 years and three months at one level of jurisdiction (after the ratification of the Convention) plus 17 years before the entry of the Convention into force (the original claim was submitted in 1980).

58. *Kaić*, cit. *supra* (note 8), para. 40. The County Court in Zagreb had a delay of six months in implementing the Constitutional Court’s decision. In this respect, the Strasbourg Court noted that the Zagreb County Court is an appellate court, “which means that the list of possible reasons for the delay non-attributable to the authorities (...) is relatively short”. *Ibid.*, para. 41

an important element of the right to an effective remedy”,⁵⁹ and continued to find that:

“... where the applicants did not receive sufficient compensation for the inordinate length of their proceedings and where the competent court exceeded the time-limit set by six months and thereby has failed to implement the Constitutional Court’s decision in due time, it cannot be argued that the constitutional complaint the applicants resorted to was an effective remedy for the length of those proceedings. The combination of these two factors in the particular circumstances of the present case rendered an otherwise effective remedy ineffective.”⁶⁰

Effectiveness of the remedies available to expedite administrative proceedings

Another point of divergence between the jurisprudence of the Constitutional Court and the case-law of the Strasbourg Court was related to the calculation of the period that was to be taken into account in the administrative proceedings. In the beginning, the Croatian Constitutional Court held that only the conduct of judicial authorities was relevant in the context of the constitutional complaint under Article 63. The duration of the administrative stages of the proceedings was not taken into account when determining the reasonableness of their overall length.⁶¹ Such an approach was different from the Strasbourg Court’s, which recognised that, when under the national legislation an applicant has to exhaust a preliminary administrative procedure before having recourse to a court, the proceedings before the administrative body have to be included when calculating the length of the civil proceedings for the purposes of Article 6.⁶²

The Strasbourg Court noted the practice of the Constitutional Court in the *Počuča*⁶³ and *Božić*⁶⁴ cases. *Inter alia*, the Strasbourg Court noted one complaint that was dismissed on the basis of finding that the proceedings before the

59. *Oreb*, cit. *supra* (note 51), para. 37.

60. *Kaić*, cit. *supra* (note 8), para. 43. Same in *Oreb*, cit. *supra* (note 51), para. 38. Unfortunately, these cases of non-compliance with the Constitutional Court orders are not isolated. In some of these cases, the applicants chose to launch several constitutional complaints in the same case. See e.g. Constitutional Court decision U-III A/825/2008 of 9 December 2008, which was rendered in the same case in which another decision was already made (Constitutional Court decision U-III A-4905/2005. Reported in Maganić, A., *Pravna sredstva protiv neučinkovitog suca, Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 30(2009), 1, note 128.

61. See Constitutional Court decisions U-III-2467/2001 of 27 February 2002, and U-III A/3638/2003 of 18 February 2004.

62. See, for example, *Kiurkchian v. Bulgaria*, application no. 44626/98, judgment of 24 March 2005, para. 51.

63. *Počuča v. Croatia*, application no. 38550/02, judgment of 29 June 2006.

Administrative Court had lasted only seven days (whereby the whole process since launching of the applicant's request addressed to the Croatian Pension Fund lasted over seven years).⁶⁵

In 2007, the Constitutional Court reversed its earlier case-law and started to take into consideration the period of the proceedings before the administrative bodies.⁶⁶ In the reasoning behind the decision, the Court referred to "well-settled case-law of the Strasbourg Court" and cited several cases, including *Počuča* and *Božić*.⁶⁷

"Silence of the administration" (appeals and actions for failure to respond) as a means to accelerate administrative proceedings

The cited 2008 decision of the Constitutional Court *in passim* noted that it will take into account the length of proceedings of the preliminary stages in administrative proceedings only if two conditions are satisfied: first, if the complainant has expressly objected to the unreasonable length of the proceedings before the administrative bodies, and, second, if the complainant proves that he has exhausted another means of legal protection – the actions brought on the basis of the "silence of administration".

As to the latter condition, the Constitutional Court was referring to an alternative remedy provided by the Administrative Procedure Act and Administrative Disputes Act. These procedures were summarised in the *Štajcar* case⁶⁸ as follows:

Article 218, paragraph 1 of the Administrative Procedure Act provides that in simple matters, where there is no need to undertake separate examination proceedings, an administrative body is obliged to issue a decision within a period of one month after a party lodges a request. In all other, more complex, cases, an administrative body is obliged to issue a decision within a period of two months after the request was lodged. Article 218, paragraph 2, enables a party whose request has not been decided within the periods established in the previous paragraph to lodge an appeal, as if his request had been denied.

64. *Božić v. Croatia*, application no. 22457/02, judgment of 29 June 2006. See para. 34: "That approach of the Constitutional Court differs from the one of the Court (...) as it does not cover all stages of the proceedings."

65. See Constitutional Court decision U-III A/635/2004 of 25 November 2004; *Počuča*, cit. *supra* (note 64), para. 27; *Božić*, cit. *supra* (note 65), para. 23.

66. Constitutional Court decision U-III A-4885/2005 of 20 June 2007. See also U-III V/578/2008 of 24 September 2008.

67. *Ibid.*, p. 4.2.

68. *Štajcar v. Croatia*, application no. 46279/99, decision of 20 January 2000.

Article 26 of the Administrative Disputes Act enables a party who lodged a request with an administrative body to institute administrative proceedings before the Administrative Court (administrative dispute) in the following situations:

1. If the appellate body does not issue a decision upon the applicant's appeal within 60 days the applicant may repeat his request, and if the appellate body declines to issue a decision within an additional period of seven days the applicant may lodge a claim with the Administrative Court.
2. When a first-instance administrative body does not issue a decision and there is no right to an appeal the applicant may directly lodge a request with the Administrative Court.
3. If a first-instance administrative body does not issue a decision upon the applicant's request within 60 days in matters where a right to an appeal exists, the applicant may lodge his request to the appellate administrative body. Against the decision of that body the applicant may institute administrative proceedings as well, and if that body has not issued a decision there is a right to institute administrative proceedings under the conditions as above under 1.⁶⁹

The Strasbourg Court in principle considered that these provisions contained a remedy that should effectively accelerate the administrative proceedings. Therefore, the prospective applicants were required to make use of these proceedings before complaining of the length of proceedings in further Strasbourg proceedings. If this was not the case, the applications were generally held to be inadmissible and were rejected for non-exhaustion of domestic remedies pursuant to Article 35, paragraph 4 of the Convention.⁷⁰

In spite of the general assessment of the “silence of administration” provisions as effective means to suppress the excessive length of the administrative proceedings, in some cases the actions brought for failure to respond did not render an adequate accelerating effect. So, for example, in *Počuča* the applicant lodged an appeal and brought an action for failure to respond. However, the consequence of appeal in that case was only further silence from the higher authorities, and the consequence of his action for the failure to respond brought before the Administrative Court was, in the beginning, further silence from this court for the next three years, and then the decision that only sent back his case to the

69. *Štajcar*, *ibid.*, p. 3-4.

70. See for example *Rauš and Rauš-Radovanović*, application no. 43603/05, admissibility decision of 2 October 2008. Until this case such applications were dismissed as manifestly ill-founded (which may be taken as a reflection of the old, pre-*Kudla* jurisprudence of the Strasbourg Court) – e.g. *Štajcar*, *ibid.* On this development of the Strasbourg Court's practice, see *Bašić v. Austria*, (dec.), application no. 29800/96, ECHR 1999-II and *Pallanich v. Austria*, application no. 30160/96, 30 January 2001.

same passive authorities with an order to decide on the applicant's appeal, setting a further deadline of 60 days. This deadline was, naturally, not met, but when, eventually (after some four months) the appeal was decided, the only result was the new decision ordering the first-instance administrative body to issue a decision, and (some three months later) a negative decision of the body which was again subject to appeal and the further action before the Administrative Court. Such a "merry-go-round" of presumed and actual negative decisions followed by decisions which remit the (never decided) case back for another decision did cast a shadow on the overall effectiveness of the alternative remedy in the administrative proceedings, at least in certain types of cases.

The issue of the length of the proceedings before the Constitutional Court

Not only could the proceedings on the account of the alternative remedies available in administrative proceedings become excessively long, but the same occasionally happened to the proceedings initiated by the main remedy, the constitutional complaint.

A good example may be found in the *Vidas* case,⁷¹ where the Constitutional Court added insult to the injury (figuratively speaking) when it needed three years and 15 days to decide on a (not overly complex) complaint regarding the already lengthy proceedings which lasted already almost seven years (out of which five years came after the ratification of the Convention).⁷² Based on that finding, the Strasbourg Court emphasised that a remedy designed to address the length of proceedings may be considered effective only if it provides adequate redress speedily, or else the effectiveness of the (otherwise effective) remedy for the excessive length of the civil proceedings could be undermined by its own excessive (i.e. unreasonable) duration.⁷³

71. *Vidas v. Croatia*, application no. 40383/04, judgment of 3 July 2008.

72. The Constitutional Court received the complaint on 28 March 2002, on which the Court decided in a decision published on 2 May 2005. *Vidas*, cit., para. 9.

73. See *Vidas*, cit., para. 37.

Reformed legal remedies after the Amendment to the Courts Act 2005

The reasons for the change to the internationally recognised effective remedy

In spite of all the occasional problems with the practical implementation, the Strasbourg Court has until present generally recognised the constitutional complaint of Article 63 as an effective remedy for the length of proceedings. Moreover, the Strasbourg Court actually praised the model of the Croatian constitutional complaint – especially its combination of acceleratory and compensatory powers – in a number of decisions related to other Council of Europe countries wherever a problem with the effectiveness of the domestic length-of-proceedings remedies occurred. The circle of countries in whose cases the Strasbourg Court openly advertised the Croatian model (and the model of some other similar jurisdictions) did not only include the “usual suspects” (e.g. Italy⁷⁴), but also countries of otherwise well-developed legal tradition of efficient adjudication, such as Germany.⁷⁵

Yet, already at the point of its invention, some knowledgeable commentators warned that the Article 63 remedy may soon become the victim of its own success.⁷⁶ Even before the entry into force of the 2002 amendments, the number of constitutional complaints quickly rose from several dozen to several thousand, the largest number of them being complaints for the length of proceedings.⁷⁷ As demonstrated in the *Vidas* case, the Constitutional Court in its own practice occasionally surpassed the average duration of processing of length of proceedings cases in Strasbourg.

In order to prevent the proceedings for unreasonable procedural length becoming themselves unreasonably lengthy, the Constitutional Court incited in

74. See cases *Scordino (No. 1)*, *Cocchiarella*, *Apicella* (cit.) and a number of others.

75. See *Sürmeli v. Germany*, application no. 75529/01, judgment of 8 June 2006, para. 100.

76. Already in 2002 the then President of the Constitutional Court argued that the new amendments will overburden the Constitutional Court with the length-of-proceedings complaints, thereby becoming “the requiem for the Court”. See Crnić, J., 2002. Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu RH, *Zbornik Pravnog fakulteta u Zagrebu*, 52 (2), 259-288.

77. According to the general statistics of the Constitutional Court (see <http://www.usud.hr>), the number of new complaints regarding unreasonable length of proceedings developed in the following way: 64 in 2000; 43 in 2001; 442 in 2002; 542 in 2003; 925 in 2004 and 1443 in 2005. See also Uzelac, A., “The Rule of Law and the Judicial System: Court delays as a barrier to accession” in: Ott, K. (ed.) *Croatian Accession to the European Union*, Zagreb (IJF), 2004, pp. 105-130, at 121 and 128.

2005 several changes to the Courts Act. The idea (which partly followed Polish and Italian examples) was to introduce a supplementary remedy for the length of proceedings which would be decided by the regular courts, and to leave the Constitutional Court with only subsidiary powers.⁷⁸ In fact, the Constitutional Court advocated a model according to which the Court would have the same role in relation to the new remedy as the Strasbourg Court in relation to the remedy before the Constitutional Court: in both cases, the examination of the merits would follow only after exhaustion of the “lower level” remedy (if such remedy had existed).

The request for the protection of the right to a trial within a reasonable time under 2005 Courts Act

The enactment of the new Courts Act happened swiftly, and the new legislation came effectively into force at the end of December 2005.⁷⁹ The Act contained a new chapter entitled “Protection of the Right to a Hearing Within a Reasonable Time” and two articles, Articles 27-28.

Article 27

- “(1) A party to court proceedings who considers that the competent court failed to decide within a reasonable time on his or her rights or obligations or a criminal charge against him or her, may lodge a request for the protection of the right to a hearing within a reasonable time with the immediately higher court.
- (2) If the request concerns proceedings pending before the High Commercial Court of the Republic of Croatia, the High Petty Offences Court of the Republic of Croatia or the Administrative Court of the Republic of Croatia, the request shall be decided by the Supreme Court of the Republic of Croatia.
- (3) The proceedings for deciding the request referred to in paragraph 1 of this section shall be urgent.”

Article 28

- “(1) If the court referred to in Article 27 of this Act finds the request well founded, it shall set a time-limit within which the court before which the proceedings are pending must decide on a right or obligation of, or a criminal charge against, the person who lodged the request, and shall award him or her appropriate compensation for the violation of his or her right to a hearing within a reasonable time.

78. See Potočnjak, Ž., Zastita prava na suđenje u razumnom roku – neki prijedlozi za unapređenje hrvatskog sustava na temelju stranih iskustava, *Hrvatska pravna revija*, 5/4:2005, pp. 1-15.

79. See Courts Act (*Zakon o sudovima*), NN 150/05 of 21 December 2005 (the Act came into force on 29/12/2005). Subsequent amendments were published in NN 16/07 and 113/08.

- (2) The compensation shall be paid out of the State budget within three months from the date the party's request for payment is lodged.
- (3) An appeal, to be lodged within fifteen days with the Supreme Court, lies against a decision on the request for the protection of the right to a hearing within a reasonable time. No appeal lies against the Supreme Court's decision but one may lodge a constitutional complaint.”

Although the Constitutional Act on the Constitutional Court was not changed in any way, the Constitutional Court promptly declared that it would take into consideration new complaints under Article 63 only after the new “request for protection of the right to a trial within a reasonable time” (RPRTT) was exhausted.⁸⁰

Thereby, a new, decentralised, multi-layered system of complaints for length of proceedings was established, with a number of potential scenarios. Here are the three most typical (but several more are possible):⁸¹

- ▶ if the applicant was to complain about the length of proceedings of the trial courts, he should first lodge a RPRTT with the “immediately higher court” (i.e. to the County Court if the Municipal Court was competent, or to the High Commercial Court if the Commercial Court was competent). Subsequently, the decision on the RPRTT could be appealed with the Supreme Court. If the applicant was still not satisfied, he could lodge a constitutional complaint with the Constitutional Court;
- ▶ if the applicant was to complain about the length of proceedings of the appeal courts, or about the length of the proceedings before higher courts (i.e. Administrative Court or High Commercial Court or county courts when they decide in the first instance), the RPRTT would be decided by the Supreme Court with no appeal options, but the applicant could turn instead to the Constitutional Court;
- ▶ if the applicant was to complain about the length of proceedings before the Supreme Court there would be no option of a RPRTT, but the applicant could immediately lodge an Article 63 constitutional complaint.

Otherwise, the powers of the courts deciding on the RPRTT are equally formulated as the powers of the Constitutional Court – they also contain both a right to issue an acceleratory order (fixing time-limits for decision-making), and the right to award compensation for the length of proceedings.

80. In fact, the Constitutional Court announced on its Internet pages that after the coming into effect of the Courts Act it no longer decides on violations of the right to a trial within a reasonable time “in the first instance”. See http://www.usud.hr/default.aspx?Show=c_praksa_ustavnog_suda&m1=2&m2=0&Lang=hr.

81. For example, if the applicant complains about the length of enforcement proceedings, or the length of proceedings before the administrative bodies (both examples are not expressly covered by the Courts Act).

New decentralised system in practice: domestic criticisms and problems in the implementation of the remedy

From the beginning, the introduction of the RPRTT was followed by controversies. Some of them were of the principled nature and dealt with the way the new remedy was introduced, whereas others were more practical and considered the implementation issues.

As first, the intensive involvement of the Constitutional Court itself in the drafting of the new provision of the Courts Act was in itself not unproblematic. The Constitutional Court acted in its own cause, what might be seen as a violation of the old rule *nemo iudex in causa sua*. In 2005, the Strasbourg jurisprudence was very positive about the effects of the current legal remedy in which the Constitutional Court played the central role. There were some, but not too many instances in which the Constitutional Court did not manage to fulfil its constitutional obligations. Most importantly, there were no serious studies or objective pieces of research that could neutrally evaluate the impact of the increasing caseload on the institutional capacity of the Constitutional Court and/or offer alternative solutions. The reasons for the introduction of the new remedy was not to improve the protection of human rights – on the contrary, the main motive for change, pronounced bluntly, was to deflect cases from the Constitutional Court and shift the main burden of decision-making to the system of the regular courts. In this respect, admittedly, the new system was instantly effective: the number of annual length-of-proceedings applications lodged with the Constitutional Court dropped from 1,433 in 2005 to 55 in 2006, which is a decrease of over 95%.⁸²

Another objection based on constitutional principles and the rule of law came from the Constitutional Court itself. The long-time President of the Constitutional Court (who retired not long before the enactment of the new legislation) questioned whether the Courts Act, as a piece of “ordinary” statutory law, can change or overrule the mechanisms contained in the constitutional legislation of the higher rank, i.e. in the Constitutional Act on the Constitutional Court.⁸³ He argued that the normative act of the lower rank could not interfere in the area specifically covered by the hierarchically higher act and therefore has to be treated independently.⁸⁴ The submission made by this critique was, therefore, that two systems of the protection of the right to a trial within a reasonable time

82. See statistics of the Constitutional Court at <http://www.usud.hr>.

83. See Crnić, J., (Ne)ustavni apsurd (ne)razumnog roka u primjeni članka 29. Ustava: O bilokaciji nadležnosti, *Hrvatska pravna revija*, 8/3:2008, p. 5.

84. It would also imply disregard of Article 28, para. 3, which expressly regulates the admissibility of the constitutional complaint.

should not be mutually dependant, and that the applicants should freely chose either the statutory or constitutional avenue. The acting members of the Constitutional Court ignored, however, these criticisms of their past President and continued to treat the constitutional complaint as only a subsidiary remedy.

All principled critiques aside, the new system was swiftly put into effect, which brought about new practical problems and doubts. Some of them were caused by the relatively short and incomplete regulation of the new remedy. One of the issues which was not clear was related to the type of proceedings according to which the courts should rule on the RPRT. As the new law was silent on this issue, the customary rules of interpretation would point to the application of the regular litigation rules of the Code of Civil Procedure. This, however, did not seem to be appropriate, as the consequence would be the application of the full set of procedural guarantees, such as the right to adversarial proceedings, full-fledged oral hearings, the right to appeal (by both sides) etc., which would necessarily add to the time needed to decide and turn the new request into the genuine “trial about the trial”. In fact, some state attorney’s offices that represented the government in the RPRT proceedings started to file replies, request oral hearings and launch appeals against the decisions rendered in favour of the applicants. In certain cases, the state attorneys even felt obliged to lodge constitutional complaints if they were not in agreement with the awarding of compensation or the amount. All in all, the overly formalistic approach had risked jeopardising the effectiveness of the new remedy.

Last legislative tweaking: the 2008 amendments to the Courts Act

To eliminate the doubts and confirm the already dominant practice, in the 2008 amendments to the Courts Act⁸⁵ Articles 27 and 28 were partially amended. In paragraph 3 of Article 27, the law expressly provided for the use of more flexible rules of non-contentious proceedings,⁸⁶ and the time-limit for the appeal in Article 28, paragraph 3, was shortened from 15 to 8 days.

Soon after these amendments, the Constitutional Court also clarified the issue of the right of the state attorney to complain about the decisions on the RPRT under Article 28, paragraph 3, of the Courts Act. In the decision published in the beginning of 2009⁸⁷ the Court held that the sense and purpose of the protection of the right to a trial within a reasonable time speak against the con-

85. NN 113/08 (the amendments came into effect on 11 October 2008).

86. New paragraph 3 of Article 27 read as follows: (3) “The proceedings for deciding the request referred to in paragraph 1 of this section shall be urgent. The proceedings will be conducted under the appropriate application of the rules of extra-contentious proceedings. In general, no oral hearings will take place.”

87. Constitutional Court decision U-IIIIVs/2390/2008 of 18 December 2008, NN 4/09.

clusion that the state would be authorised to contest the redress afforded by the Supreme Court. With some reluctance, this fact was noted by the General State Attorney's Office, which also observed that thereby the Republic of Croatia was deprived of its right to a legal remedy in all cases in which the Supreme Court ruled on the RPRTRT in the first instance.⁸⁸ *Obiter dicta*, it is interesting to note that the State Attorney did not see any absurdity in letting the state use against the individuals the remedy that is designed for the protection of individual human rights against the state.

New decentralised system in practice: the perspective of the Strasbourg Court

New remedy for the length of proceedings is still a relatively recent occurrence, and the Strasbourg Court has not yet had an opportunity to fully evaluate its effectiveness. It is partly due to the fact that the applicants now have at their disposal a complex, multi-layered system of domestic remedies. This increases the likelihood that they will obtain some kind of redress at the domestic level (see *infra* for concrete figures), but also requires more time and effort to fulfil the condition of exhaustion of domestic remedies in cases in which the redress provided at the domestic level was inappropriate, ineffective or insufficient.

Still, had the decisive criterion of effectiveness of the domestic system been its potential to deflect cases from the Strasbourg Court, the new model of remedies would have had chances to be considered effective. Although the violations of the right to a trial within a reasonable time are still frequent in the recent jurisprudence,⁸⁹ the influx of the new length cases communicated to the government seems to have been reduced.⁹⁰ The Strasbourg Court so far noted the existence of the new request under the Courts Act in *Cerin*,⁹¹ *Jeans*,⁹² *Čiklič*⁹³ and *Kvartuč*⁹⁴

88. *Izvešća o radu državnih odvjetništava u 2008.* (Annual Report of the State Attorneys' Offices for 2008), A-608/08, Zagreb, June 2009, p. 71 (see <http://www.dorh.hr>). The Report most likely wanted to raise the question of whether such jurisprudence of the Constitutional Court violates the constitutional right to appeal, although this might seem to be a rather misplaced argument in the context of the proceedings which should protect the citizens' right to a trial within a reasonable time, and not the right of the state as the formal counter party in the proceedings.

89. In 2008, out of 16 Strasbourg Court judgments finding a violation, 11 dealt with the length of proceedings and 1 with the right to an effective remedy.

90. While in the pre-2005 period over two thirds of the communicated cases were the length cases, from 2006 to 2008 the portion of the length cases dropped to less than half of all communicated cases (according to data from the Court statistics and the information from the Court Registry).

91. *Cerin v. Croatia*, application no. 45043/05, partial admissibility decision of 26 June 2008.

92. *Jeans v. Croatia*, application no. 45190/07, statement of facts of 7 September 2009.

93. *Čiklič v. Croatia*, application no. 40033/07, statement of facts of 10 July 2008.

(and in some of those cases it communicated to the government objections to the effectiveness of the new remedy) but until today no straightforward decision on the status of RPRTT as the length-of-proceedings remedy was issued. From an even more general perspective, it can be observed that the total number of applications against Croatia in 2008 was still held within relatively acceptable limits, at least compared to some neighbouring countries.⁹⁵ According to the external perspective, the new model of remedies would seem to be satisfactory, at least at the time of writing of this paper.⁹⁶ A change of perspective and a more careful introspection might, however, suggest different conclusions.

Current situation and possible future course: how long is the draining of the leaking boat possible?

The high tide approaches (manageable high tide or a devastating flood?)

The Republic of Croatia has since the beginning of its membership of the Council of Europe diligently followed the hints from the Strasbourg jurisprudence. It has to be noted that very few Council of Europe countries have changed their legislation and the case-law of their highest tribunals on so many occasions and on such a broad scale. For the agility and the responsiveness to international demands Croatian authorities have, with no doubt, to be praised.⁹⁷

Admittedly, some of the reforms were more motivated by internal reasons than by the statements of the Strasbourg Court. The introduction of the

94. *Kvartuč v. Croatia*, application no. 34830/07, statement of facts of 15 December 2008.

95. So, for example, in 2008 according to the statistics of the Strasbourg Court there was a total of 793 applications against Croatia, which is, in absolute numbers, four times less than the number of applications raised against Slovenia. Among these cases, there were 10 times less cases that were awaiting first examination (163 in respect of Croatia and 1,759 in respect of Slovenia). See *ECHR Annual Report 2008*, Strasbourg (2009), p. 129-133 (<http://www.echr.coe.int>).

96. Early November 2009.

97. The vigilance of the Croatian authorities was certainly enhanced by the notable place of the chapter on judiciary and human rights in the European accession negotiations. In the *Avis* (Opinion on Croatia's Application for Membership of the European Union, COM(2004)257final of 20 April 2004) the European Commission listed the "widespread inefficiency of the judicial system" among the major challenges, and noted that "citizens' rights are therefore not fully protected by the judiciary" (p. 16). The same problem continued to play an important role in the accession negotiations. For example, in the Progress report of November 2007, it was noted that "the excessive length of proceedings remains a serious problem" and that "ECtHR continues to issue judgments against Croatia for violations ... regarding the length of proceedings". See *Croatia 2007 Progress Report*, SEC(2007)1431, p. 49.

RPRTT was in the eyes of many viewed as a self-defence of the Constitutional Court from the influx of unpopular length cases, or even as a move intended to push the hot potatoes back into the hands of judiciary.

Yet, even the new remedy could be considered as a welcome tool for the maintenance of the important ingredient of the system of protection of the right to a prompt adjudication – its effectiveness. As retrospectively proved by some of the recent Strasbourg cases, in at least some constitutional complaints the effectiveness of the remedy for unreasonable length was undermined by its own excessive duration.⁹⁸ Moreover, the new competence acquired by the regular courts to rule on their own (non-)efficiency could be hoped to produce over time a sobering effect: faced with the judgment of the peers, the courts might autonomously recognise the pressing need to ensure prompt adjudication; deciding about the sins of others, they might be forced to acknowledge their own sins and make an effort to correct them.

The figures for the post-2005 period show that the courts have generally taken the new obligation to rule on their own effectiveness seriously. The criteria for the length of proceedings were somewhat simplified, and therefore the proceedings were relatively short. As noted by the State Attorney's Office in the very beginning of the application of the new legislation, the courts held that the "reasonable length of civil litigation, which by its nature is neither urgent nor complex, and in which there was no contribution to the length by the applicant would be three years, whereas the first instance and the second instance proceedings are viewed as a unique whole".⁹⁹

The Supreme Court and the lower courts in most cases awarded amounts of compensation that were not dramatically different from the compensation given in Strasbourg, and allegedly in some cases even gave more than the Strasbourg Court would. The courts also regularly fixed a time-period for decision-making in the delayed cases. However, the general effectiveness of the new remedial system is perhaps best demonstrated by the reception of the users of the system – and this reception was almost unexpectedly enthusiastic.

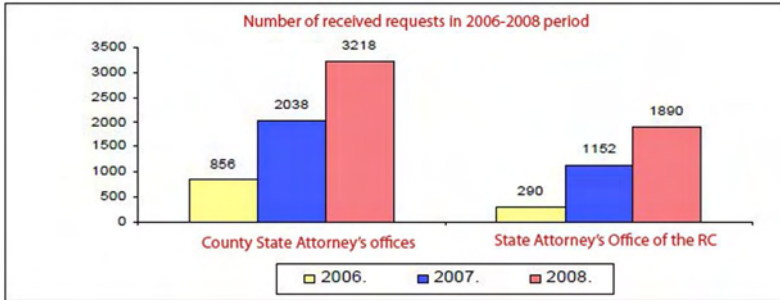
The case flow of the RPRTTs can best be traced through the annual reports of the State Attorney's Offices that have had the *ex officio* duty to represent the

98. See, *supra*, quotes from the *Vidas* case (note 70).

99. *Izvešća o radu državnih odvjetništava u 2006.* (Annual Report of the State Attorneys' Offices for 2008), Zagreb, June 2007, p. 59 (see <http://www.dorh.hr>).

state before the courts.¹⁰⁰ Their statistics are quite indicative, demonstrating a 500% to 600% increase in the 2006 to 2008 period.

Here is the graph demonstrating the continuing growth of the number of requests, both those lodged with the appellate courts and those lodged with the Supreme Court (defended by the county State Attorney's offices and national State Attorney's Office¹⁰¹ respectively).¹⁰²



As visible from the graph, the number of cases rose from 1,146 in 2006 to 5,108 in 2008. This is an increase of almost five times, whereby the increase of the cases decided in the first instance at the level of the Supreme Court is even bigger, i.e. it is an increase of 6.5 times (650%). The number of the RPRTTs was the main reason why the State Attorney's Offices caseload increased in 2008, in spite of the continuing trends of decrease in all the other areas of their work (representation in litigation, enforcement and bankruptcy proceedings).¹⁰³

100. *Obiter dicta*, one of the main virtues of the new remedy was engagement of the State Attorney's offices; before the enactment of the Courts Act in 2005 the only governmental office responsible for the length of proceedings issue was that of the Government Agent (in the constitutional complaint cases under Article 59(4) and Article 63, there was no direct representation of the state government as the cases were regularly solved as a quasi-one-party matter).

101. As to the composition of cases represented by the national State Attorney's office and decided by the Supreme Court, 60% of the proceedings were related to the length of proceedings before the county courts, 22% to the High Commercial Court, 16% to the Administrative Court, and 0,48% to the High Misdemeanour Court.

102. See *Izvešća o radu državnih odvjetništava u 2008.*, cit. (note 87), p. 71-72.

103. *Ibid.* p. 58-60.

As to the amount awarded, the situation is the following:

Year	Awarded amount (total)	Average amount (total)
2006	5.957.580 kn (0,8 million euros)	5.200 kn (712 euros)
2007	17.057.171 kn (2,3 million euros)	5.350 kn (732 euros)
2008	35.549.940 kn (4,8 million euros)	7.000 kn (960 euros)
TOTAL 06-08	58.564.691 kn (8 million euros)	6.200 kn (850 euros)

As the State Attorney's report observed, the increase of the amount of compensation in the three year period was almost six-fold (from about 800,000 in 2006 to 4.8 million euros in 2008). The increase in the compensation paid urged the State Attorney to reflect on the ways to alleviate the burden on the state budget and prevent future violations.¹⁰⁴

Further development – drawing the “worst case scenario”

It might be too early to draw definitive conclusions out of the presented figures. They are still too ambiguous. If we start with the financial impact on the state budget, the increase in the amount paid as compensation for the inefficiency of the justice system is dramatic, but the total amount paid in the 2006-2008 period (about 8 million euros)¹⁰⁵ still seems relatively low compared to the overall budget of the justice system, which was about 240 million euros in 2006.¹⁰⁶

Yet, it is hard to predict the further development. If the number of cases and the amount of the compensation paid continues to grow at that rate (approximately doubling each year), in five years' time (around 2014) the state would have to pay on behalf of its ineffective judiciary more than it pays in total for the whole judicial system.¹⁰⁷

Will this happen? Most likely, in the times of the economic crisis, the government will not be overly generous when availing the victims of the human rights

104. Ibid. p. 72. See, *infra*, note 110.

105. It should be noted that these amounts cover only the compensations paid via the RPTRT system, and exclude the compensation awarded by the Article 63 proceedings, as well as the amounts paid by the state as the result of the Strasbourg Court judgments, as well as the amount voluntarily paid due to friendly settlements with the Strasbourg applicants. All these figures (presumably lower than the above quoted amounts) are not readily available and are therefore hard to report.

106. Quoted according to CEPEJ report *European judicial systems. Edition 2008 (2006 data): efficiency and quality of justice* (EJS 2006), Strasbourg, 2008, p. 20 (the amount relates to total annual approved public budget allocated to all courts, public prosecution and legal aid).

violations the appropriate compensation for the violations. It is also not probable that the skyrocketing trend will continue at the same pace.

However, one can hardly deny that there is quite a potential for the further increases. Consulting only the scarcely available statistics on the average length of proceedings, we may reveal some disturbing findings. For instance, as a result of the casual survey of cases pending in the largest Croatian court – the Municipal Court in Zagreb – the mean duration of civil proceedings in two instances in 2001 surpassed the “reasonable” limit of three years – it was about 3.6 years. In addition, over 20% of cases in the sample lasted (only in first instance) more than four years.¹⁰⁸ After 2001, the situation did not instantly improve. On the contrary, according to the statistics collected by the Supreme Court, on 31 March 2006 in the Municipal Court of Zagreb about 30% of cases were pending for over five years.¹⁰⁹ Under the (hopefully wrong) assumption that these ratios are representative, one might conclude that only in civil litigation (excluding other branches of jurisdiction, such as enforcement and criminal proceedings) there is a potential that from 187,000 annually pending litigation cases in over 50,000 cases, parties could request compensation for the unreasonable length of proceedings. This would bring us dangerously close to the previous rough estimate that in five years’ time the compensation paid could equal the total budget of the judiciary.

Budgetary considerations aside, there are some further unanswered systemic questions that might have an impact on the effectiveness of the new remedy. Simplified as they might be, the RPRTT proceedings still take some time. More requests for the protection of the right to a trial within a reasonable time mean less time for the court to concentrate on its main function – delivering the right to a trial within a reasonable time. More work may mean more backlogs, and more backlogs could lead to more violations of the right to a trial within a reasonable time. As time goes on, the launching of the RPRTTs becomes more customary, and in fact turns into another branch of the industry of legal services.

107. It may also be noted that the overall budget of judiciary in Croatia is not low – it is 54 euros per inhabitant, which is one euro more than in France, and significantly higher than in Ireland, Poland, Hungary, Greece, Czech republic, Slovakia, Estonia and in a number of other Council of Europe countries. See EJS 2006, p. 44.

108. Mean first instance duration at that court was 843 days, i.e. 29.3 months, plus a further 444 days (14.8 months) that passed on average between the filing of the appeal and the returning of the decision on appeal back to the first-instance court. See National Centre for State Courts, *Functional Specifications Report for Computerization in Zagreb Municipal Court of the Republic of Croatia* - Municipal Courts Improvement Project – Croatia, USAID project number 801, AEP-I-00-00-00011-00, Zagreb, September 2001 (unpublished), p. 10-15.

109. According to the statistics presented by Katarina Buljan at Plitvice bilateral meeting of the Croatian and Slovenian Ministries of Justice in December 2006. More precisely, out of a total of 94,674 pending cases, 28,351 were more than 5 years old.

This could lead to more sophisticated requests, which could provoke more sophisticated decision-making, and the consequence would be a more time-consuming process. Complex procedures in several instances have little chance to be effective remedy for unreasonable length. It is a way to end a vicious circle - *circulus vitiosus*.

The decentralised system of decision-making could be a source of problems in itself. More bodies involved in decision-making may mean less uniformity in the application of the set criteria. Less uniformity may mean more need for intervention of the higher bodies i.e. more appeals. Also, the system in which the higher body decides about the length of proceedings before the lower body contains a systemic incentive to concentrate exclusively on one stage of proceedings, and disregard the overall proceedings as a whole. This would further invoke need for harmonisation, meaning more appeals and more constitutional complaints. Again, the *circulus vitiosus* is ended.

For the effectiveness of the system of remedies, one of the decisive elements is its capacity to speed up the proceedings. As such, the higher courts may fix time limits to lower courts. But, the sheer fixing of time-limits does not necessarily bring more effectiveness, as demonstrated by a number of examples from law and practice.¹¹⁰ In the case of the RPRTT the authority of the higher court to fix the time-limit is not accompanied by any concrete sanction for the cases in which the lower authority would not comply with the set deadlines. Of course, the sheer authority of the higher court might be sufficient to give a priority to an occasionally dormant or forgotten case. But, the order to finish the case cannot be of much help in the cases of institutional incapacity to deal with the assigned caseload in the timely manner, and it can help even less in the instances of systemic problems that cause delays in certain types or classes of cases. Without an appropriate reaction and sanction for disobedience, when the disregard for accelerating orders becomes a part of the daily routine, the effectiveness of the remedy would be definitely buried.¹¹¹ This is also a place where the *circulus vitiosus* might end.

Some indications of future jurisprudence of the Strasbourg Court

So far, the circle is not closed, and will hopefully never be closed. The process of judicial reforms, initiated in the mid-90s, has eventually produced some positive results. Among them, the most important is the reversion of the trend of growth of court backlogs,¹¹² and the close monitoring of “old cases” conducted by the Supreme Court. The introduction of an integral, computerised system of

110. For example, the legislative fixing of the deadlines for decision-making in Family Law was, over many years, entirely ignored and disregarded in practice. See *Obiteljski zakon*, NN 116/03, 17/04, 136/04 and 107/07, articles 265 and 266.

case monitoring and court management (ICMS) may be helpful in the introduction of the advanced time-management policies, as well as further procedural reforms that should deal with some systemic problems, e.g with the delays in the delivery of court documents, lack of concentrated proceedings, successive remittals, etc. All this is expected to ameliorate the situation and prevent the “worst case scenario” from coming into life.¹¹³

Still, some worrying signs could be seen in several recent cases of the Strasbourg Court. The possibility that the request for the protection of the right to a prompt adjudication could itself get into a maze and finish in the drawer is demonstrated in the *Cerin* case.¹¹⁴ In this case (which, by the way, was the second case concerning length from the same applicant)¹¹⁵ the court communicated to the state the complaint about the unreasonable duration of the proceedings following his two requests for the protection of the right to a hearing within a reasonable time. The RPRTT was lodged on 30 March 2006 with the County Court, but that court decided on 28 November 2007 that it no longer had jurisdiction because the Municipal Court had in the meantime given its decision in the principal proceedings. The County Court transferred the RPRTT to the Supreme Court, but that court did not make any decision on it prior to the rendering of the Strasbourg Court admissibility decision on 26 June 2008. After communica-

111. For that reason, some commentators have supported introduction of further supervisory complaints against judges who do not fulfil their functions timely, accompanied with specific disciplinary sanctions. See *Maganić*, cit. *supra* (note 60). The State Attorney's Offices Report also noted that “in the certain cases the length of court proceedings is a consequence of acts or omission of judges that have all elements of incorrect or illegal work in the sense of Article 106 of the Courts Act”; in such cases “the payment of compensation has caused damage to the state which might be requested to be covered by the responsible judge”. *Izvešće*, cit. *supra* (note 87), p. 71. The introduction of appropriate sanctions for non-enforcement of judicial decisions (including the non-enforcement by the courts themselves) is also the topic of discussions at the international level. See, for example, Conclusions of the Round Table on “non-enforcement of domestic courts decisions in member states: general measures to comply with European Court judgments” (Strasbourg, 21-22 June 2007), where strengthening the individual responsibility (disciplinary, administrative and criminal where appropriate) of decision makers in case of abusive non-execution was proposed, along with the introduction of efficient penalties and fines against the state agents that refuse to execute orders. See Council of Europe, Committee of Ministers document CM/Inf/DH(2007)33.

112. The court backlogs were continually on the rise from 1992 (about 550,000) to 2004 (1.3 million). Since then the figures are decreasing: 2005 (1.1 million), 2006 (1 million), 2007 (970,000) and 2008 (890,000). Source: Annual Statistical Surveys of the Ministry of Justice (<http://www.pravosudje.hr>).

113. Some scepticism is still sound in this matter: see e.g. in this respect the wise remarks of a current judge of the Constitutional Court in Radolović, A., *Zaštita prava na suđenje u razumnom roku – realna mogućnost (pre)skupa avantura ili utopija?*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 29:1(2008), pp. 277-280.

114. Cit. *supra* (note 90).

tion of this case to the government, the case was resolved by a friendly settlement. However, a period of over two and half years in which the courts did not respond to a request for acceleration of the proceedings would have left no doubt as to its effectiveness in the eyes of the Strasbourg Court.

In the facts of the *Čiklič* case,¹¹⁶ we can see that even if the court obeys promptly to the time-fixing order, it might not be the end of the case. In that case, a RPRTRT was lodged with the Supreme Court on 3 May 2006. The Supreme Court granted the request 10 months later(!) and ordered the High Commercial Court to give a decision on the pending applicant's appeal within one month. The High Commercial Court rendered its decision on appeal on 26 September 2007, quashing the first-instance judgment and remitting the case back for retrial. In July 2008, over two years after the RPRTRT, the proceedings were still pending in the first instance. In this case, we might be reminded of the systemic problem recognised in the earlier jurisprudence of the Strasbourg Court, namely of the possibility of the endless cycle of remittals.¹¹⁷ The RPRTRT, just like all the other remedies for the length of proceedings, seem to be equally helpless in respect to the issues of this type – they can only be resolved by the reforms on the general level.

Therefore, although it is not very likely that catastrophic scenarios will be realised, it is quite likely that we will soon see more Strasbourg Court judgments finding violations of the right to a trial within a reasonable time in Croatian cases. It is also highly probable that the RPRTRTs will at least in some cases not be found effective as a remedy for the length of proceedings. This, however, should only encourage further reforms. As noted in a draft of the new Council of Europe document, "the rights to trial within a reasonable time and to an effective remedy (...) are fundamental to the Convention system and to the notion of a democratic state governed with respect for human rights and the rule of law. Whilst no Council of Europe member state can be said to have achieved perfection, membership itself implies an obligation to strive constantly for self-improvement".¹¹⁸

115. In the first *Cerin* case, a violation of Article 6 was found and the applicant was awarded 30,000 kn compensation for delays in the case that was initiated in 1984. See *Cerin v. Croatia*, application no. 54727/00, judgment of 15 November 2001.

116. *Cit. supra* (note 92).

117. See, for example, *Zagorec v. Croatia*, application no. 10370/03, judgment of 6 October 2005. In that case the first-instance court had given three judgments on the merits, all of them subsequently quashed and remitted by the appellate court. In several cases, the Strasbourg Court ruled that successive remittals "may disclose a serious deficiency in the justice system." See Grgić, Aida, "The length of civil proceedings in Croatia – Main causes of delay", in: Uzelac, A./van Rhee, C.H.(eds.), *Public and Private Justice. Dispute Resolution in Modern Societies*, Antwerpen-Oxford: Intersentia, 2007, p. 159.

118. See Draft Guide to Good Practice of the Committee of Experts on Effective Remedies for Excessive Length of Proceedings, doc. DH-RE(2009)007, Addendum, p. 2.

The case is not over: a few concluding thoughts

In conclusion, we may only echo the wise saying of the Strasbourg Court: “The best solution in absolute terms is indisputably, as in many spheres, prevention.”¹¹⁹

Without denying the remarkable successes in the establishment of the whole network of remedies for the length of proceedings in Croatia, we would like to recall the underlying rationale: the individual right to a fair trial in reasonable time. This right imposes on the member states of the Council of Europe the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time. The remedies such as constitutional complaints and RPRTs can appropriately cure the individual and isolated occurrences of the disease, but cannot fight the epidemic. For that, persistent structural changes are needed. Some of them are outlined in the documents of other bodies of the Council of Europe, most notably in the documents of the European Commission for the Efficiency of Justice (CEPEJ).¹²⁰

In the meantime, we have to be aware that the effectiveness of legal remedies for the length of proceedings is not measured by their ability to deflect the cases from the Strasbourg Court, but by their ability to provide appropriate redress in the individual cases. We also have to be aware of the risks that determination of the (un)reasonable length of proceedings becomes “a trial within a trial”. This would be self-defeating, since the purpose of the remedies for the length of proceedings is to shorten the judicial activities, and not to add more formalities and costs to the system.

Finally, we have to recognise that the most effective way of dealing with the lack of effectiveness of judicial system is not in the awarding of compensation, but in the thorough study of the reasons for this lack, and in the constant fight against the discovered causes. Replacing the struggle for efficiency with the passive payment of compensation for inefficiency is not an option: the capitulation is the most costly way of the quest for the Holy Grail of effectiveness of the justice system.

119. *Cocchiarella*, cit. *supra* (note 28), para. 74.

120. See documents on judicial time-management of the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ), in particular *CEPEJ Framework Programme: A new objective for judicial systems – the processing of each case within an optimum and reasonable time frame*, CEPEJ(2004)19; “*Time Management Checklist*”, CEPEJ (2005) 12 REV; *SATURN Guidelines for judicial time management*, CEPEJ (2008) 8.

LEGAL REMEDIES FOR THE PROTECTION OF THE RIGHT TO TRIAL WITHIN A REASONABLE TIME IN SLOVENIA

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Introduction

The Slovenian Constitution of 1991¹ contains an extensive chapter on human rights and fundamental freedoms (Part II; Articles 14-65). In Article 23, it explicitly provides for a guarantee of a trial without undue delay. In addition, treaties in the field of human rights, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention) are directly binding and are applied by the Slovenian courts, by virtue of Article 8 of the Slovenian Constitution. However, as all rights and freedoms contained in the Convention are also guaranteed by the Slovenian Constitution, the Constitutional Court (in a constitutional complaint procedure) examines allegations regarding violations of the Convention in the framework of examining the violation of corresponding rights under the Constitution.² For example, if the appellant asserts the violation of the right to trial within a reasonable time and refers to Article 6 of the Convention, the Constitutional Court examines the matter from the aspect of the right to trial without undue delay, as guaranteed under Article 23 of the Constitution. The Constitutional Court thereby clearly rejects the view that different wording of Article 6 of the Convention (the right to trial within a reasonable time) and Article 23 of the Constitution of the Republic in Slovenia (right to trial without undue delay) would result in any difference as to the substance of the protected right. In any case, the influence of the jurisprudence of

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

2. See, for example, decision of the Constitutional Court, Up 262/99 of 25 April 2002.

the European Court of Human Rights on the Slovenian courts is evident.³ In particular, the Constitutional Court often relies on the case-law of the Convention and its positions concerning particular procedural guarantees (such as the right to be heard and the right to equality of arms). Judgments of the European Court of Human Rights are often quoted in the decisions of the Constitutional Court.

As explained above, the right to trial within a reasonable time is guaranteed in Slovenia, and its importance is well recognised at the formal level. On the other hand, the reality is that this right is often violated in proceedings in Slovenian courts. At least in the sphere of civil cases Slovenia is still hampered by an excessive duration of litigation and proceedings for the enforcement of civil judgments, as well as by huge court backlogs. This seriously undermines both the legal certainty and the reputation of the judiciary in the eyes of the public. Only recently, the European Court of Human Rights⁴ and the Constitutional Court of Slovenia⁵ delivered influential judgments stating that there is a structural defect in the functioning of the Slovenian civil justice system and that the right to trial within a reasonable time is too often violated. The European Court of Human Rights established that the average length of judicial proceedings in Slovenia revealed a systemic problem resulting from inadequate legislation and inefficiency in the administration of justice.⁶

In this context, the question of whether there are any effective procedural remedies against an excessive duration of procedure gained importance. Since the *Kudla* case,⁷ the European Court of Human Rights has been examining the length of proceedings cases from the aspect of two conventional rights: the right to trial within a reasonable time (Article 6.1 of the Convention) and the right to an effective legal remedy against the violation of conventional rights (Article 13 of the Convention). In the *Lukenda* case, the European Court ruled that the Slovenian legal system does not provide for adequate and effective legal remedies against the violation of the right to trial within a reasonable time.⁸ The Court established that a party could neither invoke such remedies when the proceedings in question were still pending nor can he or she effectively claim a compensation for – foremost – non-pecuniary damages after the termination of proceedings in which the right to trial within a reasonable time was violated.

3. A. Mavčič, “The influence of the European Court on human rights case-law on Slovenian constitutional case-law: the right to fair trial”, *Revue de justice constitutionnelle Est-Européenne*, 2003, numéro spécial, p. 103-123.

4. *Lukenda v. Slovenia*, application no. 23032/02, judgment of 6 October 2005.

5. Decision of the Constitutional Court, No. U-I-65/05, 22 September 2005.

6. *Lukenda v. Slovenia*, application no. 23032/02, judgment of 6 October 2005, paras. 93-95.

7. *Kudla v. Poland*, application no. 30210/96, judgment of 26 October 2000.

8. *Lukenda v. Slovenia*, application no. 23032/02, judgment of 6 October 2005.

Situation before the implementation of the 2006 Act

Shortly after the decision of the European Court in the *Lukenda* case, the Slovenian Constitutional Court also rendered a judgment declaring that the Slovenian legal system does not provide for adequate remedies against the violation of the right to trial without undue delay.⁹ With this decision, the Constitutional Court overturned its previous case-law. The previous position of the Constitutional Court was that there were two remedies available to a party who believed that his/her right to trial without undue delay had been violated. First, such a party could file an action with the administrative court. With such an action, a party pursued a judicial review of an omission (failure to deliver a judgment) of a public body (a court), resulting in a violation of a certain human right (the right to trial within a reasonable time). After the above remedy was exhausted, a constitutional appeal against the violation of the right to trial without unnecessary delay could also be filed.¹⁰ The Constitutional Court thus “invented” two remedies against the violation of the right to trial within a reasonable time, available in pending proceedings. However, this doctrine was heavily criticised.¹¹ As to the first remedy (review in the administrative court), it was questioned, *inter alia*, what decision (except a mere declaration) could the administrative court reach and what practical effect (except putting an additional burden on – at that time – the already overburdened administrative courts) this remedy could have.¹² Besides, it was doubtful also from the theoretical aspect whether the concept of administrative review could be applied at all with regard to omissions of a judge. As to the second remedy (constitutional complaint), the main objection was that the Constitutional Court blatantly disregarded the restriction imposed by the Constitution itself (Article 160). In Slovenia (unlike, e.g., in Germany and in the system of the Convention), a constitutional complaint may only be lodged against a decision (a judgment, a court order, etc.) of a public body, which allegedly violates human rights, but not against an alleged violation of human rights caused by a material act or an omission on the part of a public body. In the Slovenian system, a constitutional complaint cannot be lodged on the grounds of an omission of the court to deliver a judgment or on the grounds of a material act of the judge, but only against the

9. Constitutional Court Decision No. U-I-65/05, of 22 May 2005.

10. Constitutional Court Decision No. Up 277/96, of 7 November 1996.

11. See, for example, Galič, *Ustavno Civilno Procesno Pravo* (Constitutional Civil Procedure Law), GV Založba, Ljubljana, 2004, p. 373 ff.

12. See also: “Završek, Zakon o varstvu pravice do sojenja brez nepotrebnega odlašanja – zakon z vidika odvetnikov in pravic strank” (“Act on the Protection of the Right to a Trial without Undue Delay – from the Perspective of Counsels and the Parties’ Rights”), *Pravosodni bilten*, 2008/1, p. 91.

judgment. Thus, there can be no constitutional complaint before the termination of proceedings in any case. The Constitutional Court chose to ignore this restriction – supposedly in favour of a more comprehensive protection of human rights.¹³ However, experience showed that the constitutional complaint against the violation of the right to trial without undue delay has not been an effective remedy – it just put an additional burden on the already overburdened Constitutional Court.

Before the 2006 Act, the situation in Slovenia was unsatisfactory also as regards compensatory relief for non-pecuniary damages. The problem was that with regard to moral (non-pecuniary) damage in the form of mental distress, the principle of *numerus clausus* applies in Slovenian law (Article 179 of the Obligations Code).¹⁴ Thus, only legally recognised moral (non-pecuniary) damages can be recovered. Concerning the mental distress, non-pecuniary damage is legally recoverable only if it is suffered owing to “a reduction in life activities, disfiguration, defamation of good name or reputation, deprivation of liberty, violation of a personality right, or the death of a close person” (Article 179 of the Obligations Code). Mental distress in the form of a creditor’s suffering, pain, the feeling of frustration or helplessness caused by the excessive duration of proceedings was not a recoverable damage under the Obligations Code.¹⁵ Certain courts have tried to subordinate such damages under the notion of the “violation of personality rights”.¹⁶ This, however, was not convincing. The right to trial without undue delay is not a personality right. It is a human right (a procedural guarantee), but there is no general provision entitling a person to claim compensation for non-monetary damage incurred by the violation of human rights in the Slovenian Obligations Code. Other courts have directly invoked Article 41 of the Convention and stated that the provision concerning just satisfaction for non-pecuniary damage in the case of violation of the right to trial without undue delay can be relied upon by Slovenian courts.¹⁷ However, this view has been rejected by the Supreme Court of Slovenia, which rightly pointed out that Article 41 of the Convention relies on competencies and procedures at the European Court of Human Rights and does not provide the legal basis for procedures and competences in national courts.¹⁸ The third view was that the provision of Article 26

13. See in favour of this concept: “Čebulj, Ustavna pritožba zaradi kršitve pravice do sojenja v razumnem času” (“A Constitutional Complaint based on a Violation of the Right to Trial within Reasonable Time”), *Podjetje in delo*, 2000, No. 6-7, p. 1157.

14. See, for example, “Strohsack, Odškodninsko Pravo in Druge Neposlovne Obveznosti” (“Law of Torts and Other Non-Contractual Obligations”), Ljubljana, 1990, p.225.

15. Završek, op. cit., p. 93.

16. For example, judgment of the Maribor Court of Appeals No. I Cp 179/2008, of 10 February 2009.

17. For example, decision of the Celje Court of Appeals No. Cp 26/2008, of 23 October 2008.

of the Slovenian Constitution should be applied directly and thus derogates from the principle of *numerus clausus* of legally recognised non-pecuniary damages under Article 179 of the Obligations Code. The aforementioned provision guarantees the right to compensation for damage caused by the unlawful acts of a person performing a function or engaged in an activity on behalf of a state body. Thereby, it does not provide for any restrictions as to the modality of the damage. To summarise, before the enactment of the 2006 Act, it has been at least questionable whether there were sufficient legal grounds for effectively claiming compensation for non-pecuniary damages caused by the violation of the right to trial without undue delay.¹⁹ On the other hand, there were no such restrictions concerning pecuniary damages but – as evident from the case-law of the Convention – at least with regard to ordinary civil litigation, it is practically impossible to establish a causal link between excessive duration of proceedings and pecuniary damages. To my knowledge, there have been no successful claims for compensation of pecuniary damages in that context in Slovenia so far.

In the *Lukenda* judgment, the European Court established that the mentioned legal remedies and the aggregate thereof were not effective. The judgment shows that the criticisms of the remedies “invented” by the Constitutional Court were well founded. These remedies did not contribute to effective protection of the right to trial without undue delay but only put an additional, however useless, burden both on administrative courts and constitutional courts. Therefore, the Constitutional Court changed its position soon after the *Lukenda* judgment. It admitted that there are no effective legal remedies against the violation of the right to trial without undue delay in Slovenia and stated that a comprehensive legislative reform was required in order to rectify the situation.²⁰

Act on the protection of the right to a trial without undue delay (2006)

General outline of the 2006 Act

Following the above decisions of the European Court and the Constitutional Court, the Act on the protection of the right to a trial without undue delay (hereinafter: the Act) entered into force in 2006 and has been implemented as of 1 January 2007.²¹ The adoption of the Act was also a part of the “*Lukenda Project*”.

18. Judgment of the Supreme Court No. III Ips 41/2006, of 18 September 2007.

19. Compare: “Koman Perenič, Odškodnina po Obligacijskem zakoniku (OZ) in po Zakonu o varstvu pravice do sojenja brez nepotrebne odlašanja” (✓Damages Under the Obligations Code and Under the Act on the Protection of the Right to a Trial without Undue Delay”), *Pravosodni bilten*, 2008/1, p. 75.

20. Constitutional Court Decision, No. U-I-65/05, of 5 October 2005.

The Slovenian Government adopted the Project at the end of 2005; its objective was to eliminate backlogs in the Slovenian courts by the end of 2010 by providing for structural and managerial reform of the judiciary. The Act was amended in 2009, but not substantially.²²

In general, the Act provides for a combination of two types of legal remedies; one which is specified for speeding up a court proceeding (supervisory appeal and a motion to set a deadline) and the other which is specified for awarding (particularly non-pecuniary) damages. The first type of remedy is designed to accelerate the pending proceedings. In this sense, the remedy offers a preventive relief. On the other hand, once the proceedings in which the right to trial without undue delay has been violated, have terminated, the unreasonable duration can no longer be rectified. Therefore, a compensatory relief in the form of a claim for damages is the only remaining option.²³

New remedies may be used by parties to court proceedings, participants in non-contentious proceedings and by injured parties in criminal proceedings (Article 2). However, entities of public law (the state, local self-government bodies, government agencies, etc.) are exempt from the right to seek just compensation (Article 24).

Supervisory appeal and the motion to set a deadline

The Act stipulates that in the event of a delay in the pending proceedings, any party may lodge a supervisory appeal (*nadzorstvena pritožba*) with the president of the court examining the case.²⁴ Unless the appeal is deemed to be manifestly unfounded or incomplete (Article 6.1) the president of the court must request the presiding judge to report on the progress of the proceedings, and the latter is required to indicate in writing to the presiding judge any irregularities he may find. The president of the court may also require the judge to submit the case file if he considers it necessary (*rokovni predlog*, Article 6.3). If the judge notifies the president of the court in writing that all relevant procedural acts will be performed or a decision issued within a time-limit not exceeding four months, the president of the court shall inform the party thereof and thus conclude the consideration of the supervisory appeal (Article 6.4). If after receiving the report of

21. "Zakon o varstvu pravice do sojenja brez nepotrebne odlašanja" (ZVPSBNO); Official Gazette No. 49/06.

22. "Zakon o spremembah in dopolnitvah Zakona o varstvu pravice do sojenja brez nepotrebne odlašanja" ("Act Amending the Act on the Protection of the Right to a Trial without Undue Delay"), Official Gazette No. 58/2009.

23. For a detailed and comprehensive presentation of the Act see: Pavlin, "Pregled vsebine Zakona o varstvu pravice do sojenja brez nepotrebne odlašanja" ("An Overview of the Contents of the Act on the Protection of the Right to a Trial without Undue Delay"), *Pravosodni bilten*, 2008/1, p. 13-46.

the trial judge, the president of the court establishes that the court is not unduly protracting the decision-making in the case, he dismisses the supervisory appeal by a ruling (Article 6.5). If the president of the court establishes that the right to trial within a reasonable time has been violated, he or she may put the case on the priority list (particularly if the matter is urgent) or set deadlines for procedural measures.²⁵ If he orders that appropriate procedural acts be performed by the judge, he also sets the time frame for their performance, which may not be less than 15 days and not more than six months, as well as the appropriate deadline for the judge to report on the acts performed (Article 6.6). If the president of the court establishes that the undue delay in decision-making in the case is attributable to an excessive workload or an extended absence of the judge, he may order that the case be reassigned (Article 6.7).

If the above supervisory appeal proves unsatisfactory²⁶ a further remedy is available in the proceedings which are still pending: a motion to set a deadline (Articles 8-11 of the Act). The motion is decided upon by the president of a superior court (a court, which exercises appellate jurisdiction over the court that conducted the proceedings in which the right to trial within a reasonable time has allegedly been violated). The party may lodge a motion to set a deadline within 15 days as of the receipt of the ruling or, in the case of non-response, after the time-limit for the response has expired. Thus, a prior exhaustion of the remedy of supervisory appeal is a procedural prerequisite for the filing of a motion to set a deadline. The procedure and possible decisions (Article 11) which can be taken by the president of the higher court with regard to a motion to set the deadline

24. Following the patterns of the old Austrian statute, the supervisory appeal has traditionally been a device against irregularities in court proceedings. It has, however, traditionally been rather a measure of administrative supervision within the court's hierarchy and not a remedy in the proper sense. It was merely the act of drawing to the attention of supervisory authority (the head 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 a lower state body. It was thus an internal administrative remedy which was only minimally formalised, thus it meant hierarchical supervision of the president of the body (not necessarily only a court) of a timely and also proper work of her/his subordinates. See: Peter Pavlin, "Nadzorstvena pritožba kot učinkovito pravno sredstvo zoper zavlačevanje sodnega postopka" ("A Supervisory Appeal as an Effective Legal Remedy Against Delaying of Court Proceedings"), *Pravna praksa*, No. 11/2001 – Annex, pp. I–XIV.

25. See also: Potočar, "Pristojnosti sodne uprave oziroma predsednikov sodišč v zvezi z Zakonom o varstvu pravice do sojenja brez nepotrebnega odlašanja" ("Competences of the Court Management and Presidents of Courts with Regard to the Act on the Protection of the Right to a Trial without Undue Delay"), *Pravosodni bilten*, 2008/1, p. 59.

26. This is the case if the president of the court dismisses the supervisory appeal or fails to respond to the party within two months or fails to send the notification or if appropriate procedural acts have not been performed within the time-limit set in the notification or ruling of the president of the court.

generally correspond to those of the president of the court with regard to the supervisory appeal; with the exception of powers to reassign a case to another judge (see *supra*).

The Act strives to assure that both the decisions and practical measures concerning the above remedies are taken promptly. The time-limits imposed by the Act are short. For example, the president of the court examining the case had to decide within two months if a supervisory appeal was well-founded. If the judge dealing with the case notifies the president that procedural acts or a decision will be forthcoming within four months, the president informs the party accordingly. If the complaint is justified, procedural acts are to be carried out within a period of up to six months. As to the motion for a deadline, a decision on whether the complaint is well-founded must be rendered within 15 days and, if justified, procedural acts must be performed within four months.

Additionally, since the constitutional complaint to the Constitutional Court is also a part of Slovenian legal order (Article 160, paragraph 1, subparagraph 6 of the Slovenian Constitution), any party to judicial proceedings may also file the constitutional complaint to the Constitutional Court, as a last internal legal remedy within Slovenia. Of course, legal requirements of exhausting acceleratory legal remedies of supervisory appeal and motion to set a deadline must be fulfilled.²⁷

Claim for (non-pecuniary) damages

After the proceedings in which the right to trial without undue delay had (allegedly) been violated, have terminated, the party may file an action for just compensation. The act specifically defines a non-pecuniary damage caused by an excessive duration of court proceedings as a legally recoverable damage. The Act limits the amount of non-pecuniary damages to 300-5,000 euros (Article 16.2). Besides, a court may, when appropriate, take into account foremost the behaviour of the applicant in the previous procedure, reject the claim for monetary compensation if it establishes that a mere declaration of violation (and a possible publication of a judgment) presents a sufficient remedy (Article 18.1). The Act also imposes a procedural prerequisite that prior to an action, the claimant must seek (within nine months after the final resolution of the case) a con-

27. See the obiter dicta statement of the Constitutional Court in its Ruling, No. U-I-93/07, of 22 October 2009: "2. (...) When an aggrieved person opines that the Court does not operate in such manner [decides without undue delay], it is then available to her to request adequate judicial protection due to violation of the right to a trial without undue delay as is provided by the Act on the Protection of the Right to a Trial without Undue Delay (Official Gazette No. 49/06 and following ZVPSBNO). After its exhaustion [of its acceleratory legal remedies] it can file the constitutional complaint in accordance with provisions of Articles 50-53 of the Constitutional Court Act (Official Gazette No. 64/07 – officially consolidated text – hereinafter ZustS)."

sensual dispute resolution with a state attorney (Article 19). An action may be filed only if a settlement is not reached within three months. The action must be filed within 18 months after the final resolution of the case. In addition, a party which has not availed himself of at least one of the accelerating remedies against the excessive duration of proceedings, while these were still pending (supervisory appeal or the motion to set a deadline), shall be precluded from claiming compensatory relief after the termination of proceedings (Article 15). Thus, a party who has not attempted to protect his or her right to trial within a reasonable time, while the proceedings were still pending and when it was therefore still possible to accelerate them, cannot seek compensatory relief.²⁸

According to Article 20 of the 2006 Act, all claims for non-pecuniary damages are decided on pursuant to the rules applicable to small claims proceedings, as provided in the Civil Procedure Act²⁹ (hereinafter CPA). This means that the procedure is conducted in a predominantly written manner, whereby all facts and evidence must be presented before the trial (Article 452, CPA). An oral hearing may be omitted unless it is explicitly requested by a party (Article 454, CPA). The jurisdiction is vested in local courts (*okrajno sodišče*) in the place of the domicile of the claimant (Article 20.3 of the 2006 Act). An appeal is possible but limited to the examination of grave procedural errors and erroneous application of substantive law, and does not allow for a re-examination of the finding of facts (Article 458.1, CPA). A further appeal on points of law (*revizija*) to the Supreme Court is excluded (Article 458.8, CPA).³⁰

The aforementioned provisions refer to claims for non-pecuniary damages. Furthermore, under Article 21 of the 2006 Act, a party may bring an action for *pecuniary damage* caused by a violation of the right to trial without undue delay within 18 months after the final decision. When deciding on pecuniary damages, the court has to take into account the provisions of the Obligations Code and the substantive criteria of assessment as to whether the right to trial without undue delay has been violated. The law is not entirely clear, but it seems to me that the aforementioned procedural prerequisites (exhaustion of remedies available when the proceedings were still pending – supervisory appeal and the motion to set a time-limit, as well as an obligatory attempt to settle the case directly with the State Attorney’s Office) do not apply with regard to claims for pecuniary damages. In any case, it may be expected that also in the future, claims for the

28. Pavlin, Pregled, op. cit., p.37.

29. “Zakon o pravdnem postopku”, Official Gazette No. 26/99 - 45/2008).

30. The preference for simplified proceedings, strict time-limits and restrictions concerning the possibility of an appeal is also expressed in the Venice Commission Report on the effectiveness of national remedies in respect of excessive length of proceedings adopted by the Venice Commission at its 69th Plenary Session (15-16 December 2006); para. 209).

reimbursement of pecuniary damages will very rarely be successful. It is practically impossible, at least in ordinary litigation cases, to establish a causal link between the violation of the right to trial within a reasonable time and pecuniary damages.³¹

Both with regard to pecuniary and non-pecuniary damages, it is important to note that the law provides for a strict liability of the Republic of Slovenia for damages (Articles 16.1 and 21.2).³² Therefore, no intent or negligence needs to be asserted and proved, only other prerequisites for damages: violation of the right, damage and causal link.³³

Substantive criteria of review

With regard to criteria which the courts should take into account when assessing the complaints concerning a violation of the right to trial without undue delay, the Constitutional Court of Slovenia has relied on standards, established by the case-law of the European Court of Human Rights even before the implementation of the 2006 Act.³⁴ The same approach was confirmed with the 2006 Act. In assessing the reasonableness of the length of proceedings, the Slovenian courts are in essence required to look at the criteria established by the European Court of Human Rights case-law, whereby there is no absolute standard of reasonableness of the duration of proceedings. The circumstances of each particular case must be taken into account, namely the complexity of the case, the applicant's conduct (in particular as regards the use of procedural rights and the fulfilment of obligations in the proceedings) and those of the competent

31. For example, it cannot be speculated that the outcome of the case would be different if it was decided within reasonable time. In addition, the delayed delivery of a positive judgment for the creditor and the delayed execution of the judgment, of course, may cause pecuniary damage to the creditor. However, the law provides for the liability of the debtor for late performance (default interest, liability for damages due to non-performance). As the delay is remedied through the liability of the debtor, the failure of the state to secure a timely resolution of the dispute did not, as such, cause damage to the creditor. On the other hand, the argument of the debtor that due to the excessive duration of proceedings, he or she is now liable to high default interest, is not well-founded, either. The huge amount of default interest that the debtor is liable to pay was not caused by the failure of the court to timely resolve the dispute, but by the non-performance of the debtor. The debtor is obliged to perform his obligation once it is due, and is not entitled to wait for the judgment which just confirms the obligation already existing under the substantive law. The default interest which the debtor must pay is a result of his failure to perform the obligation when it was due, and not a result of the excessive duration of proceedings. See also Koman Perenič, *op. cit.*, p. 73.

32. This is in line with recommendations of the Venice Commission Report on the effectiveness of national remedies in respect of excessive length of proceedings adopted by the Venice Commission at its 69th Plenary Session (15-16 December 2006); para. 205).

33. See Koman Perenič, *op. cit.*, p. 70-73.

34. Constitutional Court Decision No. U-I-60/03, of 4 December 2003.

authorities, which are further specified (compliance with the rules on the order of resolving cases, or with statutory deadlines for fixing preliminary hearings or for giving court decisions), and the importance of what is at stake for the applicant in the dispute.

Assessment of the 2006 Act by the European Court of Human Rights

In the *Grzinčič* judgment,³⁵ the European Court of Human Rights has had the opportunity for the first time to assess the system of remedies afforded by the 2006 Act. The Court has found (the aggregate of) these remedies to be effective and therefore in compliance with Article 13 of the Convention. The Court repeated its finding that a combination of two types of remedies, one designed to expedite the proceedings and the other to afford compensation, seemed to be the best solution for the redress of breaches of the “reasonable time” requirement.³⁶ With regard to remedies available in pending proceedings, the Court noted in particular that the 2006 Act provided for strict and short time-limits.³⁷ In the Court's view, these deadlines comply with the requirement of speediness necessary for a remedy to be effective. The Court was therefore satisfied that the aggregate of remedies provided for by the 2006 Act in cases of excessively long proceedings pending at first and second instances was effective in the sense that the remedies were in principle capable both of 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.³⁸ The Court also noted that in assessing the reasonableness of the length of proceedings, the Slovenian courts are in essence required to look at the criteria established by the European Court of Human Rights' case-law.³⁹

The Court also ruled that the just satisfaction system for non-pecuniary damages, which can be sought after the termination of proceedings, also complies with the requirements of Article 13 of the Convention.⁴⁰ A compensatory remedy is, without doubt, an appropriate means of redressing a violation that has already occurred.⁴¹ The Court, however, did not specifically assess the limitation

35. *Grzinčič v. Slovenia*, application no. 26867/02, judgment of 3 May 2007. See also: P. Pavlin, Prva pozitivna sodna presoja Zakona o varstvu pravice do sojenja brez nepotrebnega odlašanja (The first Positive Assessment of the Act on the Protection of the Right to a Trial without Undue Delay), 26 *Pravna praksa*, 2007, No. 18, p. 25

36. *Grzinčič v. Slovenia*, application no. 26867/02, judgment of 3 May 2007, para. 96.

37. *Ibid*, paras. 86-88.

38. *Ibid*, para. 98.

39. *Ibid*, para. 97.

40. *Ibid*, para. 89.

of the amount of damages to 5,000 euros as imposed by the 2006 Act. Nevertheless, in light of the previous case-law of the Court,⁴² it should be expected that this limitation shall not be considered unreasonable and does therefore not undermine the effectiveness of the remedy.⁴³

The Court observed that it was too soon to establish any long-term practice of domestic authorities applying the 2006 Act; however, as the Act was specifically designed to address the issue of the excessive length of proceedings before domestic courts, the Court concluded that there was no reason to doubt its effectiveness at this stage. However, as the Court warned, this position might be subject to review in the future and the burden of proof as to the effectiveness of the remedies in practice remains on the Slovenian Government.⁴⁴

Conclusion

Can a structural defect be cured at the level of an individual case?

It would be unrealistic to expect that the presented new law can substantially contribute to the acceleration of court proceedings in Slovenia. It does however contribute to lessening the burden of the European Court of Human Rights as an appeal to this Court will only be admissible after the exhaustion of remedies available under the 2006 Act.⁴⁵ It is difficult to dispel the impression that this was probably what the Convention had primarily in mind when it started imposing obligations on the member states to establish domestic remedies for the protection of the right to trial without undue delay. I find it impossible to agree with the opinion of the European Court that “where the judicial system is deficient in structural respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution.”⁴⁶ Remedies such as a motion for setting deadlines and a supervisory appeal can be very effective in a system which, in general, functions well and where the violation of the right to trial within a reasonable time is just an exceptional defect,

41. Ibid, para. 96.

42. *Scordino v. Italy*, application no. 36813/97, judgment of 29 March 2006, *Dubjakova v. Slovakia*, application no. 67299/01, judgment of 10 October 2004.

43. See also Pavlin, Pregled, op. cit., p.38 and Koman Perenič, op. cit., p. 76.

44. *Grzinčič v. Slovenia*, application no. 26867/02, judgment of 3 May 2007, para. 108.

45. See Ibid, para. 111. At least for proceedings which are still pending in Slovenian courts the prerequisite for the exhaustion of remedies available under the 2006 Act also applies to cases where the application to the European Court of Human Rights had been lodged even before the Act was implemented (para. 105). In the *Grzinčič* judgment, the European Court observed that there were at that time some 1,700 cases against Slovenia pending before the Court, which concerned the length of proceedings (para. 104).

46. Ibid, para. 95.

attributable to improper administration of an individual case. However, if a judiciary suffers from huge backlogs in courts and overburdening of judges, violations of the right to trial within a reasonable time are not that often the result of an inadequate administration of justice in a particular case but rather of the mere fact that the case has not yet been put on the agenda due to backlogs. In such conditions, the mentioned remedies cannot really be effective – unless they result in taking the cases “over the queue” (either directly by ordering the case to be put on a priority list or indirectly by setting deadlines which could, due to the existing backlogs, not be complied with unless the judge himself gives priority to the case). This however jeopardises the right to equality before the law and results in the fact that other litigants with open cases in the same court will need to wait even longer for their turn. The problem of an excessive number of court cases can hardly be effectively remedied by creating new court cases, just like the problem of the overburdening of judges can be hardly remedied by imposing new burdens (deciding appeals, writing reports, etc.) on them. It seems it is a matter of simple logic to conclude that when the defect is of a structural nature, it cannot be cured with measures at the level of an individual case, but only with measures at the structural level.

The time will show whether the new remedies were effective or whether they just added more oil to the fire. When the European Court of Human Rights rules that certain states have “perfectly understood” what kind of remedies the Court had in mind,⁴⁷ it is regrettable that it did not at the same time give any information as to whether the duration of proceedings and backlogs in courts in these member states had in fact decreased as a result of these remedies. I hope that it might not be too pessimistic to raise the question of whether, in the future, the Court might face applications concerning a violation of the right to trial within a reasonable time in the proceedings concerned with the protection of the same right.

Parties’ contribution to the acceleration of proceedings – solely through the exhaustion of available remedies?

It is beyond doubt that the European Court of Human Rights is right in pointing out that achieving acceleration and concentration of proceedings is not the sole responsibility of the Court but of the parties as well. Parties should be active in proceedings. However, in this context, one should think of the timely submission of facts and evidence in order to avoid adjournments, diligent participation in proceedings, refraining from dilatory tactics, attendance at court hearings, substantiated denial of facts, the observance of court orders and set time limits,

47. *Ibidem*.

bona fide participation in settlement negotiations and ADR procedures, etc. Merely by filing motions for acceleration and supervisory appeals, little or nothing is achieved in favour of the aforementioned goals in practical sense. By imposing additional burdens on judges, they can, in practice, even be counter-productive. Nevertheless, the filing of such motions and appeals is very much encouraged by the 2006 Act and the case-law of the European Court of Human Rights in order to comply with the requirement of exhaustion of remedies as a prerequisite first, for an action for just satisfaction in domestic courts and then for access to appeal in Strasbourg.

Notion of “remedy” and its preventive, acceleratory or compensatory character

There seems to be some confusion as to the use and the meaning of different legal terms. For example, “remedies” could be understood as measures adopted by the judiciary, included in legislation and court administration in order to improve the functioning of the justice system (such as: improving procedural laws, better court management, strengthening court personnel and infrastructure, investing more financial resources in the judiciary from the state budget, etc.). In fact, such measures are the most effective “remedies” for systemic failures within the judiciary. However, in the context of Article 13 of the Convention (linked to Article 35.1 on the exhaustion of domestic remedies) one cannot perceive remedies in this sense. What Article 13 of the Convention requests is a remedy, available to an individual in his or her particular case, thus a remedy in the sense of an individual, subjective right (claim). Naturally, one does not have an individual legal claim for the above-mentioned measures to be implemented.

A further dilemma exists with regard to the differentiation between preventive and compensatory remedies or accelerating and compensatory remedies. At first sight, the differentiation seems to be simple: a preventive remedy is one that can be used while the proceedings are still pending (in order to accelerate them), while a compensatory remedy is available after the termination of the proceedings (when the acceleration of the proceedings is no longer possible, but only redress in the form of damages). However, also the remedies designed to expedite the proceedings (such as a supervisory appeal or a motion to set a deadline) are not exactly preventive in the sense that they, as the European Court of Human Rights puts it, “expedite the proceedings in order to prevent them from becoming excessively lengthy”.⁴⁸ It would be unreasonable to stimulate or even demand that parties should avail themselves of such remedies even before there was any dysfunction in their pending case. Also these remedies are supposed to

48. *Grzinčič v. Slovenia*, application no. 26867/02, judgment of 3 May 2007, para. 95.

be applied after there has already been an unjustified delay. This corresponds to the practice in Slovenian courts. Parties do not avail themselves of, for example, supervisory appeals, unless there is already a serious delay in proceedings as a whole. Such remedies can be preventive only in cases where the delay may be identified as the result of a malfunction in a single phase of the proceedings and has not yet resulted in delaying the proceedings as a whole. Here, the delay can be “caught up” by “speeding up” the proceedings at a later stage. But in the case of a structural defect (backlogs in courts), the delay is usually not attributable to a malfunction at a particular stage of proceedings. In such cases, the above-mentioned remedies can (at best), diminish the delay which has already occurred, but not ensure an overall compliance with the reasonable time standard (whereby, according to the position of the Venice Commission, even in such a case, such remedies can still not be considered as preventive).⁴⁹ Thus, such remedies might be denoted as “accelerating”, but not as “preventive”. Remedies which are genuinely preventive in the strict sense are only measures of the judicial, executive and legislative powers concerning the structural level of the functioning of the justice system – but such measures, as explained above, cannot be considered “remedies” in the sense of Article 13 of the Convention.

Prior exhaustion of the claim for damages in a domestic court – a systemic solution?

Certain doubts can be raised also with regard to the European Court of Human Rights’ requirements concerning remedies available after the termination of the proceedings. The imposition of a requirement that an applicant should first be enabled effectively to seek just compensation for non-pecuniary damages in domestic courts is not a systemic solution but rather a tool preventing the overburdening of the European Court. If it were a systemic approach, it would apply to any violation of procedural guarantees in courts whose judgments are not subject to further appeal. It is true that after the proceedings in domestic court have terminated, it is no longer possible to safeguard the core of

49. The Venice Commission makes a clearer differentiation between preventive and compensatory remedies than the European Court of Human Rights. Remedies aimed at fast-tracking pending cases are not necessarily preventive. If they are applied in proceedings where there has already been an undue delay, they aim to ensure *restitutio in integrum* and not prevention. In such a case, according to the Venice Commission, remedies are not preventive, even if they result in the remainder of the case being dealt with more quickly than an ordinary one; in this manner, the undue delay will be caught up and the global length of the proceedings will be reasonable. In such a case, a pecuniary reparation will not be necessary – but this still does not mean that such remedies should be considered as preventive. Report on the effectiveness of national remedies in respect of excessive length of proceedings, adopted by the Venice Commission at its 69th Plenary Session (15-16 December 2006); paras. 178-179).

the right to trial within reasonable time. Indirect remedying through just satisfaction is the only remaining option. But, in legal systems which do not allow for the reopening of domestic proceedings on the ground of the applicant's success at the European Court of Human Rights, the situation with regard to other procedural guarantees is the same. For example, if a right to be heard is violated in the highest court in the state (see, for example, the *Gaspari* case – a violation of the right to be heard in the Constitutional Court⁵⁰), subsequently, there can be no direct protection of this procedural guarantee. The European Court of Human Rights cannot quash the domestic judgment and in civil (unlike in criminal) cases in Slovenia, a judgment of the European Court constitutes no ground for the reopening of domestic proceedings. Thus, the only benefit for the applicant, which can be obtained with an application to the European Court of Human Rights is monetary compensation. However, the European Court has never stated that in such cases, the applicant should first file a claim for just satisfaction in a domestic court whereby the state would be obliged to ensure effectiveness of such a claim. I do not maintain that this should be the case. I just want to point out that at a systemic level, it is difficult to see a difference between the case in which the right to trial within a reasonable time has been violated in proceedings which have already terminated and a case in which the right to be heard was violated in proceedings in the highest domestic court (where no further appeal is possible and also a judgment of the European Court of Human Rights is no ground for the reopening of domestic proceedings). Therefore, the fact that the European Court of Human Rights only introduced a requirement of exhaustion of domestic remedies for just satisfaction in the context of violations of the right to trial within a reasonable time cannot be seen as a result of a systemic doctrine. Rather, it is the result of practical considerations concerning the prevention of overburdening this Court.

Final remark

My scepticism does not mean that I would like to undermine the importance of the right to trial within a reasonable time. There is no doubt that justice delayed is justice denied. Neither does it mean that I do not agree with the position of the European Court of Human Rights that member states should organise their respective judicial systems in such a way that their courts can meet each of the requirements, including the obligation to hear cases within a reasonable time.⁵¹ The fact that courts are overburdened and that there are huge backlogs should be no excuse. Furthermore, it cannot be denied that a positive effect of

50. *Gaspari v. Slovenia*, application no. 21055/03, judgment of 21 July 2009.

51. See, for example, *Union Alimentaria Sanders SA v. Spain*, application no. 11681/85, judgment of 7 July 1989.

the judgments of the European Court of Human Rights obliging the contracting states to pay just satisfaction was that at least some member states, Slovenia probably being among them, finally found it reasonable to invest more financial resources in the judiciary.

The aforementioned dilemmas and criticism are also not directed against the Slovenian legislator. Slovenia just fulfilled what the European Court of Human Rights “encouraged” (in fact, requested) it to do without leaving it much choice. Within these limits the adopted solutions are the utmost that could be achieved. Rather informal proceedings upon a supervisory appeal and the motion to set a deadline are less burdensome for the judiciary than a full-scale appeal (such as a constitutional appeal or an action in administrative court) would be. But it is most important that the situation in the Slovenian justice system concerning the reduction of backlogs in courts is improving – not because of the 2006 Act, but because other measures were adopted with the aim to improve the functioning of the judiciary. The statistics in the recent years show a decrease in court backlogs.⁵² One can hope that in the medium term, excessive duration of proceedings in Slovenia will become rather an exception attributable to the improper administration of an individual case than the result of a systemic defect. In such conditions, remedies available under the 2006 Act can be effective.

52. See the *Annual Report of the Supreme Court of the Republic of Slovenia for 2009*: http://www.sodisce.si/mma_bin.php?static_id=20090604152856

THE WORK OF THE COMMITTEE OF EXPERTS ON EFFECTIVE REMEDIES FOR THE EXCESSIVE LENGTH OF PROCEEDINGS

Mr Jakub Wołaszewicz

Chairperson of the Committee of Experts on effective remedies for excessive length of proceedings (DE-RE)

In the second part of my presentation I would like to draw your attention to the work of the Committee of Experts on effective remedies for the excessive length of proceedings. This is a new working group within the Council of Europe which I have the honour to be a chairperson of. This group should draft a recommendation concerning effective remedies against undue delay of proceedings, as well as prepare proposals for states on how to introduce such a domestic remedy.

The Committee has underlined the fact that the recommendation should not seek to prescribe a “perfect” remedy in all its aspects but rather define the broad conceptual characteristics, as identified by the Court, of a system of remedies that would be effective in addressing the overall problem of excessive length of proceedings. In this respect, it should include both preventive measures to ensure respect for the requirements of Article 6 of the Convention, as well as remedies introduced in pursuance of Article 13 of the Convention, since, as underlined by the Court, prevention is itself the best remedy and a recommendation that failed to acknowledge the importance of prevention would be incomplete and less effective than it might otherwise be.

As I have already mentioned, the Committee considered it important to refer to preventive measures and also the significance of systemic causes, and furthermore that these issues appear at the beginning of the operative provisions, thus emphasising their primary importance. This would allow the recommendation to be structured by reference, first, to preventing the occurrence of excessive length of proceedings, second, to expediting proceedings that risked becoming excessively lengthy and third, to remedying violations of the right to trial within a reasonable time by expediting proceedings, affording redress for disadvantage or, preferably, allowing for a combination of the two. Nevertheless, the Commit-

tee was mindful of the fact that the terms of reference implied a need for balance between preventive measures and remedies in the sense of measures intended to address excessive length of proceedings once arisen.

One particular issue discussed by the Committee was whether the recommendation should call on states to introduce a remedy to expedite excessively long proceedings, a remedy to redress disadvantage or a combination of the two.

The Committee also decided to include an element concerning translation, publication and dissemination of the recommendation and annexed document.

At the end of the first meeting the Committee discussed the document that would be annexed to the recommendation, giving guidance to the Secretariat for preparing a first draft:

- ▶ the annexed document should follow the structure and order of the recommendation;
- ▶ it should explain why each element of the recommendation had been included as well as how it could best be implemented;
- ▶ the focus should be on practical measures rather than analysis;
- ▶ the annexed document should contain only the number of examples of existing measures necessary for illustrative and pedagogical purposes, and should not be a compilation of all member states' practices;
- ▶ there should be sufficient detail of existing measures to allow other states to understand how they operated in practice and take useful inspiration from them;
- ▶ insofar as possible, there should be an indication of the likely cost of different measures;
- ▶ the Court's findings and comments on existing practices should be included, with only measures that the Court had approved being presented as examples of good practice;
- ▶ relevant work of other bodies, such as the Venice Commission and the European Commission for the Efficiency of Justice (CEPEJ), should be summarised, bearing in mind that whilst certain factual details may have been outdated the conclusions and recommendations remained generally valid.

The issue of excessive length of domestic proceedings is the most frequent guest in Strasbourg proceedings. It is a legal cancer that leads every judicial system to a lethal status. Unfortunately, the extensive length of proceedings concerns also the Court and radical decisions are therefore needed in this respect. I imagine that a remedy for this pathology lies in the adoption of several pilot judgments. This would relieve the Court in a radical way of almost 30% of pending and new cases. This way, the problem of the excessive length of domestic proceedings would be solved the fastest and would not require the introduction of changes into the European Convention, while significantly reducing the Court's caseload.

THE VENICE COMMISSION'S WORK ON REMEDIES AGAINST THE UNREASONABLE LENGTH OF PROCEEDINGS

Dr Bogdan Aurescu¹

Venice Commission, Council of Europe

The Venice Commission adopted its Report on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings at its 69th Plenary Session of December 2006, after a work of almost two and a half years.

The initiative to prepare the Report came from Romania in 2004. The Romanian proposal was officially formulated during the Conference on The European Convention on Human Rights: from integrating standards to shaping solutions (Bucharest, 8-9 July 2004), organised to celebrate 10 years since the entry into force of the European Convention on Human Rights (the Convention) for Romania [on the basis of a previous preliminary exchange of views of the Romanian Agent before the European Court on Human Rights (the Court) (also a substitute member of the Venice Commission) and the secretariat of the Venice Commission].

Why was Venice Commission interested in a study/report on such topic? First, because Venice Commission has always had an interest in the work of the

1. Substitute member of the Venice Commission (Romania). President of the International Law Section of the Romanian Association for International Law and International Relations (the Romanian Branch of the International Law Association) and editor-in-chief of the Romanian Journal of International Law. Member of the Permanent Court of Arbitration, Lecturer professor (International Law) at the Faculty of Law, University of Bucharest. Former Director General for Legal Affairs, Undersecretary of State and Secretary of State for European affairs in the Romanian Ministry of Foreign Affairs, former Agent of the Romanian Government for the European Court of Human Rights, former Agent of Romania before ICJ in the case "Maritime Delimitation in the Black Sea" (*Romania v. Ukraine*). Currently, Secretary of State for strategic affairs in the Romanian Ministry of Foreign Affairs.

Court. For instance, such interest was expressed in its opinion on the implementation of the judgments of Court of December 2002, where the Commission expressed the view that it would be useful if the Council of Europe's Committee of Ministers (CM) were to develop guidelines on what measures to be taken by the respondent States following the finding by the Court of a breach of a particular provision of the Convention. Such guidelines, inspired by the practice of the CM and the case-law of the Court in this respect, would allow for a stricter approach by the CM when supervising the execution of the Court's judgments.

Second, because the excessive length of proceedings already represented in 2004 one of the main sources of cases before the Court.

In fact, taking into account this situation, the CM included special references in its May 2004 Recommendation (2004(6)) on the improvement of domestic remedies. It recalled that, in addition to the obligation of ascertaining the existence of effective national remedies in the light of the case-law of the Court, member states have the general obligation to solve the problems underlying violations found. The member states were thus called to, in particular:

- ▶ “review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court; and
- ▶ pay particular attention (...) to the existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings.”

Why was Romania interested in a study/report on such topic? Indeed, in 2004 Romania among the Council of Europe member states with a very limited number of judgments dealing with excessive length of proceedings (1 in 2003 – Pantea; 1 in 2004 – Bursuc). But we knew it was coming: in 2005 there were 4 (3 in the field of criminal proceedings (Moldovan (2), Stoianova & Nedelcu, Tudorache) and 1 regarding civil proceedings (Strain & others)); in 2006 there were 7 (2 regarding criminal proceedings (Petre, Aliuta) and 5 regarding civil proceedings (Nicolau, Carstea & Grecu, Matica, Guta)). In 2007 there were 8, in 2008 – 24, in 2009, as of 16 September, already 10. So, a total of 55 judgments, plus some 4 friendly settlements. Eighty cases were already communicated to the Agent, and it seems that there are some 300 more waiting to be notified. It is not as impressive as the record of other countries, but we are aware of the structural problems of the national judicial system. At that point in time we had the intention to promote specific national legislation to provide for domestic remedies for the unduly length of proceedings; I still consider it a necessity. The Romanian Ministry of Justice is now in the process of drafting a specific law on addressing this matter, while the new draft of the Code on Civil Procedure includes certain provisions on the issue.

On the hand, as a matter of policy Romania was (and continues to be) sensitive to general problems related to the functioning of the Court and always promoted and supported general measures to ease its workload (e.g. Romania was among the countries to support and sign Protocol 14 to the Convention on the first day of its opening for signature; unfortunately, there is still one state blocking the entry into force of this reform instrument). Romania constantly supported the recent initiatives aimed at allowing the provisional application of Protocol 14, as well as the adoption of Protocol 14 bis (Romania signed it on 15 September 2009).

How did the Commission work? First, a questionnaire was drafted by the secretariat together with the Romanian MFA. It comprises data for all Council of Europe member states, representing now the most complete database on the status of domestic remedies (or of the need of such remedies) on excessive length of proceedings. Second, the Commission also worked in close co-operation with European Commission for the Efficiency of Justice (CEPEJ), the work of the two bodies being complementary. Third, the Romanian MFA provided assistance again by organising in Bucharest in April 2006, within the framework of the Romanian Chairmanship of the Committee of Ministers of the Council of Europe, together with the Venice Commission, a Conference on Remedies for unduly lengthy proceedings: a new approach to the obligations of Council of Europe member states. On this occasion, representatives of the Venice Commission, the Court, the Directorate General II of the Council of Europe, CEPEJ, government agents and representatives of the Romanian authorities discussed possible guiding principles in the identification of effective remedies for unreasonably lengthy proceedings. The results of these discussions were essential for finalising the Report. Fourth, a working group² was established by the Venice Commission in order to draft, with the important assistance of the secretariat, the Report.

The purpose of the Report was to make a comparative study on existing national remedies with respect to allegations of excessive length of proceedings, with a view to proposing possible improvements in their availability and effectiveness within the meaning of Article 13 of the Convention. It was not the purpose of the study to identify the sources of the problem or to deal with issues relating to the functioning of justice and the concrete management of court procedures. The report aimed at assisting the CM and the Directorate General II, as well as the Council of Europe member states in addressing this problem in a global manner, with a view to identifying solutions based on the national expe-

2. Bogdan Aurescu (substitute member, Romania); Pieter Van Dijk (member, the Netherlands); Elsa Garcia Maltras de Blas (expert, Spain); Franz Matscher (expert, Austria) and Giorgio Malinverni (member, Switzerland).

riences, the case-law of the Court and the know-how of the Council of Europe, as well as to assist the PACE, which is also willing to contribute to the speedy and effective implementation of the judgments of the European Court of Human Rights.

I will proceed now to a synthetic presentation of the structure and main findings of the Report.

First, the Commission examined in Chapter III of the Report the issue of the “reasonableness requirement” provided for in Article 6 of the Convention, as well as of the right to an effective remedy before a national authority under Article 13, taking into account the connection between these two key-provisions of the Convention. The commission found, *inter alia*,

- ▶ that excessive delays in the administration of justice constitute an important danger for the respect of the rule of law and that the notion of reasonableness must reflect the necessary balance between expeditious proceedings and fair proceedings.

Also,

- ▶ that undue postponement of judicial decisions may result in a denial of justice for the parties to the proceedings and lack of confidence in the capacity of the state to dispense justice, to decide disputes, and, very importantly, to punish crimes as well as to prevent and deter future crimes.

At the same time,

- ▶ the celerity requirement must not impinge on the need to preserve the independence of the judiciary in organising its own procedures without undue internal and external control;
- ▶ foreseeability is also essential;
- ▶ in the assessment of the reasonableness of the length of a set of proceedings, regard must be had to the circumstances of the case and the criteria laid down in the Court’s case-law, in particular the complexity of the case, the applicant’s conduct and that of the competent authorities, and the importance of what was at stake for the applicant (the parties) in the dispute;
- ▶ the effectiveness of human rights largely depends on the effectiveness of the remedies which are provided to redress their violation;
- ▶ the existence of an actual breach of another (“substantive”) provision of the Convention is not a prerequisite for the application of Article 13;
- ▶ the “national authority” competent for providing the remedy must not necessarily be a judicial authority;
- ▶ the effectiveness of a national remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome.

Then, in Chapter IV, the Commission examined the issue of the supervision by the CM of the Court’s judgements in respect of the length of proceedings. In supervising the implementation of judgments finding a breach of the reasonable

time requirement, the CM most often requires, as an individual measure, the acceleration of the proceedings in question if these are still pending. Such speeding up, which may be seen as a form of *restitutio in integrum*, will often be the result of a judgment by the Strasbourg Court, even in the absence of a specific remedy under domestic law, in particular in those cases in which the Strasbourg Court imposes a “special diligence” or when the breach concerns the failure to enforce a domestic court’s decision or concerns the continuing breach of a substantive Convention provision (the right of property, for example).

In Chapter V, the Commission undertook a comparative overview of the existing remedies in the Council of Europe member states in respect of allegedly length of proceedings, especially on the basis of the answers to the questionnaire. It found that:

- ▶ in a number of countries there is no general requirement with respect to the reasonableness of the length of judicial proceedings, but provision is nonetheless made for a maximum time-limit for examining and deciding a case;
- ▶ in the majority of the Council of Europe member states there exists a procedural venue allowing an individual to complain about the excessive length of proceedings, either as a general action in the form, for example, of an action for breach of a constitutional or conventional right, or a civil action for tort against the state, or as a specific remedy for the breach of the reasonable time requirement, in the form of a request to accelerate the proceedings in question or an action against the state for the damage caused by non-compliance with the obligation to give a decision within a reasonable delay;
- ▶ some countries have established specific remedies after having been faced with the limits of the ordinary legal remedies and having been urged by the findings of the European Court of Human Rights. Some other countries are currently preparing legislation aimed at introducing a specific remedy or improving the existing ones;
- ▶ remedies identified on categories: preventive or acceleratory remedies, designed to expedite the proceedings in order to prevent them from becoming excessively lengthy, while compensatory remedies provide the individual with redress for delays that have already occurred (regardless of whether or not the proceedings have ended); pecuniary remedies providing for a financial reparation for the damage incurred (material or non-material, or both); non-pecuniary remedies providing for a moral reparation (for example, the acknowledgment of the violation or the mitigation of a sentence);
- ▶ certain remedies are available for both pending and terminated proceedings, and others are only available for pending proceedings;
- ▶ certain remedies may be applicable to any kind of proceedings (civil, administrative or criminal), while others are applicable only to criminal proceedings;

- ▶ then, the commission examined, separately, the remedies available for administrative and civil proceedings, as well as for criminal proceedings, both the preventive and the compensatory ones.

The following Chapter (VI) of the Report deals with the way the Court assessed the national remedies in its case-law as far as the length of proceedings. In a first phase, the Court, respecting the margin of appreciation given to the contracting states, refrained from indicating a specific form or type of an “effective remedy” with respect to an alleged violation of the right to a hearing within a reasonable time, but recently it adopted a more directive approach to what remedy is to be considered as effective within the meaning of Article 13. So, it has started to expressly encourage certain respondent states to proceed speedily with a prospected legislative initiative, or to amend the existing range of legal remedies or add new remedies so as to secure genuinely effective redress for violations of that right, following the indications as to the characteristics of an effective remedy given by the Court itself in the judgments. The Commission examined first the remedies found effective and then as non-effective as to the issue of unduly length of proceedings. In conclusion, according to the Court, states have to:

- ▶ organise their legal system so as to prevent unreasonable procedural delays from taking place;
- ▶ if excessive delays occur, acknowledge the violation of Article 6 of the Convention and provide adequate redress;
- ▶ when their legal system is deficient in terms of reasonableness of the length of proceedings, provide an acceleratory remedy;
- ▶ if they chose not to do this, and also in cases when excessive delays have indeed already taken place, provide a compensatory remedy, in the form of either financial compensation or other forms such as mitigation of the sentence and discontinuance of the prosecution.

A remedy in respect of the excessive length of judicial proceedings must be, according to the Court, effective, sufficient and accessible.

- ▶ There must exist sufficient case-law proving that the application can actually result in the acceleration of a procedure or in adequate redress.
- ▶ Also, the duration of the remedial procedure needs to be reasonably short, and requires “special attention” on the part of the competent authorities in order to avoid infringements of Article 6 in respect to the remedial procedure. An unreasonable duration of the remedial procedure itself may amount to a disproportionate hurdle to the effective exercise by an applicant of the right to individual application within the meaning of Article 34 of the Convention and exempt an individual from the obligation to exhaust it. The payment of the awarded compensation must be made within six months from the date when the relevant domestic decision becomes enforceable. Indeed, in order

to be effective, a compensatory remedy must be accompanied by an adequate budgetary provision so that effect can be given to decisions of the court awarding compensation within six months of their being deposited with the registry (or from the date when they become enforceable).

- ▶ Rules concerning legal costs (such as the fees of registration of judicial decisions) in the remedial procedure would be lower than in ordinary proceedings in order to avoid that excessive costs may constitute an unreasonable restriction on the right to lodge such claims.
- ▶ Reparation refers to both pecuniary and non-pecuniary damage.
- ▶ Sufficiency of the remedy depends on the level of compensation.
- ▶ The remedy must be available both for proceedings that have already ended and for those that are still pending.

Last, but not least, the Report included in Chapter VII the Venice Commission's proposals on the effectiveness of remedies concerning the length of proceedings. The Commission expressed the view that each State Party to the Convention should provide, in the first place, acceleratory remedies. In addition to – and not as an alternative to – these acceleratory remedies, states must provide compensatory remedies for breaches of the reasonable time requirement which may have already occurred. The acceleratory remedies in the form of a request to take the procedural step to avoid unreasonable delay are to be seen as preventive, not compensatory. They do not amount to a *restitutio in integrum*. When an undue delay has taken place in a certain phase of the proceedings, the possibility of putting an end to such delay to avoid an unreasonably delayed trial as a whole does not represent reparation in kind. A *restitutio in integrum* is possible in the following forms:

- ▶ If the proceedings are still pending: (a) If the proceedings are criminal, by way of mitigation of the sentence or similar remedies. If the proceedings are civil, administrative or criminal, by way of *fast-tracking the case* to the extent possible. This means that the threshold of reasonableness in the remainder of the proceedings will be reduced, the case will be dealt with more quickly than an ordinary one: in this manner, the undue delay will be caught up (of course not arithmetically) and the global length of the proceedings will be “reasonable” within the meaning of Article 6, paragraph 1. In this case, no pecuniary reparation is necessary.
- ▶ If the proceedings are terminated, the only possibility will of course be pecuniary reparation.

The Commission recommended that member states should provide in the first place acceleratory remedies designed to prevent any (further) undue delays from taking place at any time until the proceedings are terminated. In addition, they should provide compensatory remedies for any breach of the reasonable

time requirement which may have already occurred in the proceedings (prior to the introduction of the effective acceleratory remedies).

Then, the Commission addressed separately the recommendations for remedies for civil and administrative proceedings, as well as for criminal proceedings (see paragraphs 192-235 of the Report).

The Commission concluded that the adoption by Council of Europe member states of specific laws on length-of-proceedings remedies does not appear indispensable and is not required in countries which already dispose of effective remedies for excessive length, which are known by the authorities, the courts and the public. However, the Venice Commission underlined that specific laws present the matter of reparation in an abstract and general manner, and therefore have the advantage of clarity and comprehensiveness. They may be thus more easily accessible to the public (and, in some cases, even to the courts) as well as to the instances of the Council of Europe.

The final message of the Venice Commission was that it stands ready to assist any country which should wish to draft a specific piece of legislation setting out or improving the national remedies in respect of excessive length of proceedings, as well as the CM and the Directorate General II in their assessment of the general measures taken by states pursuant to Article 46 of the Convention.

VIEWS OF THE DEPARTMENT FOR THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Ms Corinne Amat

Head of Division, Department for the Execution of Judgments of the European Court of Human Rights

Ladies and gentlemen,

It is an honour and a great pleasure for me to represent the Execution Department, whose task, as you know, is to assist the Committee of Ministers in its supervision of the execution of judgments of the European Court. I would like to join the previous speakers in thanking the Slovenian Chairmanship of the Committee of Ministers for organising this important seminar on the length of proceedings.

We are all aware that the issues that come up in this context are crucial, with litigation over the excessive length of proceedings, which generates numerous repetitive cases, representing a very large part of the complaints submitted to the European Court. But the subject is also important on account of what is at stake for the parties – justice that is too slow undermines individuals' confidence in justice itself, and thus affects the very foundations of the rule of law.

I have listened with keen interest to all the speeches that we have had the pleasure to hear until now. The national experiences that have been presented to us are highly instructive, in both their diversity and their points of similarity. They illustrate the great complexity of the issues that arise in this field, highlighting the manifest need for co-operation at European level to find the best solutions; the work of the CEPEJ and that of the Venice Commission are thus precious sources of expertise.

We can also applaud the ongoing work under way on a Committee of Ministers' recommendation on this issue, as presented to us by Mr Wołásiewicz. Such a recommendation would undoubtedly support states in their efforts. It is also

essential that it be sufficiently ambitious as to induce them to take the most complete approach possible in combating excessive slowness in justice and ensuring effective remedies at national level.

Concerning the experience of the Committee of Ministers in the matter of execution of judgments relating to the excessive length of judicial proceedings, in the first place, I would like to recall the great proportion of cases of length of proceedings amongst the cases pending before the Committee of Ministers, a direct consequence – obviously – of the great proportion of cases of this type submitted to the Court. In fact, half of the cases pending before the Committee deal with the excessive length of proceedings; 41% exclusively, 9% along with other findings of violation, sometimes closely linked to duration.¹

Many complex issues present themselves in the framework of the execution of judgments.

First of all, there are those that concern individual measures in favour of the applicant. In this respect, one must not lose sight of the fact that non-respect of the reasonable time requirement is often in addition to the violation of a substantive Convention right. The most logical, natural action is to accelerate pending proceedings so as to ensure the rapid completion of a procedure which has already lasted too long. Most of the time, the Committee of Ministers remits the matter to the national authorities to ensure such acceleration and their undertaking to this end is sufficient. However, the Committee will show greater firmness when particular diligence is required, either because the Court itself has mentioned this in its judgment or the facts of the case require it; or because of its very essence, a case is one in which the passage of time is of particular significance: for example, cases concerning people suffering from illness, employment disputes or proceedings relating to child custody.

Urgent issues may thus present themselves at the level of individual measures, which must not be neglected; even – above all – when there is a systemic problem. In fact, there are situations in which the applicant cannot wait until general measures are defined, adopted and then finally take effect.

As regards the adoption of general measures, the Committee's task is clearly even more complex and the rich experience that it has acquired in the matter deserves to be studied, as it constitutes an important source of inspiration for states confronted with this problem.

First of all, there are the difficulties encountered in identifying adequate general measures. It is not easy to analyse the sources of the problem; the job obviously falls to the national authorities, who are best placed to analyse the situation on the ground. Once the sources of the problem have been identified, the choice of appropriate measures to remedy them is itself also difficult and com-

1. These figures include circa 2,200 Italian cases.

plex. Assessment of the extent of the problem is, however, essential; in the light of the first experiences of the Committee of Ministers in the matter, in the 1980s, it must be said that, with hindsight, the size of certain problems was perhaps underestimated at the time and the insufficiency of certain reforms very soon became apparent.

When a strategy is finally adopted, there follows a long and complex process of adoption of general measures, with plenty of problems also there, concerning, for example, the financing of measures, the evaluation of the adequacy of measures (which furthermore presents also the problem of the Committee's supervision in this respect), the difficulty of establishing reliable statistics that can be interpreted to evaluate the results; the work of the SATURN Centre and its guidelines are a valuable aid in this field.

Finally, the issue of effective remedies is itself also often complex.

- ▶ Is it necessary to adopt a compensatory remedy and/or an acceleratory remedy?
- ▶ The question of the level of compensation is also a key element when it comes to evaluating the effectiveness of a compensatory remedy.
- ▶ Another question is that of knowing how to ensure the availability of the funds necessary for payment of compensation – what particular budgetary provisions to adopt?
- ▶ Will compensatory remedies be accessible at any moment or only at the end of a procedure?
- ▶ How to fight against slowness in the execution of legal decisions.

The subject is vast, but given the time that has been given to me, I would like simply to again raise two aspects that to me seem crucial.

The implementation of an effective remedy must not obscure the need to adopt measures for avoiding excessive length of proceedings

In fact, in focusing on the large number of cases, one can be tempted towards being interested only in the issue of remedies. One must not forget, however, that states' primary obligation (by virtue of Articles 1 and 6 of the Convention) is to ensure that justice is done within a reasonable time. The broad measures to be taken where there are structural problems in the matter will not bear fruit until the medium- or even long-term and the effective remedy thus constitutes an indispensable interim measure.

But even if it is necessary, such a measure is not sufficient: the Committee of Ministers regularly underlines this aspect, as it has done recently, for example, in the interim resolution that it adopted in March 2009 in the group of cases

Timofeyev v. Russia, in which it recalled – and I quote – “the consistent position of the Convention organs that the setting up of domestic remedies, however important, does not relieve states from their general obligation to solve the structural problems underlying violations”.

The measures to be taken should also include warning mechanisms (statistics or others), which, even in the presence of an overall satisfactory situation as regards the lengths of proceedings, can rapidly reveal emerging problems that, without rapid treatment, would risk leading to a new situation of structural dysfunction.

An image to conclude on this point: if a boat is leaking, obviously one can react by energetically bailing out the water (which is what a remedy does); but it would be better to set about repairing the boat as quickly as possible (which is what measures under Article 6 aim at). Once the boat is repaired, one keeps the bucket on board, just in case.

An effective remedy should be both acceleratory and compensatory

Certainly, the Court, in its case-law since the *Kudła* judgment, has for the time-being left a choice between the two types of remedy and has never considered that a purely compensatory remedy was ineffective solely because it did not foresee the possibility of acceleration.

But if since *Kudła* the Court has consistently confirmed its case-law, it has also expressed its preference for a remedy presenting both aspects (see, for example, the case *Zunic v. Slovenia*, decision of 18 October 2007). This solution has furthermore been adopted by a number of countries (Austria, Croatia, Spain, Poland, the Slovak Republic to name but a few).

This approach can only be encouraged. From a practical point of view, in the absence of an acceleratory remedy, there is a risk of repeated requests for compensation, which would lead to a new overburdening of courts and a further problem of duration: the remedy would then be at least as bad, if not worse than the evil.

One must also underline the importance of accelerating certain types of proceedings, since not doing so would lead to a further violation of the Convention, under not only Article 6 but also other articles of the Convention (under Article 8, taking into account the impact of the passage of time on parental rights, for example; or under Article 1 of Protocol No. 1, when the duration of proceedings concerning a property right end up by themselves constituting a breach of that right).

Conclusion

The Committee of Ministers closely supervises reforms presented in the framework of the execution of judgments of the European Court and assists states as much as possible. The Execution Department works in close co-operation with the states concerned, in order to find solutions and responses to all the questions that I have just evoked.

High-level meetings have thus been organised on several occasions in Italy, meetings to which the Committee referred in its interim resolution of last March. We have also had the opportunity to meet the authorities of other countries, such as Poland or Croatia, in relation to these issues, without mentioning all the bilateral meetings that take place in Strasbourg with the delegations concerned.

We are of course inspired by the Committee's rich experience in the field and we also try to take as much advantage as possible from synergies with other Council of Europe bodies, including the CEPEJ and the Venice Commission, which are for us precious sources of expertise.

But let us be clear about one thing: the battle will never be totally, definitively won. It is a long-term task for those faced with situations of systemic problems and an object of vigilance for the others.

It is not enough to introduce an effective remedy for the parties, nor to show a positive tendency for a certain time, in order to settle the question. These results would certainly allow the Committee of Ministers to bring an end to its supervision and the Court to register fewer repetitive applications. But to guarantee diligent justice must always remain an ongoing concern – even when the length of proceedings is not or is no longer a major problem. Past experience and exchanges such as today's are also there to remind us of this.

Thank you for your attention.

DISCUSSION 1

Urška Klakočar (Slovenia)

I have widely studied the application of the Slovenian Act Regulating the Protection of the Right to Trial without Undue Delay and I understand the situation from both perspectives – that of the judicial administration when imposing legal remedies under the Act, as well as that of the judge who has to take account of these remedies in a specific case. I profoundly share Prof. Galič's view that these legal remedies will not suffice to overcome the structural problems of the Slovenian judiciary. They can only be efficient in cases of fault (...), when, for example, a judge forgets about a case and leaves it in his cabinet, and the fault is really on his side. Let me add that it would be appropriate to have more judges present here today, since we are, after all, discussing their work, and more presidents of courts. I was very much impressed by the Dutch presentation and I believe that Slovenia should draw from such standards and try to find the reasons for the courts' heavy workload and devise structural solutions, not only legal remedies. These are, in my opinion, overrated. And another point: it would be necessary to raise awareness of judges, as they take this as an additional burden – as writing an excessive number of messages. They should be more involved. Co-operation with other players in the justice system, for example lawyers, is also of key importance. I feel that there are certain law firms in Slovenia which are specialised in filing such complaints and have been plying the courts with them. The problem is lack of awareness among all players in this field, be it among clients who are not inclined to alternative conflict resolution, especially mediation, or among lawyers who keep filing complaints because of their own personal interest, and lack of co-operation between them. The judicial system itself is problematic and I agree with Professor Galič that more efforts should be invested in the system, where the real problems can be tackled.

Thank you.

Arto Kosonen (Finland)

Before 2000, we did not have any length of proceedings cases, so I was surprised to have this kind of seminar in Strasbourg at the time, but nowadays I am not surprised at all. This is a problem which has to be taken away. A couple of comments concerning the interventions: Mr Marco Fabri referred to many issues but two in particular, namely chief justices, and the issue was mentioned here also. Is it so that a good chief justice could help in this process? I remember when Finland ratified the Convention in 1990. Before that, it was said that the Convention had already been applied at the Court of Appeal in Vaasa before ratification. It was a good sign; at least the general idea was followed. So, how about this hostile environment; is it just the reverse situation? Perhaps Mr Fabri could explain this situation. Concerning Italy, in relation to population, they have fewer cases than Finland does nowadays, to point out one detail. Regarding Mr Albers' presentation, a few good points have been mentioned. How about this judges-deputies in other courts. Could it be possible to have a pool of judges somewhere and then just send them to remote places where there are too many cases. One issue is the creation of a council for the judiciary. That is, to my mind at least, a very good point, a good co-ordinator... to have a discussion about. Finally, we are discussing the situation of the courts. Of course, the pre-trial investigation by the police and the activities of the prosecution also take time and have to be handled. We have had some really interesting and innovative interventions here.

Thank you.

Ahmet Münci Ozmen (Turkey)

I am also a Co-Agent of the Government. I have two points that I would like to mention. First point: we are thinking about the measures to accelerate the domestic procedures. Yes, there is a serious need to accelerate the domestic procedures, but at the same time, we have to reflect on the quality of the domestic judgements because sometimes, there may be a negative correlation between the acceleration of procedures and the quality of judgements. So, we must be very careful not to victimise or sacrifice the quality of domestic judgements to acceleration. The second point: if I am not mistaken, Prof. Uzelac has stated that extra measures must be set up for exceptional cases. Well, am I right, when I say that exceptional cases mean complex cases? If so, how can we define complex cases? We have to define complex cases. What do complex cases mean? We all know the complexity of some of the famous Strasbourg Court's cases. We cannot find a concrete definition in that case-law. Is it perhaps the right time to reflect on the definition of complex cases? In the Turkish practice we have been facing several complex cases. What do complex cases mean in the Turkish practice? Well, in the

Turkish practice, complex cases mean that it relates highly to the content of the cases, but also to the number of defendants, complainants and litigants. We see that in various Turkish cases, even in civil law cases, there are numerous defendants, complainants and litigants. In some penal cases, again, numerous defendants. So the judge has to establish the links, the correlations and the relations between these defendants, litigants and complainants, not only to establish the links but also to collect the necessary evidence and documents. Well, this takes time, it is a time-consuming process. Let me give an example: property cases. Property cases seem to be simple cases, but sometimes they can be amazingly complex in the Turkish practice because if the property comes from the Ottoman era, then you have to translate the scripts, the land registers, and you also have to find the land registers in the archives. This is really time-consuming and in these property cases, there are numerous heirs, litigants and third parties. You cannot imagine the number of parties in such cases, and of course, it is obvious that you have to communicate at least all the necessary documents to the heirs and the relevant parties. In most cases, you cannot even find out who the heirs are, the relatives of the parties. The matter is not just the – forgive my expression – the laziness of courts or judges; rather, it is the matter of the complexity of individual cases. So, yes, there are structural problems and I accept that there are highly structural problems in Turkish practice. We have to ameliorate and get rid of these structural problems, but there are also individual and special exceptional cases. So, we also have to address these exceptional cases. I would like to conclude this second point by saying that we have to define what complex cases are.

Rob Linham (United Kingdom)

Thank you very much. My name is Rob Linham. I am from the Ministry of Justice of the United Kingdom.

I was very interested in the presentations made by the panel. I thought it was a very interesting range of experiences and views. What it leads me to consider, though, is whether we – and when I say “we” I mean all of us addressing the question of length of proceedings – may have something of a problem of terminology. I was particularly interested in a point made by our last speaker, when he asked what we mean when we say “remedying”. Are we remedying a problem in an individual case, or are we remedying a systemic problem in a legal system? And much of what has been called a remedy here has been the first type. But, as the last speaker said, the problem will never be solved simply by playing what we would call in English a game of “Whack-a-Mole”: here is another case that has popped up, whack that case, here is another case, whack that one. They will keep coming

up. I was at the meeting last week that Mr Wołásiewicz will speak about soon, of DH-RE in Strasbourg. And the point I was making there, a point which I hope Jakub will forgive me for repeating, is that the word “remedy” tends to steer consideration to this first type of procedure: we want to deal with the individual case, no matter how many of those individual cases there are. And I admit that “preventative remedy” is the phrase used in the Court’s case-law, but it tends to steer you towards retrospective addressing of the problem rather than prospective addressing of the problem. In fact, the idea of preventative remedy in English is like describing a vaccine as a cure: it does not really make logical sense. In fact, in the UK, much of what is described as a remedy for a systemic problem we would just consider procedure. So you have got things like active judicial case management, motions or sanctions to address deliberate delay by parties, or motions to dismiss proceedings for lack of prosecution, in general, the lack of case to answer. All of these, and the way we administer the justice system, are directed towards stopping cases becoming exceptionally long and it puts the onus on the parties. As the minister was saying as well about alternative dispute resolution – something we use extensively in the UK - but none of this to us would be seen as a remedy. It would be seen as good practice for a properly functioning legal system. And so, fixating on this word “remedy” tends to lead us to fixate on retrospective approaches rather than prospective approaches. We will not address the problem of an excessive number of cases going to Strasbourg unless we start thinking prospectively as well as retrospectively.

Thank you.

Urška Klakočar (Slovenia)

I would like to ask a question, maybe a representative of the Ministry of Justice. In my opinion, judges should necessarily be in the audience, as today we are speaking about judges, since they are the ones who decide in judicial proceedings, and I would like to know why one never thinks about training judges or providing them with training as to how to deal with their cases within a certain time frame, how to summon and hold a hearing; in my opinion this is a possible solution as judges should learn how to distinguish difficult cases from easier ones, more complex from less complex, more important from less important, and to decide on a certain case within a certain time frame. We should consider providing judges with such training since, after all, they are the ones who will or will not bring a case to an end. In my opinion a discussion without including judges remains only a discussion; in order to resolve the problem, judges should be involved and some time frames introduced or the president of the court provided with some guidelines. He is namely the one who sets time frames for judges of

the court, he presides and ensures that cases are decided in a normal time. Could perhaps the representative of the Ministry comment on this issue; if some improvements are being planned, etc.

Moderator: Peter Pavlin (Slovenia)

I wanted to intervene in any case, since the position of the representative of the Republic of Turkey was very interesting. And now I also have the challenge of the Slovenian judiciary. And I shall therefore try to respond to both of them. Since this Round Table is an international event, I shall continue my intervention within the framework of this general discussion in English.

Concerning the first issue stated by the representative of the Republic of Turkey, the co-Agent before the European Court of Human Rights, the issue of complex cases. I think it is possible to relate to this from several viewpoints within Slovenia. Probably, it is not known to all participants from other member countries of the Council of Europe and non-governmental organisations and representatives of the Council of Europe, but the issue of court backlogs or the system of court backlogs started in 1994 during the reorganisation of the judicial system in Slovenia. It was probably a really bad moment from several aspects. We had to deal with the issue of privatisation, meaning more conflicts at the courts; we were dealing with the issue of the return of nationalised property, which also brought a lot of disputes to the courts; there was also the issue of unlawfully fired employees. At the same time, when all other legislation, especially criminal, judicial, prosecutorial, internal legislation was changing, at the same time, in 1994, there was also a judicial reform. It was sort of recognised at the end of 1995 that court backlogs had started, but it was too late at the time to start some action; also, there was an additional problem, namely at that time, lot of judges went into private attorney service.

There was some mention of complex cases as being from older times or related to the old Ottoman Empire law or Ottoman property law, if I remember correctly. See the example of the return of nationalised property in Slovenia – most of the cases can be automatically deemed to be complex, because the statute on the return of the property was adopted in 1991 and became fully operational by the end of 1993 and heirs or heirs of the heirs filed claims for the return of property, documentation was not perfect and so on and so on, and some of these cases are still at courts, they have not been resolved yet. I am not saying that the return of nationalised property is still a big issue in Slovenia per se, it is not, but it is also one of the areas which really contributed to the issue of court backlogs and most of these cases can be deemed to be complex cases. Just to reassure everyone here who is thinking that systems should and can always be organised

in order to solve everything within a reasonable time in accordance with the case law of Strasbourg, I am not completely certain that this is possible. There is still somebody in Vienna dealing with some sort of civil law claims related to the First World War, the dissolution of the Austro-Hungarian Empire. Secondly, in the United States of America, I do not recall exactly, I think it was the Treaty of Paris of 1783 on returning the property of Loyalists who were deported or their property confiscated by the American revolutionaries – I think claims were still being resolved some 40 or 50 years later by the American judiciary. In these exceptional cases, for which we can automatically predict that they are complex, I do not think it is really possible to have a trial within a reasonable time or an effectively good remedy because it is automatically complex.

And now a brief reply to Ms Klakočar from the Local Court of Ljubljana and also from the Supreme Court of Slovenia. If this is really a proposal, I mean, there is still time to propose another theme for the education of judges and presidents of courts next year on case management within our Centre for the Education of the Justice System. As far as I am concerned, since I am not the one who decides, by the way, this is accepted.

Thank you.

Alan Uzelac (Croatia)

I think that the question of our Turkish participant was directed to me. My friend Peter Pavlin tried to help me answer this difficult question. I would just like to add a few points and clarify my position.

When I was referring to exceptional cases, I was not talking about complex cases. Actually, I was more in line with Prof. Galič's presentation. He *inter alia* argued that even if the judiciary works as it should, i.e. without creating backlogs and delays of systemic nature, delays may occur in exceptional cases. Therefore, we might need effective remedies for such cases. These cases can be rather simple. A case can be left in the drawer for a few decades. Eventually, it happens even in the best judiciaries, like the judiciary in England and Wales.

The complex cases are a completely different issue. A specifically interesting point is when we have more applicants, a so-called multi-party litigation. I think this is again a sheer matter for good court and case management. For example, if we have 1,000 parties in one proceedings, we can either try these cases together or separate all these cases into 1,000 litigations. Let us suppose that separate proceedings would last one year each. I would not say that they would be equally or less efficient compared to one merged case which would last 100 years. This is definitely not so. You should find some balance between the speed and the efficiency in such matters, and I think it is a matter of sound judgment. We have a

good guidance from the Strasbourg Court on what should be appropriate, and what should be an unreasonable time frame. Within the European Commission for the Efficiency of Justice (CEPEJ), we have done a systematic study on the practice of the European Court, in collaboration with an expert, Madame Calvez, a judge at the French Court of Cassation. In the executive summary it is stated that even in rather complex cases, the Strasbourg Court regularly found violations of the right to a trial within a reasonable time if the proceedings lasted 8 years and more. This can be the rule of thumb, although the Strasbourg Court never said that there was an absolute timeframe. Very, very exceptionally, there may be a case that is not unreasonably long even though it lasted over a decade. But again, the burden of proof to demonstrate that the length was still reasonable is on the state and judges in Strasbourg rarely show a lot of understanding for excuses under such circumstances. To sum up, complexity of judicial proceedings is a matter that deserves a thorough systemic study, but should not be taken as an easy alibi for excessive length in particular jurisdictions.

You also raised the point of quality. This is also an interesting point. Within the CEPEJ, we discussed whether a case can also have unreasonably short, and not just unreasonably long duration. The answer was “yes”. We concluded that we have to focus on optimum and foreseeable duration, not just on speed at any cost. On the other hand, we should strive to be better than reasonable, because the “reasonable time” requirement is just a minimum standard set by a common court for all European countries. But let us ask ourselves about the impact of speed on the quality. I think that it is not reasonable to ask a judge to produce a good quality judgment within minutes, hours or days. However, within months or years, yes. I have been involved in the adjudication of complex cases in which time was of essence. In some cases it was possible to produce a decision of good quality after the process that lasted only three months. Sometimes we needed more, say five or six months or more than a year, if issues were rather complex. However, in none of such cases could one argue that for a good decision a process of 10 years is needed. And I have never seen a judgment improve just because the case lasted 10 years over the usual time frame. The balance between speed and quality can and should be struck.

The final point that I would like to make is related to the intervention of our very active Slovenian judge. She raised a very interesting question to which I would like to add a question of my own. The question is for my friend Aleš Zalar, who is not with us anymore, and I do not know whether he would still be my friend if I would be asking him this question. The point that was raised was about the impact of lawyers’ fees on the duration of proceedings. This is something that has so far been handled as a taboo topic. There are a very few studies in this field. Yet, there is already sufficient evidence to suggest that lawyers’ fees have a significant impact on the duration of proceedings. I was very happy to see that Slov-

enia was trying to control the impact of lawyers' fees on the length of proceedings by binding the amount that can be charged to the stages of judicial proceedings. Now, I was a little disappointed when I heard that the government subsequently softened its approach to lawyers' fees. Therefore, I would like to hear an explanation from the Minister of Justice for his efforts in this field. The control of the methods of charging lawyers' fees in the context of party representation in judicial proceedings is, in my view, very important for the control of the length of proceedings. According to some scholars, countries like Germany have a very efficient judiciary specifically because they have adopted systems of charging lawyers' fees that motivate the speedy, and not excessively lengthy proceedings.

Nenad Vujić (Serbia)

Our regular annual programme includes the topic of the European Convention, especially Article 6 – the length of proceedings. And here we have a so-called eyewitness, because one of the trainers of this programme is Ms Nuala Mole, and we established this programme before Serbia signed the Convention because now, according to Slovenian and Croatian experience, we will have such difficulties and of course, we have many cases – 90% of our cases that we lose in Strasbourg, is the length of proceedings. Of course, we try to resort to education, to have judges solve this problem, especially because I am not... and I agree with the colleague from the UK. I am against these remedies, because I am afraid now we have a constitutional complaint, we have this or that remedy, and always after a few years, we have a conclusion that we are again stuck in a procedure, we are overburdened and so on. But in Serbia, we try to solve this problem through the constitutional complaint. I hope we will succeed and we also try through some changes in a criminal procedure code and civil procedure code to improve this procedural discipline with regard to the participation of the parties and... I hope we will change the execution phase of judgements and some structural changes. But during our education, we try to explain and we always have a typical question for a continental judge. What is the reasonable time? One, two, three, five years? And always, we must struggle and explain that it is not a question of time. Professor Uzelac mentioned in one French case, France lost, because one year is too long. And in one case, against Italy which lasted 11 years, the Court said that it was not such a long case. It is a question and always we try, particularly through education, to explain, especially if you have a juvenile justice case or family case. One or two years is too long and I hope our constitutional court will understand and make this distinction between the cases. And finally, some of our judges are over-learned because there was a case, in which a judge called me because she wanted to explain how she directly applied the European Convention in a crim-

inal case – she reduced the punishment because the case took so long and so I think that sometimes, people can be over-educated. But we try to fight against this and the true education is actually a long procedure, but it is the only way. Again, I must say that remedies, remedies, remedies are what we have; we have always after a few years and maybe we must use some experience acquired by the UK, because it has a small number of cases – you have maybe 11, 30, but Article 6 is not important. Some may be the alternative measures like mediation or plea bargaining or this kind of measures to actually reduce backlogs in a court and this is the only way to solve this complex problem.

Thank you.

Corinne Amat (Council of Europe)

I would merely like to go back over the different interventions that have underlined the importance of the idea of the complexity of cases and the risk of undermining the quality of procedures when trying to reduce their duration. The complexity of cases is a concept that the Court itself takes into account when assessing the reasonableness or otherwise of the length of proceedings, as you have underlined. But in that context, it also seems to me to be important to recall the interest in looking – in the case of all proceedings, whether they be particularly complex or not – into periods when proceedings are pending, periods of inactivity, as indeed the Court itself does. Looking into unexplained periods of inactivity in proceedings would allow a reduction of the duration where the inactivity is unjustified, whilst preserving the possibility of taking any necessary measures in seeking resolution of the case; one thereby preserves the quality of the procedure whilst also preserving respect for this difficult-to-define idea of “reasonable delay”.

There is effectively no absolute standard for reasonable delay. It is by analysing these periods where nothing is happening in the proceedings, and asking oneself why nothing is happening, that will lead to the adoption of a certain type of solution. Is nothing happening because the judge in charge of the case is short of resources? Is nothing happening simply because, as you have underlined, there is a need for training in case management? Or, is nothing happening because there is perhaps a lack of motivation? Each of these deficiencies can be otherwise resolved, as can the multitude of other reasons that may explain a period of inactivity. It is an analysis of these periods in the proceedings that will allow one to discover from where the problem comes and, from there, to understand what could be the appropriate solution or solutions.

Thank you.

Nuala Mole (United Kingdom)

Thank you very much. My name is Nuala Mole. I am the Director of the AIRE Centre in London and as I am speaking tomorrow, I will be very brief now. I just wanted to say that my experience of working with judges and prosecutors and lawyers, including in Serbia and other countries of central and eastern Europe and the former Soviet Union, particularly on addressing this intransigent problem of the undue length of proceedings has led me to see as a vice something which I would normally see as a virtue, and that is tolerance. I think that the level of tolerance demonstrated in the administration of justice is actually at the root of the problem. Judges tolerate lawyers who do not turn up on time, they tolerate lawyers who turn up without the documents, and lawyers tolerate lawyers on the other side who do not turn up with the documents. The judges allow a case to start when all the documents, all the evidence and all the witnesses have not been gathered. The trial starts and then gets adjourned and everybody disappears to the four corners of the country, then when it is reconvened you cannot collect them all again. All the participants in the system for the administration of justice, both criminal and civil, have to become a little bit less tolerant and there has to be a lot more discipline in ensuring that judges, lawyers, parties, prosecutors, and those who are involved in other aspects, including securing the attendance of key witnesses, all that tolerance has, unfortunately, sadly, to go because that is, in my view, one of the root causes of the problem – the system operates in a way which is far too tolerant of inefficiency.

Thank you.

Marco Fabri (Italy)

If I heard well, the question was about the hostile environment in which a judicial reform can take place. For example, a legal community, I like the word legal community, which has a formalistic and not a pragmatic approach in carrying on a judicial reform which may contribute to establish an hostile environment. A contest in which there are deep and structural problems in the legal community is another example which undermines the possibility of effective judicial reforms, and demand for specific measures first. Just to give an example: in Italy, 50% of all national cases related to compensation for traffic accidents happen in only one city, Naples. This is clearly a hostile environment to carry out reforms to filter the number of cases filed in the court and speed up the court proceedings, because it is quite clear that there is a major structural problem which involves the lawyers who are making their salaries out of these cases. In such an environment, even the best judge in the world could have a difficult time. Judicial reforms need the active participation of the legal community, a team approach,

in which solutions are built through consensus by the actors. If the legal community, the lawyers do not share with the courts this approach any reform is going to fail. Generally speaking, procedural rules are the same within a country, but there are many differences in court performance, in the way in which justice is served. Most of these variations are due to the environment in which rules are applied. If the environment is hostile, there is no way that the reform will be successful. I would like to emphasise the importance of the micro level of the approach that should be used in carry out reform and in particular delay reduction programmes. Reform can certainly have an international or national ambition, but they have to be carefully followed and tested in the local environment in which they are going to be applied.

Andrej Auersperger Matić (European Parliament)

I would like to ask a question relating to the issue of undue delay from the perspective of European Union law, in particular because the speed of judicial proceedings is one of key conditions for the mutual recognition of judgments. One of the major problems noted in this context is the very different duration of proceedings in different member states of the European Union. I was therefore very happy to hear today's presentations on this topic and especially those of Prof. Uzelac and Prof. Galič. On the other hand, I was surprised to hear the viewpoint of the Council of Europe, because the issues tackled do to seem to be so complicated that they could not be identified with more precision. If we are speaking about eastern Europe, it appears obvious that it is certain features of the legal systems in this region which create undue delays in judicial proceedings. Given, for instance, the multiple-level trials, defendant-friendly procedures, non-respect of the principle of precedent or insufficient incentives for litigants, it is questionable whether the result is really an anomaly. It could simply be the normal state of affairs.

What is surprising is that the Court itself, when trying to identify issues relating to undue delay, does not define measures which the states could adopt to avoid condemnation. I very much agree with Prof. Galič that the doctrine of remedies since the *Kudla* case is, in a way, a failed technique to solve this problem. This doctrine does not solve the underlying causes of lengthy trials and I am wondering why Council of Europe bodies do not adopt at least recommendations which the Court could then refer to when imposing obligations on states. If I understood the contribution of the Venice Commission correctly, the proposed measures are mainly those relating to legislation intended to provide a right to remedy in cases of a breach of the right to a trial within reasonable time. However, there is little mention of structural measures. Do eastern European

legal systems have too many layers of jurisdiction, insufficient resources or is there another deeper reason for the present state of things? I am wondering in particular whether not only in eastern Europe, but also in southern Europe, the number of disputes in courts is simply too overwhelming for the kind of legal system that we have. Or, in other words, are present judicial procedures simply outdated?

Corinne Amat (Council of Europe)

There is a fundamental principle concerning the execution of European Court judgments, that of the freedom of choice of the means available to the state for executing the judgment. This is why the European Court in its judgments rarely gives a very precise and concrete indication of the measures to be taken; for that reason and without doubt also because the Court quite simply is not always equipped to undertake the research on the ground or to have sufficient knowledge of the situation at national level to propose concrete solutions on the matter.

It is true that certain problems have easily identifiable origins. That said, one nevertheless often notes, in the Committee of Ministers' practice, a certain confusion on the part of states at the beginning of the process when it comes to identifying the measures to be taken. Very often, the violation does not arise from a single source. Of course, the source to which you refer, namely unsuitable procedures which could be improved, is often one. But very frequently there are a multitude of different sources that together will lead to lengthy proceedings and for which it is not always easy to find good solutions. I think that the presentations that were made this morning have perfectly illustrated this problem. Of course, we try to help states overcome this difficulty by putting at their disposal the greatest possible expertise and range of examples of good practice; it is here that the technical expertise of the Venice Commission and the CEPEJ come into their own, as well as the expertise that the states can themselves provide by sharing their experiences, particularly on things that have not worked, because these often provide more eloquent lessons than those efforts whose results we are not yet able to evaluate. This is why I insisted in my speech on the need for co-operation at European level on all these issues because I think that it is a problem that concerns all Europe. Even if the solution must be individualised according to national systems, the search for possible ways of finding solutions should be done, in my view, with the greatest transparency and co-operation at European level.

Bogdan Aurescu (Council of Europe)

I would also like to add something. Well, I do not agree totally with your assessment that the central and eastern Europe countries have the problem of the length of proceedings because of their communist heritage. We have, of course, certain specific features and that is why we have this problem, but they do not come necessarily from the communist times. I do not think it is true if you see, well, the fact that the largest number of cases is in Italy and France. I think this is totally untrue and, on the other hand, most of our judicial systems are copies of the western systems, for instance the Romanian system is a copy of the French and in part Italian and a little bit of the German system. So, this is not the problem. The second issue is, I totally agree with the view that we need a range of combined measures to be used in order to combat the length of proceedings.

The Venice Commission focused on legislation because this is what the Venice Commission does. It is giving advice on pieces of legislation. But, it is extremely important, if we want to make this effort effective and to succeed, we have to combine legislative reform with organisational and management measures and all other organisational and budgeting and human resources measures, etc. All these instruments should be used in a combined way but, of course, one that is best suited to the specific situation in each and every country.

PART TWO:

INTRODUCTION

After more than a decade of constant struggle with an increasing caseload, the European Court of Human Rights is finally in a position to experience some actual changes. On 1 October 2009, Protocol No. 14 bis to the Convention for the Protection of Human Rights and Fundamental Freedoms entered into force. Together with the enforcement of the Madrid Agreement on the provisional application of certain provisions of Protocol No. 14 on 1 June, the reform process of the European Court of Human Rights reached a turning point.

The reform of the Court began in 2001 with the adoption of Protocol No. 14 aimed at guaranteeing long-term efficiency of the Court. However, pending the final ratification of Protocol No. 14 and its entry into force, the two temporary measures provided a true and reliable basis for additional procedures of the Court to be applied as soon as possible and for the largest possible number of the Council of Europe member states, aimed at bringing immediate results.

In the beginning of July, the first decisions under the new procedures were adopted; to date, 7 states have ratified Protocol No. 14 bis, 10 have signed it prior to ratification, and 10 have made a declaration accepting the provisional application of the corresponding procedures of Protocol No. 14.

Immediately after their adoption, Slovenia underlined the importance of the two new legal instruments, which were an important breakthrough in the reform process and paved the way forward. We believe that the enforcement of Protocol No. 14 should remain our first priority. We therefore welcomed the statement by the Russian State Duma of 23 September to resume the issue of the ratification of Protocol No. 14, thus facilitating its entry into force. We also believe that it is necessary to simultaneously discuss the future of the Court at a high political level and to work on the long-term vision of a sound and vigorous Court. We strongly support all the efforts invested in accomplishing this goal.

To this end, the Slovenian Chairmanship hosted a Round Table on Short-Term Reform of the Court – in preparation for the Interlaken Conference – which took place on 21 and 22 September in Bled. The purpose of the Bled discussions on the short-term reform of the European Court of Human Rights was to contribute to the efforts to improve the efficiency of the Court within the existing legal system and at the same time make a contribution to the long-running debate on the necessity for a long-term reform. Special gratitude is due to the dedicated individuals who worked hard on behalf of the Slovenian Chair-

manship to organise this event, especially Ms Irena Jager Agius, Ms Anita Števanec, Ms Helena Jaklitsch, Mr Peter Pavlin, Ms Maja Velič, Mr Roman Završek, and Ms Simona Drenik, as well as the dedicated and professional staff of the Council of Europe Secretariat and of the European Court of Human Rights.

The event provided experts with a platform to exchange national experiences on best practices, as well as to discuss issues of potential interest in the framework of a short-term reform of the Court, particularly repetitive applications and “class actions” or collective applications. More than 80 participants from the Council of Europe member states participated in the discussion.

General conclusions of the Bled Round Table were adopted on 22 September 2009. The Round Table set up a forum of discussions intended to bring the Court closer to people.

We would like to thank all speakers and all participants who contributed to the Round Table, which was very successful and at a high professional level. The participants acknowledged the actuality of the discussion, expressing their satisfaction with a free, open and wide-ranging discussion. Representatives of non-governmental organisations expressed their special thanks for the opportunity to discuss the topic on an equal footing with representatives of the European Court of Human Rights, the Committee of Ministers and state agents. The participants stated that the Bled discussions were an important contribution to the Interlaken process.

BETWEEN MADRID AND INTERLAKEN – BLEĐ DISCUSSIONS SHORT-TERM REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS

Ms Simona Drenik

*Head of the International Law Division, Ministry of Foreign Affairs
of the Republic of Slovenia*

Dear high representatives of the European Court of Human Rights, representatives of the committees of experts of the Council of Europe, distinguished speakers, ladies and gentlemen,

I am pleased to welcome you here in Bled, this beautiful Alpine gem, of whose beauties you have already heard, discovered upon your arrival or are already familiar with, both on my own behalf as well as on behalf of the State Secretary at the Ministry of Foreign Affairs, Ambassador Dragoljuba Benčina, who cannot attend the today's conference due to urgent government obligations.

It is my great honour to open the second part of the Bled Round Table on Short-Term Reform of the European Court of Human Rights on behalf of the Chairman of the Committee of Ministers of the Council of Europe. I hope that the today's Round Table will contribute to further activities required for accelerated reform of the European Court of Human Rights and that the Bled discussions will contribute to efforts made so far to increase the Court's effectiveness and reduce backlogs. Therefore, I am particularly pleased that your discussions will focus on the Court's short-term reform, i.e. on changes which can be made without considerable structural modifications.

The promotion and protection of human rights and the rule of law are fundamental values of the Council of Europe, while encouraging promotion and protection is among the priorities of the Slovenian Chairmanship of the Committee of Ministers of the Council of Europe. In its chairmanship programme, Slovenia devoted particular attention to promoting the reform of the European Court of Human Rights. This is one of the most topical issues of the Council of Europe, which was taken over from Spain at a rather dynamic time of adopting various mechanisms aimed at temporarily increasing the Court's efficiency.

The idea that the European Court of Human Rights is the victim of its own success with reference to a large number of pending cases and backlogs, has almost turned into a cliché. However, one should not forget that it represents a great achievement of the regional system for the respect of human rights and fundamental freedoms. The judicature of the Court is impressive and also presents a challenge for the national legal systems of member states, for which regular awareness-raising, and training of judges in the judgements of the Court is required. This particularly applies to constitutional and supreme courts which control respect for human rights in domestic legal systems.

During the Spanish Chairmanship, Slovenia – as a Council of Europe member state – took an active part in the discussions on possible measures to immediately improve the efficiency of the overburdened European Court of Human Rights as it was aware of the necessity for change.

Different solutions had to be found based on the evaluation that Protocol No. 14, which foresaw changes to the control system of the European Convention on Human Rights, would not enter into force so soon, and bearing in mind that any changes to resolve the problem of increasing backlogs of the court are inevitably required. Solutions were sought within procedures already foreseen by Protocol No. 14. These procedures introduced novelties, such as single judges, enlarged competencies of the committee of three judges, and the new criteria of admissibility of cases.

The latest solution to the problem was reached at the Madrid ministerial meeting in May, which saw the adoption of the Madrid Agreement, based on which the most urgent procedural provisions of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms and the new Protocol No. 14 bis, which summarises the same procedural provisions and enables their implementation according to the consent of three member states committed under the Protocol, are provisionally applied. Slovenia was the fourth Council of Europe member state to ratify Protocol No. 14 bis, and aims to contribute to the implementation of short-term measures as soon as possible.

The entry into force of the Madrid Agreement on 1 June and the forthcoming entry into force of Protocol No. 14 bis represents a watershed in the lengthy reform process of the European Court of Human Rights and, at the same time, a

necessary condition to achieve concrete results as soon as possible, with as wide a scope as possible. Provisional measures before the Court already apply to some countries. We will listen to presentations and analyses of their recent results with interest and great expectations, also in relation to contributions within both parts of the discussion.

The discussion on short-term reform of the Court should be understood within the broader context of comprehensive long-term reform of the Court, as presented in the memorandum of the President of the European Court of Human Rights, judge Jean-Paul Costa, with a view to preparing for the Interlaken Conference. As mentioned, short-term reform is only the first step on the path to long-term reform of the court.

Slovenia welcomes all Switzerland's efforts in this process and the endeavours regarding the initiative to host the high-level conference on the future of the European Court of Human Rights in Interlaken in its capacity as Chair of the Committee of Ministers in the first half of 2010. The Bled Round Table is certainly an important step on the path between Madrid and Interlaken; thus, dear speakers, distinguished guests, ladies and gentlemen, I am looking forward to your contributions and undoubtedly a fruitful debate.

Thank you for your attention.

PROVISIONAL APPLICATION OF CERTAIN PROCEDURES IN PROTOCOL 14 – SINGLE JUDGE AND THREE-JUDGE COMMITTEES – A NOTE ON THE FIRST STEPS

Mr Erik Fribergh

Registrar of the European Court of Human Rights

Historical description

On 12 May 2009 in Madrid two new legal instruments were adopted by the Committee of Ministers, both of which had the same purpose, namely to make it possible for the Court to apply the single judge procedure and the new competence for three-judge committees as foreseen by Protocol 14.

The two new instruments were, on the one hand, a new Protocol to the Convention called Protocol 14 bis, and, on the other hand, an Agreement between the negotiating states of the European Convention on Human Rights on the provisional application of the above two procedures.

Protocol 14 bis requires three ratifications. It will enter into force on 1 October 2009. However, a state may also indicate under Protocol 14 bis that it accepts the two procedures provisionally before the entry into force. If so, such provisional application will start on the first day of the month following the declaration of provisional application. The Agreement will apply in respect of a state as of the first day of the month following the declaration of the state that it accepts the two procedures under the agreement.

Switzerland was the first state to submit a declaration under the Agreement – already on 12 May 2009 – and technically speaking therefore the two new procedures could be applied by the Court as of 1 June 2009.

The Court first had to adopt new Rules of Court and that was done on 29 June 2009.

The new Rules of Court entered into force on 1 July 2009. They are contained in an addendum to the Rules of Court.

Already, by 1 July, 7 states (Denmark, Germany, the Netherlands, Norway, Luxembourg, Switzerland and the United Kingdom) had made the necessary declarations either under Protocol 14 bis or under the Agreement.

The first single judge decisions (146) were adopted in the first week of July.

The single judge procedure under Protocol 14 provides for a system whereby the decision is taken by a single judge with the assistance of a non-judicial rapporteur, who is a member of the Registry. The single judge is appointed by the president of the Court. In practice, the single judge operates within the framework of the existing sections. The president therefore bases his decision on proposals coming from the sections, notably the section presidents.

The non-judicial rapporteurs (NJR), who are all members of the Court's Registry, are appointed by the president of the Court on the proposal of the Registrar.

The single judge procedure

The procedure operates in the following way.

The initial legal analysis is carried out by the NJR or a legal assistant supervised by the NJR. He/She will designate the application as a possible application for the single judge procedure. Thereafter, the NJR will draft a short note proposing that the application be declared inadmissible or struck out.

The note will be sent to the single judge for decision. A copy of the note is also sent to the national judge for information.

If the single judge considers after consultation with the NJR that a particular application should be examined by a committee or a chamber, she/he will so decide.

After the decision, the applicants will be informed of it in the normal way by a letter from the Registry.

The three-judge committee procedure

The provisional application of Protocol 14 gives the Court the possibility of assigning to three-judge committees, applications which should be decided on the merits where the issue is covered by the well-established case-law of the Court. In order to benefit as much as possible from this new power and in line with what has been said in the Explanatory Report,¹ the Court has adopted a simplified procedure for these cases.

1. Explanatory Report to Protocol No. 14, paras. 68-72.

The initial preparation of the cases remains the same as before. The only addition being that the judge rapporteur in his/her analysis will indicate that the case appears to be suitable for examination by a three-judge committee. The case follows the usual procedure for communication by the section president. The committee will only be seized with the application once the parties have submitted written observations and Article 41 claims.

The new element lies in the fact that due to the well-established case-law on the issue in question the Court would not need any observations from the government. Consequently, under this new simplified procedure the government are not invited to submit observations but are only given an opportunity to submit such observations if they so wish. At the same time the parties are encouraged to settle the case (declarations to that effect are attached to the letter to the parties where appropriate).

Should no settlement be achieved and if the government would wish to submit observations they would be sent to the applicant for information only. At the same time he/she would be asked to submit claims under Article 41 of the Convention. Such claims will later be sent to the government for comments.

Thereafter the case would be prepared in the usual manner and presented to the committee for examination.

The procedure is simplified because it reduces the procedural steps compared to the normal chamber procedure. Instead of having two rounds of submissions, there will now be a maximum of one (the applicant's views in his/her application and the government's possible comments).

Statistics

The Court started to apply the new procedures as of 1 July 2009.

Before the judicial recess (from 13 July) the Court had issued 146 single judge decisions: 76 regarding Germany, 41 the United Kingdom, 17 the Netherlands, 8 Switzerland, 3 Norway and 1 Denmark.

By 1 September, 15 states had accepted the new procedures. They had entered into force with regard to 12 states. A total of 270 single judge decisions had been taken (Denmark 7, Germany 178, Luxembourg 2, Netherlands 17, Norway 17, Switzerland 8 and United Kingdom 41).

Liechtenstein joined on 1 September; Georgia on 1 October; Slovenia and Monaco will join on 1 November.

BETWEEN MADRID AND INTERLAKEN

Dr Almut Wittling-Vogel

Vice President of the Steering Committee for Human Rights

Ladies and gentlemen,

I would like to thank the Slovenian Government very much for the invitation to this Round Table and for the opportunity to speak. I am here as a representative of the Steering Committee for Human Rights, the CDDH. This committee has always played an important role in the debate and the process of reform, and will surely continue to do so as we move forward.

Now the Court is saying to us: “We are drowning in a flood of cases.”

What can the CDDH do to save the Court from drowning and to put its feet onto dry land for the future?

Well: the CDDH has already done quite a bit.

When it became clear that a massive flood of complaints was threatening to engulf the Court, the CDDH built a lifeboat. Its name is “Protocol 14”. As we all know, this boat is still at the shore and has not yet set off. And although a boat may not be a long-term solution, it would still make sense to send Protocol 14 on its journey. After all, it is not supposed to evacuate the Court. We do not need to rescue the crew of a sinking ship. Rather, the lifeboat is only supposed to load up and transport off as many cases as possible, thereby reducing the pressure on the Court.

I was very pleased to hear that the last state to cast off, which has been hindering the boat from beginning its journey, stated two weeks ago in the Liaison Committee that it was working intensively on the topic.

In the meantime, however, smaller boats are on the sea as well. They were built in the CDDH and baptised in Madrid. Their names are “Protocol 14 bis” and “provisional application”. Every state has the possibility of launching one of these boats to support the Court, and many have already taken advantage of the opportunity. I’m happy to report that the German boat has already transported off 178 applications. Others have been successful as well. More states will follow.

Clearly, these boats will not be sufficient to come to a long-term solution. But I hope that we can understand the Court's reports to mean that they do help.

Of course, a sustained solution would be a dyke which keeps away a portion of the flood of applications. Or a new canal, through which the flood of applications that reaches the Court can flow off more easily. Or a combination of the two. Or a combination of several dykes and canals.

Building dykes and canals are long-term projects. The CDDH will be happy to turn away from boat building and work on these more sustainable challenges. And it will do as soon as the Interlaken Conference fires the starting gun.

What can the CDDH do in the meantime?

The CDDH can continue to build boats, little dykes and small canals. It has already started to do so.

First of all: last week, the first meeting of the new Committee of Experts on Effective Remedies for Excessive Length of Proceedings took place under the chairmanship of our esteemed colleague Jakub Wołásiewicz. We talked about this in detail yesterday. If we are successful in resolving these cases at the national level, we might have built more than merely a boat, but rather something like an initial dyke which could serve to protect the Court.

Secondly: the CDDH has already set up another working group to focus on creating a statute for the Court. Here, we have the opportunity to amend certain non-core provisions of the Convention that may positively influence how the flood of applications are dealt with. For example, in times of especially heavy caseloads, the existing chambers could be made smaller and additional chambers could be formed. So perhaps we are here dealing with building a canal which could enable the flood of applications to flow off more quickly.

However, both projects must be counted among the measures that cannot be realised quickly. This is because both of them require legislation. Effective remedies against excessive length of proceedings require legislation at the national level. And we will need a new amending protocol to create a statute for the Court.

The CDDH has been working on a third item as well. It has drawn up a report that was welcomed by the ministers in Madrid. In the report, the Committee also looks at reforms that are possible without amending the Convention.

None of the CDDH's proposals in this report are really new. Basically, they may be placed into two groups. The first group are proposals that the states can take up in order to build more lifeboats – smaller or larger – for the Court. These include:

- ▶ co-operation in pilot judgement procedures;
- ▶ termination of proceedings by unilateral declarations (and, of course, by friendly settlements);
- ▶ secondment of national judges to the Registry of the Court;

▶ compliance with “judgements of principle,” even when they are issued in cases that are against another country. This also includes the willingness to join such proceedings as a third party;

▶ translation, publication and dissemination of the Court’s case-law.

And I have already mentioned improving the remedies at the national level.

The second group are the responsibility of the Court itself. These might be termed suggestions as to how it can get onto higher ground or otherwise protect itself from the flood of applications. These include:

▶ implementation of pilot judgment procedures;

▶ acceptance of unilateral declarations;

▶ stricter application of the Convention’s admissibility criteria, particularly the six-month deadline;

▶ continued development of the grounds for striking out an application *à droit constant*, especially due to the principle of *de minimis non curat praetor*.

On this point, let me note that Germany has a quite special length of proceedings case which was communicated recently. The issue in the original proceedings (the proceedings which were allegedly too long) was whether the state was obliged to pay 7.99 euros to a well-compensated public servant. This person had bought magnesium pills and was of the – wrong – opinion that the state had to reimburse these 7.99 euros as a health care measure. I am not of the opinion that cases like this should take away any work capacity from an international court. Of course, I accept that Germany has a problem with length of proceeding cases, especially the lack of an effective remedy for length of proceeding cases. But there are many other cases pending at the Court which illustrate this problem and there is no need, either for the Court or for the applicant, which would force the Court to decide this special case.

Further measures in the responsibility of the Court are listed below.

▶ Integration of seconded judges from the member states into the Registry.

▶ Proactive invitation to the member states for third-party interventions in cases which could lead to a judgment of principle. This could increase the willingness of states to implement such judgments even if they are not a party to the case.

▶ More transparency in the determination of just satisfaction pursuant to Article 41 of the Convention. This could lead to more willingness to settle on the part of the applicants.

Most of these suggestions are not only not new: many of them are already being implemented. It is primarily the Court itself that has either already implemented the proposals or is in the process of spurring on further developments in these areas. But there are things left to be done.

These proposals have not become irrelevant. We must continue to work on their realisation. This applies to both the states and the Court – in the sense of a

common responsibility for the Court as the President has emphasised in his memorandum.

But the long-term measures will also be a topic for the CDDH very soon. The Committee of Ministers has already invited the CDDH to submit an opinion by the end of November on the issues to be covered by the Interlaken Conference.

In conclusion, therefore, I would like to emphasise that the reform working group of the CDDH will be meeting as early as the beginning of October in order to begin preparing this opinion for the Interlaken Conference.

This is our view as we go forward.

So, what signal are we sending from Bled? It has three elements:

- ▶ firstly, we support the Court.
- ▶ secondly, we are continuing work on reform measures which are possible without amending the Convention.
- ▶ and thirdly, we are preparing the issue of farther-reaching structural reforms. I believe that this is a very important signal.

Thank you.

BETWEEN MADRID AND INTERLAKEN

Dr Frank Schürmann

Agent of the Swiss Confederation before the European Court of Human Rights

Introduction

Thank you very much for the kind invitation to Bled and for giving me the opportunity to speak about the ideas with regard to the short-term reform of the European Court of Human Rights.

I do like the title of this Round Table: Between Madrid and Interlaken. Somehow, we are already closer to Interlaken today. Firstly because Bled looks more similar to the Berner Oberland, where Interlaken is located, than to Madrid. And, secondly, because the short-term reform of the Court is an important subject today, and it will be an important subject in Interlaken as well.

Before I'd like to share some reflections with you about the short-term reform, I will say some words about the Interlaken Conference.

In fact, it was quite clear from the beginning of the internal discussions that one of the main activities during our presidency should be dedicated to the Court. This intention was confirmed by the President of the Court: as you might remember, at the end of January of this year, Mr Costa had presented the idea of a *grande conférence politique* which should be held in the first part of 2010.

Initially, we had in mind a conference or a colloquia bringing together, so to speak, the key players of the Convention system: judges of the Court, representatives of the Committee of Ministers (Article 46), judges of the highest national jurisdictions and government agents.

After discussions with the President of the Court, we gave up this idea in favour of a high level political conference. Having in mind the very intensive discussions about the reform, especially those after the Rome Conference of 2000, we must say that there is not a lack of proposals on how to improve the control

system. In fact, there are plenty of them and the recent publication of the Spanish Presidency, *Reforming the European Convention on Human Rights – A work in progress*, gives an impressive overview of what has already been discussed. What is needed now, is the political choice and the implementation of this choice – choice on how the system should be improved in the short term, and how member states want it to function in the longer term.

In July of this year, the President of the Court presented a memorandum, “with a view to preparing the Interlaken Conference.” A very fist exchange of views took place on 8 September, in the “Liaison Committee” of the Committee of Ministers, in the presence of Mr Costa and Mr Fribergh. I think, one can say that the reactions of most of the Ministers’ Deputies were concrete and encouraging.

The Interlaken Conference will be held under the responsibility of the Ministry of Foreign Affairs and the Ministry of Justice. Having regard to Interlaken, our authorities are happy and grateful to the Slovenian authorities for having organised the two round tables. The two subjects lie indeed “between Madrid and Interlaken” and will be of great use for the preparation of the Swiss Conference.

So, the goal of Interlaken is to bring together the Ministers in charge of the implementation of the Convention, in particular for the following objectives:

1. the solemn reaffirmation by the State parties of their commitment to ensure the rights defined in the Convention and to make its mechanism to protect these rights as effective as possible.
2. the support of the States for the efforts of the Court to improve its efficiency in the short term *à droit constant*, that is without changing the text of the Convention.
3. the strengthening of the structural reform process in the longer term.

Mr Costa concludes the mentioned memorandum of the Court by saying that “overall the Conference would lay down a clear road map for both the immediate and the more distant future”. And he added: “This goal is not only indispensable but also achievable.” The Swiss authorities do share this view and, of course they do also share the hope that the Conference can fulfil the expectations.

Ladies and gentlemen, let me now turn to the subject of this Round Table, the short-term reform of the Court.

As Mrs Wittling-Vogel pointed out before, the discussions on possible short-term measures have quite a long history. It seems difficult, after the report of Lord Woolf, after the Wise Persons’ Report and after several conferences that have been held during the last years, to identify really new tracks. The Steering Committee for Human Rights (CDDH) has made a thorough analysis of all the proposals that have been put on the table so far and, as Mrs Wittling -Vogel mentioned before, has given concrete indications especially as to the short term.

The Court is overloaded. Only some years ago, there were about 50,000 pending cases, today there are about 110,000 and tomorrow, there will probably be more than that. From a general point of view, there are two main ways to lighten the load of the Court: first, by improving the efficiency of the Court in the treatment of the pending applications and second, by avoiding new applications. In the maritime picture of Mrs Wittling-Vogel, there are the boats and the canals on the one hand, and the dykes on the other. For both ways, there are possible short-term measures that can be considered.

I begin with the treatment of the applications.

Of course, increasing human resources in the Registry is an appropriate short-term measure, but, to my mind, it is not more than that. There are certain limits to a further increase, for budgetary reasons, but also for practical reasons.

It is also important to point out that the way applications are treated can be influenced to a certain extent by the member states and to a certain extent by the Court itself.

According to Article 19 of the Convention, the Court is the master of the interpretation of the Convention, including the provisions dealing with admissibility criteria, such as the six-month time-limit, the exhaustion of domestic remedies and the notion of victim according to Article 35.

Even if there is no explicit rule in the Convention, the Court is competent to adopt internal rules relating to its organisation and its working process, as laid down in the Rules of the Court.

On this basis, one could envisage several measures, going beyond those already realised by the Court, mentioned in the memorandum of President Costa. I think, for instance, of:

- ▶ the definition of what can be considered as an “application” according to Article 34;
- ▶ the definition of priorities in the treatment of the applications;
- ▶ the creation of special sections within the existing Court, dealing with manifestly inadmissible applications;
- ▶ the field of application of pilot judgments and the way, clone applications are treated following a pilot judgment;
- ▶ the possibility to treat applications which do not fit in the category of pilot judgments as class actions;
- ▶ the possibility to introduce fees for the Court procedure in clearly defined cases.

These are all organisational measures and, once again, there is nothing new about them. But nevertheless, they might contain a certain potential to render the treatment of applications even more effective.

As mentioned by previous speakers, there is also a potential of improvement on the side of the member states, namely in relation to unilateral declarations

and – this concerns also the applicants – in relation to friendly settlements. I will not mention the increased use of third interventions in this context, because, at least the immediate effect will not be less, but more work for the Court. By the way, I won't mention it in the context of prevention of new application neither because I doubt whether third intervention is really an appropriate means/instrument in this regard.

This point brings us to possible measures suitable to avoid new applications – the dykes. In this field, first of all the member states are concerned and engaged to do their homework. The appropriate measures are well known and have been largely discussed and proclaimed, such as:

- ▶ the allocation of effective remedies in the sense of Article 13 of the Convention;
- ▶ the need to analyse the causes of length of proceedings and to do something against it;
- ▶ the publication of the great developments of the case-law in the national languages (even if this is, in the context of the discharge of the Court, a double-edged measure);
- ▶ making the national authorities aware of the judgements of principle of the Court;
- ▶ and, of course, the respect of the obligations under Article 46 of the Convention.

And the Court itself? In the memorandum, the President of the Court makes reference to the key principle of subsidiarity, and he specifies that “it is perhaps more appropriate to refer to the sharing of responsibility for the protection of human rights between national authorities and the Court”.

This is a very important statement. It shows that subsidiarity is not a one way road. The principle refers first of all to the states, but to the Court as well. Let me turn it this way: maybe, to some extent, the overload of the Court is also home-made and we can not exclude that there will be a growing number of applicants coming to Strasbourg with the hope to find the Court as a forth instance, re-examining their case – civil, criminal or administrative cases – in the light of human rights. I am afraid that there lies a huge potential of applications (in this hope of individuals), and it could become bigger as the case-law gets known.

After all, it is in the responsibility of both, member states and the Court, to take appropriate short-term measures, without ignoring their long-term effects.

Let me come to an end: there is potential to improve the situation of the Court *à droit constant*. The next years will show to what extend short-term measures, taken together with the organisational changes foreseen in Protocol 14 bis, can keep up with the expected further increase of applications.

BRING THE RIGHTS HOME: HOW TO DEAL WITH REPETITIVE APPLICATIONS IN THE FUTURE

Mr Erik Fribergh

Registrar of the European Court of Human Rights

Introduction

I am very pleased to address the issue of “repetitive applications” from the perspective of the European Court of Human Rights and its Registry at this important meeting.

I take the opportunity to thank the Slovenian authorities for organising so timely this Round Table. I believe it is one of the central items worth discussing in the run-up to the conference on the future of the Court which will be taking place on 18-19 February 2010 in Interlaken, during Switzerland’s Chairmanship of the Council of Europe.

The views which I shall express this morning are my own and should not be taken as those of the Court. The decision to hold the Interlaken Conference is premised on the idea that we must reform the Convention system. It is my duty as a Registrar to make proposals as to how this could be done (whether they are good or bad will be for others to decide).

Speaking about the future of the Court, I should like, from the very beginning, to express my strong conviction that Protocol No. 11 represented an extremely important step forward in strengthening the judicial character of the European human rights protection system. Nevertheless, the machinery envisaged at that time to deal with the case-load definitely requires some adjustments today, in order to cope with the realities of a jurisdiction that now covers 47 contracting states – unlike in the early nineties – and to avoid a breakdown of the system. The huge volume of applications which raise the same issues the Court has already dealt with is one of the biggest challenges facing the Court today.

Put simply, the solutions to the Court's problem are either to reduce the volume of incoming applications or to simplify or speed up the process by which cases are dealt with, indeed both. There are some measures that can be introduced almost immediately, while other proposals will require legislative reform. Experience has shown that may take many years. (We all know that time is a luxury the Convention system can scarcely afford in the current situation.) What I hope – as a result of our discussions this morning – is to send out a strong message (to the governments, parliaments and public opinion); so that when the government representatives meet at the political conference in Interlaken they will launch the necessary process of reform.

But before sharing with you the solutions that can be envisaged, let me first draw you a picture of the current situation with regard to repetitive cases, and the Court's current approach to processing them.

Types of repetitive cases and some examples

It is no secret that the Court's docket is currently engorged with repetitive cases against a wide variety of states. More than 50% of the total number of judgments delivered since the Convention system was first established over 50 years ago concern what are known as "repetitive" cases; about 25,000 applications currently pending before the Court fall into this category. An even greater cause of concern is that, in spite of the efforts deployed by the Court to deal with these cases on an individual basis by streamlining the proceedings and developing a wide range of tools – such as the pilot judgment scheme, and unilateral declarations, which I will come back to later – there are no signs that the problem is actually receding.

Two main types of situation may be identified.

1. Systemic situations

Firstly, there are cases raising issues of a systemic nature, which stem from a defective legal provision or administrative practice and which can in fact be remedied fairly easily, by modifying the law or practice concerned, provided of course that the political will exists. An example of this can be found in a long series of cases concerning the independence and impartiality of State Security Courts in Turkey. The Court first held in the case of *Incal* in 1998 that the presence of a military judge on the bench of State Security Courts deprived those courts of the independence and impartiality required by Article 6 of the Convention, because the military judges were subject to the military hierarchy. The solution was simple and the law was changed in 1999 to exclude military judges, and eventually the State Security Courts were abolished altogether. Nevertheless, the Court had to deal with several hundred cases of this type.

Another group of cases has arisen out of the restitution of property nationalised in eastern Europe between the end of the Second World War and the fall of the Berlin Wall. Problems originating in denationalisation legislation affecting virtually all of the former Eastern bloc states, but as an illustration, mention may be made of some of the specific difficulties which have arisen in Romania. There are several different types of situation but one of the principal ones is the result of a lack of coherency in the approach of the domestic courts. On the one hand, the courts recognised that the original owners had never lost their ownership rights, since the nationalisation was considered to have been unlawful from the beginning, but on the other hand they also accepted that third parties who had in the meantime bought the properties from the state in good faith – usually the tenants – also had title. The result was that the courts actually recognised two competing titles in respect of such properties and refused to order the return of the property to the original owners. The Strasbourg Court has held in numerous cases that this constitutes a violation of the right of property guaranteed by Article 1 of Protocol No. 1 to the Convention.

Another problem which is also related to the post-Communist transition has arisen in connection with rent control, in particular in Poland, where the legislation restricted rent increases to such an extent that landlords were not even receiving enough income to allow them to fulfil their contractual obligation to maintain their property in good repair. In the Court's view, this inflexible system imposed a disproportionate burden on landlords, upsetting the fair balance which has to be secured under Article 1 of Protocol No. 1 when different interests are at stake.

Other situations which can be mentioned briefly, without going into further detail, are: the length of pre-trial detention, especially in Poland and Bulgaria; discrimination between widows and widowers with regard to entitlement to certain allowances in the United Kingdom; the problem of property in northern Cyprus owned by Greek Cypriots; and the practice of "indirect expropriation" in Italy.

2. Endemic situations

The second type of situation the Court is confronted with is where the problem is the result of a structural breakdown, usually due to a lack of sufficient resources or inefficient organisation. Remedial measures in this context are more dependent on budgetary means, one example being widespread poor prison conditions.

This problem is most acute in Russia, Ukraine, Poland and Bulgaria, often as a result of chronic overcrowding and outdated prisons in a poor state of repair. In such cases, the Court often refers to the standards laid down by the Committee for the Prevention of Torture, and it will thus take into account factors such

as the notional area per person in a cell, the number of beds available – sometimes there are fewer beds than detainees, forcing them to take turns to sleep – as well as access to natural light, opportunities for exercise and so on.

Another example of an endemic situation – that we might find in the second largest group of repetitive cases currently pending before the Court – is non-execution of final binding judgments of national courts. State authorities either delay in complying with judgments against them or simply refuse to do so altogether. This is often when the judgment has ordered payment of a pension or other claim, and the State does not have the funds to comply with it. This is not accepted as a valid excuse by the Strasbourg Court. In spite of the huge number of cases where the Court has found a violation of Article 6 of the Convention in this respect, hundreds of new cases of the same kind continue to be lodged against Russia, Ukraine and Moldova, and various other countries where many final binding decisions are simply not enforced or executed.

I must also mention, last but not least, the category of “excessive length of proceedings before national courts,” which is in fact the largest group of repetitive cases currently pending before the Court. I will say no more about it, though, as this topic was widely discussed yesterday, on the first day of this round table.

How has the Court responded to these different repetitive issues?

The Court’s approach to repetitive cases

The Court’s approach to addressing this problem has been to examine each case on the merits and award compensation where appropriate.

Initially, of course, the Court tried to considerably streamline the procedure and simplify the text of the judgment as much as possible. New repetitive applications are grouped together by subject and sent to the responding states with a very short statement of the facts. Recent practice within the Court shows that it is possible to deal with this kind of application on a scale greater than ever before (to give you just two examples, 200 non-execution cases were sent to Russia in one simultaneous communication, and 500 length-of-proceedings cases to Italy). The judgments in such cases tend to be rather succinct. The reasoning is often essentially limited to a finding that the case concerns a situation in which the Court has already found numerous violations in the past and that there is no reason to reach a different conclusion in the present case. Despite this, the preparation of each case may require considerable work, especially if the Court has to assess how much compensation it is appropriate to award.

As a second measure, the Court encouraged the conclusion of friendly settlements between the parties, pointing out the benefits, namely that since in a repetitive case the finding of a violation is virtually inevitable, a settlement will avoid the government the stigma of a high number of violations, while also avoid-

ing unnecessary effort and expense in preparing observations. Moreover, at the end of the day, the compensation awarded by the Court in the event of a violation is likely to be of a similar level to that accepted in a settlement. From the applicant's point of view, the main advantage is that compensation will be available much quicker.

As a third measure, in the event of an unjustified refusal by the applicant to settle the case, the government have been encouraged to submit a unilateral declaration acknowledging the existence of a violation, alongside their offer to pay compensation. Such declarations allowed the Court to consider that it was no longer justified to continue the examination of the application, and to strike it out of its list.¹

Fourthly, in the last few years the Court has developed a practice of delivering "pilot" judgments. I will not say much about that, as this topic has been widely discussed and monitored over recent years.² I only wish to point out that the Court has become very aware that its approach to dealing with repetitive cases should focus more on identifying the underlying causes. It has increasingly shown a great willingness to give clear indications – under Article 46 of the Convention – in the operative part of its judgments as to what steps should be taken by the state to remedy the dysfunction. Besides, at the beginning of this year the Court adopted a new policy on the order in which it deals with cases, the immediate consequence of which is that any case which is symptomatic of a new systemic or endemic problem should now be dealt with priority. The essence of the problem which the Court has sought to address in this way is the unacceptably long time it takes to process and adjudicate applications concerning serious Convention violations, on applications raising issues of general importance or which are symptomatic of a new systemic or endemic problem. In other words, the aim of this new policy was to shift delays in processing cases away from the more important and the urgent cases and over to less serious cases, where a delay is considered to be less of a problem.

From these premises, allow me to draw a few preliminary conclusions.

The need for a new approach

The reality is that none of the solutions I have mentioned have really helped to stem the flow of repetitive cases or to solve the underlying problems at the

1. The statistics reveal a real progression of the number of cases disposed of through a friendly settlement: in 2007 and 2008 more than 1,000 cases were disposed of following friendly settlements, which is almost half the total number of friendly settlements reached between 2002 and 2008.

2. I could refer to the Stockholm Colloquy of 9-10 June 2008 and to the recent colloquy in Warsaw on 14-15 May 2009.

domestic level, although in some friendly settlements governments do undertake to take appropriate measures of a more general nature, and some pilot judgments have helped us solve problems of high numbers of similar applications pending before the Court – the *Broniowski*, and *Hutten-Czapska* and *Lukenda* cases are probably the best-known examples.

The Court's approach of examining each of these cases on the merits and awarding compensation where appropriate actually has the effect of attracting more and more cases. The more the Court attempts to render individual justice in these cases, the greater the problem of repetitive cases becomes: increased output at Strasbourg seems to act as a magnet for even more repetitive cases. With certain countries, the supply of new cases appears to be practically inexhaustible. Moreover, a large volume of communicated cases followed by judgments ordering compensation to applicants has in practice added to a government's difficulties in dealing with the underlying problem. Besides, repetitive judgments of just one or two pages are sometimes viewed as a parody of the judicial process; in these cases, the Court appears to function more as a low-level small-claims tribunal, which might does not contribute to its authority as Europe's final arbiter in the domain of fundamental rights.

Pending reform of the Convention, such an approach is nevertheless consistent with the Court's duty to consider all meritorious cases brought before it. To refuse to deal with such cases would be to effectively extinguish the valid claims of many applicants who have been unable to vindicate their Convention rights within the domestic legal order.

Although the Court is working ever more productively, the reality is that it is not capable of dealing with such a large number of cases within a reasonable time-frame. The lengthening delays faced by many applicants threaten to render the right of application theoretical and illusory. It is true that, with the entry into force of Protocol 14 bis and the agreement on the provisional application of certain procedures of Protocol 14, we have a new tool in the extended competence of the three-judge committees, who will be able to adopt judgments in the simplest, most well-founded cases. I can ensure you that the Court and its Registry will make the most of this new and simpler procedure to work even more efficiently. In my view, as the number of such repetitive cases increases and budgetary resources dwindle, it must be seriously queried whether acting as a small-claims court is the proper role for an international Court to play and if, by doing so, the Court is not being diverted from its more important tasks of judicial interpretation and application of the Convention.

Indeed, so much of the Court's time has been devoted to straightforward cases in recent years, that there is a steady accumulation of substantial cases – those that really matter because they identify new areas of dysfunction in the national systems of human rights protection, because they raise allegations of

the most serious human rights breaches, because they make it possible for general human rights jurisprudence to evolve and progress. This is, perhaps, the most worrying aspect of the caseload situation and it is made worse by the budgetary pressure exerted by the member governments of the Council of Europe who, perhaps understandably, demanded increases in visible productivity, i.e. in the number of cases disposed of, with the inevitable result that the more complex cases – again, the more important ones – are not always dealt with in good time, contrary to one of the Convention’s own requirements, that judicial proceedings be concluded within a reasonable time.

As I mentioned before, at the beginning of this year the Court adopted a new policy on the order in which cases are dealt with, the consequence of which was that cases are now dealt with on the basis of their importance. One obvious and expected result of this new policy will be considerable delays in the processing of repetitive cases. Because they now belong to a “non-priority” category of cases, they will no longer be processed until all the other applications, concerning serious Convention violations or raising issues of general importance, have been dealt with.

That brings me to a crucial point in the discussion on the reform of the Court, and to the main theme of my intervention this morning, namely, the future of repetitive applications. Rather than keeping such a large number of cases on the Court’s list, with no guarantee that the Court will be able to deal with them in the future, at least within a reasonable time, would it not be better if those applications could be transferred away from the Court and back to where they belong, namely in the state concerned and in the Committee of Ministers? (In other words, is the right of individual petition best advanced and furthered by an approach that is not entirely focused on the need to remove the national root causes of the problem and that ultimately serves to aggravate it?)

But this is not the only reason. The very existence of all these repetitive applications is clear evidence that the states and the Committee of Ministers have not adequately fulfilled their obligations when it comes to executing previous judgments. Should future policy in respect of repetitive applications not, therefore, impress upon the states once and for all that they must effectively honour their obligations? And impress upon the Committee of Ministers that it must effectively supervise the execution of judgements.

From my perspective, the answer to that question can only be affirmative.

The proposed new policy

Proposal requiring the amendment of the Convention

I do see the future of repetitive cases as a real, effective system of responsibility for the protection of human rights shared between national authorities and the Court. In this new system, every actor – at the national level (the contracting states) and the international level (the Court and the Committee of Ministers) – would have a specific role to play.

- a) The task of the Court would be, first and foremost, to focus its energies on identifying the structural and systemic causes underlying the different categories of repetitive complaints. It would then choose one or several representative applications from that particular group and notify them to the respondent government. And then process them, without undue delay, and give clear indications in the operative part of the judgment as to what steps should be taken by the state to remedy that particular dysfunction. This could mean, for instance, requiring the state to create appropriate remedies at the national level, which would provide potential applicants with an opportunity to have their grievances examined within the national legal system, in conformity with the principle of subsidiarity. The Court should also indicate how to settle cases already pending before it of the same nature.
- b) Once the “root causes” and the steps that should be taken by the state to remedy the dysfunction have been clearly identified, the burden should shift from the Court to the respondent state and the Committee of Ministers. All the other repetitive cases should be repatriated from the Court to the national level, where the applicants would have access to the domestic remedy the state was required to create. In addition, the Court would notify those cases to the Committee of Ministers, which would ensure that the state effectively redressed the Convention violation suffered by each individual applicant.

In order for this to happen, the Convention needs to be amended, to provide that, after having identified a dysfunction at the domestic level and indicated to the respondent state what steps should be taken to remedy that particular dysfunction, the Court should reject any other application which raises the same issue. That would involve, of course, an obligation upon the state to reopen that case at the domestic level and consider it again in the light of the judgment which the Court identified as being its precedent. In my view, states should be obliged to introduce such a procedure and to keep the Committee of Ministers informed about its outcome in every individual case referred to them by the Court.

Certainly, such a proposal breaks with the rule that every well-founded case should be judicially decided at the international level. Yet, contrary to what might be expected, such a solution – inspired by the principle of subsidiarity –

is perfectly in line with the basic philosophy underlying the Convention whereby the national and international courts share the responsibility for providing effective human rights protection. What is more, it does not water down the right of individual petition since, on the one hand, the “repatriation” of each case is accompanied by an obligation upon the state to reopen the proceedings and, on the other hand, each individual case will be supervised (reviewed under the supervision) of the Committee of Ministers. Admittedly, one could object that the Committee of Ministers has neither the remit nor the resources to function in this way; but if, as I argue, these cases should not be processed by the Court, then it is time to look at how the Committee of Ministers could be given the legal remit to take on this role and equipped to do so.

This proposal will require legislative reform and, as experience has recently shown, that may take many years. (As I stated before, time is a luxury that the Convention system can scarcely afford nowadays. That is why) Pending the requisite changes to the Convention, we must also think of a means of introducing a new procedure to deal more effectively with repetitive cases.

Action to be taken pending the amendment of the Convention

The new procedure I mentioned earlier is, in fact, built on ideas developed in the pilot judgment procedure, and it has the distinct advantage that it does not require any amendment of the Convention. It has, as a starting point, a Strasbourg Court judgment which identifies a dysfunction at the domestic level and indicates to the respondent State what steps should be taken to remedy that particular dysfunction – I will call it a “leading case”. All similar applications related to that “leading case” would then be passed directly by the Court to the respondent government and to the Committee of Ministers, who will be required to see to it that they are settled in accordance with the leading judgment concerned. Pending their response, the Court will adjourn its examination of the applications.

In other words, in contrast to the present practice of registering every repetitive application with a view to adjudication at some point in the future, there could be a lighter procedure that would see the Court simply recording such claims and formally notifying them to the respondent governments and to the Committee of Ministers. If the reply is that the state or the Committee of Ministers cannot do any thing about them, or simply in the event of unreasonable delay in implementing the corresponding leading case, it would be open to the Court to take some of these applications to judgment.

In this scenario, the weight of the numbers of repetitive applications notified by the Court to the Committee of Ministers will very clearly convey to it the scale of the problem and thus the urgency of remedial action by the State concerned.

As I mentioned before, the advantage of this proposal lies in the fact that it can be put into practice immediately. Nevertheless, a more effective, adequately-resourced Committee of Ministers seems to me a condition if it is to produce the desired positive results. Indeed, the political weight and expertise of the Committee of Ministers should measure up to the vital task the Convention confers upon it, namely to ensure the enforcement of the Court's decisions. I take this opportunity to stress, once again, the need for a more effective – that is to say a more determined – supervision of the execution of judgments. This is, in my opinion, the key to eliminating repetitive cases. There must be a climate of true political accountability of states to their peers when it comes to remedying the causes of repetitive applications.

From a more general point of view, the enforcement issues are becoming more and more judicial and I continue to believe what I said last year at the Stockholm colloquy – that one issue that could be taken up in future reform 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 Committee of Ministers. 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.

In any event, my conviction is that a more effective, adequately-resourced Committee of Ministers would strike a better balance in the Convention mechanism and would be the key to eliminating repetitive cases. There is no doubt that the Court would be in a much better position if its judgments were better executed by the Committee of Ministers and by the States.

This is not to deny the importance of individual applications; they must remain at the centre of the Convention system, because it is through them that weaknesses in a State's system of protection are identified. But we must recognise that the role of the Court as an international court is to reinforce human rights protection at the national level, not to replace it. The principle of subsidiarity should prevail.

“Bring rights home” could be chosen as a slogan for the important efforts required making this principle clear and effective.

Conclusion

Let me finish by repeating the main theme of my address today. One of the guiding notions of the Convention is that of balance: balance between conflicting rights, balance between the individual interest and the general interest. If balance plays an important role in the substantive application of the Convention, it is also a crucial element in the operation of the supervisory mechanism. Here the balance is between national protection and international protection; both

components must function effectively if the system is to work. In recent years that balance has been upset to the detriment of the international component: far too many cases come to Strasbourg which should, in accordance with the principle of subsidiarity, have been decided by the domestic authorities.

The Court cannot bear a disproportionate burden in enforcing the Convention; that burden has to be shared with the domestic authorities. I can only repeat that the underlying aim of the Convention is to create a situation in which the great majority of Convention complainants do not have to come to Strasbourg, because their complaint has been satisfactorily addressed at national level.

It seems to me that the basic philosophy of the future policy in respect of repetitive cases should aim to recover that balance, to restore the national component of the Convention protection to its proper – and, I would say, inevitable – place in the system.

The right of individual application implies individual justice for every applicant. But with repetitive cases, this burden becomes impossible to bear. It is clear that certain states repeatedly fail to meet their obligations under the Convention and to take subsidiarity at all seriously. On this latter point, the Court's recurrent exhortations over the years have failed to make any appreciable impact in some States. Further repetition cannot be expected to make much difference.

The Court's approach to repetitive cases needs to be modified. The focus should be on ensuring that the contracting states and the Committee of Ministers effectively honour their obligations.

I have now addressed one of the issues – repetitive applications – to which an answer must be given in Interlaken. I have outlined one possible answer. I have also touched on other issues which will require answers: one being all the issues relating to execution of the Court's judgments. The problem of execution of repetitive applications is only one of the problems of execution. There are also others.

Other issues which must be addressed at Interlaken are the future filtering of applications. Do we wish to have a first-instance tribunal or something to that effect, and measures which will safeguard the Court's independence? One issue is the Court's administrative independence in respect of which already the Wise Persons made recommendations. In this respect the authorities of the Council of Europe have been curiously unwilling to react.

I look forward to hearing your comments.

SHORT-TERM REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS – REPETITIVE APPLICATIONS

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At the outset, it is useful to recall that during the discussions about a new Protocol No. 14, adopted in spring 2004, repetitive applications or clone cases were identified as representing roughly 60% of cases which were not declared inadmissible.¹ Of course, all statistical figures tend to be somewhat misleading, but the reality that repetitive cases are a heavy burden for the Court, consuming time and energy of the staff and the judges, can hardly be denied.

We must recognise that in consequence of that finding, the comprehensive “reform package” of 2004, which consists of Protocol No. 14 as well as of three recommendations of the Committee of Ministers to the member states and of a resolution of the Committee of Ministers addressed to the Court, focused, *inter alia*, on the issue of repetitive applications.

At that time, and the situation has not changed since then, it was considered that repetitive or clone cases arise from the same root consisting in a dysfunction of the national legal system. It was therefore regarded as necessary:

- ▶ first, to prevent systemic dysfunctions from occurring (by appropriate dissemination of the Convention text and case-law, by education of legal professions, by enacting legislation which is in conformity with the Convention law);²

1. See the Explanatory Report to Protocol No. 14, adopted by the CDDH on 7 April 2004, para. 7. Figures concerning the year 2003 were examined to that effect: 96% of cases were disposed of in 2003 by inadmissibility or striking-out decisions, in the remaining cases, the Court gave 703 judgments out of which some 60% concerned repetitive cases.

- ▶ second, to enable the Court to process the cases showing the presence of a systemic problem in the most efficient way possible (on the one hand by conceiving a pilot (or leading) judgment procedure where appropriate, and on the other hand by simplifying the treatment of repetitive cases themselves)³ and to alleviate the Court's burden by authorising it to reject cases of neither pecuniary nor human rights interest;⁴
- ▶ third, to put an emphasis on the full and adequate execution of the Court's judgments, be they earmarked as pilot decisions already by the Court or later by the Committee of Ministers because they disclose the existence of a substantial systemic problem or the lack of effective domestic remedy.

We cannot help observing that within the international community which comprises several dozens of states⁵ – and this is precisely the context of the action –, measures to be implemented at the central level, i.e. at that of an international institution, are by far the easiest and quickest to be put into practice, notwithstanding the obviously reiterated principle of subsidiarity.

This explains why the pilot judgment procedure organised by the Court on the initiative of the Committee of Ministers is a relative success. Although the first pilot judgment was given in mid-2004,⁶ i.e. shortly after the Committee of Ministers' relevant resolution, and some post-pilot judgment admissibility or striking-out decisions have already been issued by the Court,⁷ the work usually remains to be done by the respondent state in question and it is not up to the Court to check whether it has been done as this responsibility lies with the Committee of Ministers.⁸ In the context of an international community, it is still rather premature to assess how the pilot judgment procedure functions. We are allowed to say that it performs well if the respondent state co-operates. This is the limit, however, and it is sometimes utterly difficult to pass a law when parliament has been unable to do it for many years in full knowledge of the factual and legal situation. One must admit, nevertheless, that the charm of the Strasbourg

2. These items are the object of a series of the Committee of Ministers' recommendations adopted between 2000 and 2004.

3. The Committee of Ministers' resolution Res(2004)3 on judgments revealing an underlying systemic problem and resolution Res(2002)59 concerning the practice in respect of friendly settlements. New wording of Article 28 of the Convention, developed later in this contribution.

4. See the new admissibility criterion introduced by Protocol No. 14, based on the absence of a significant disadvantage suffered by the applicant.

5. There are 47 Contracting Parties to the Convention and Council of Europe's member states.

6. The *Broniowski v. Poland* judgment, (GC), application no. 31443/96, 22 June 2004.

7. See the *E.G. v. Poland* decision, application no. 50425/99, 23 September 2008; and the *Wolkenberg and Others v. Poland* decision, application no. 50003/99, 4 December 2007.

8. The *Burdov v. Russia* (no. 2) judgment, application no. 33509/04, 15 January 2009, para. 126.

Court usually helps change minds even if it were solely because no appeal lies from the ultimate expression of the European justice.

I would predict with a similar explanation that the other innovation of the 2004 “reform package”, contained, unlike the pilot judgment procedure, in an amending protocol to the Convention, which is Protocol No. 14, and copied from there and pasted in Protocol No. 14 bis, should normally be a relative success too. I am talking about the three-judge committees’ new competence to decide on the merits instead of the repetitive cases being allocated to chambers composed of seven judges.

A committee can render a judgment on the merits if the underlying question of interpretation or application of the Convention is already the subject of well-established case-law. As such a judgment, unlike judgments given by chambers, should be immediately final, the prerequisite of this procedure consisting in the existence of well-established case-law, presumable on all the questions underlying the case, is of utmost importance. The unanimous vote of the members of the committee is a certain safeguard against a premature classification of the case as fit for this procedure as is, to a lesser degree, the possibility for the Committee to invite the national judge of the respondent state to sit instead of one committee member, but in other aspects we have to wait till the procedure is applied as the amended Rules of Court do not make the procedure clearer in comparison with the text of the Convention. In principle, however, the procedure should resemble that conducted before a chamber, I suppose, despite the fact that the Explanatory Report to Protocol No. 14 describes it as “simplified and accelerated”⁹ which leaves the door open to various interpretations some of which may well be situated outside the limits of the fair trial.¹⁰

The application of the new provision of Article 28 of the Convention can follow a pilot judgment by its form or by its nature or even, though probably not very often, be based on the case-law concerning other states than the respondent one in an individual repetitive case. Of course, the reduction of the number of judges involved should normally accelerate and simplify the proceedings. We do not know, however, what will be the impact of such a change in practice, especially when we look at summary judgments which are being given by the Court in some situations even without Protocol No. 14 being applicable; in other words, we ignore whether – or to what extent – this measure will really save the Court’s precious time and resources and will not be detrimental to the examina-

9. See the Explanatory Report to Protocol No. 14, para. 69.

10. Between 2004 and 2007, the respondent state was usually deprived of its right to reply to the applicant’s argumentation developed only in his/her comments on the initial observations of the government. The Court changed this objectionable practice without, however, amending its rules to this effect.

tion of cases which deserve it. We can hope that the states having ratified Protocol No. 14 in the past will opt for its provisional application or enable Protocol No. 14 bis to be applied vis-à-vis them, but the success of this step is fully dependant on the openness of the states that provide precisely a lot of work to the Court, not on the good will of those whose “contribution” is negligible.

Unfortunately, there are only a few measures inserted in Protocol No. 14 that would be put into practice in the near or immediate future. The new admissibility criterion will not be applied and the overwhelming majority of other measures conceived in 2004, as they aim at the states and require that reforms be taken, appear certainly useful and even quite fundamental, but desperately laborious at the same time. I do believe that domestic remedies are the right way to address the issue of repetitive cases, but introducing new remedies, especially of onerous nature for the state treasury, is far from being easy, be it through enactment of legislation or through its implementation in administrative or judicial practice. The responsibility for checking up the existence and effectiveness of domestic remedies should first lie with the states, but it is carried out by the Court in its case-law on Articles 13 and 35, paragraph 1, of the Convention and further by the Committee of Ministers within the framework of its surveillance of the execution of the Court’s judgments, ordinary or pilot ones. This process is obviously time-consuming and its speed depends on the states’ responsiveness to the Court’s negative conclusions as to the existence of effective domestic remedies.

Moreover, states can be (and sometimes certainly are) tempted to wait until the Court pronounces its verdict, finding it less painful to pay just satisfaction awarded at the international level than to go through reforms of their national legal orders. It is obviously true for widespread problems of the domestic legal systems which could give rise to repetitive applications to the Court. The Court has perfectly understood what is here at stake; accordingly, the Strasbourg judges gave incentives to states regarding the financial dimension of the compensatory domestic remedy against the length of judicial proceedings.¹¹ I am going to say nothing new but to recommend proceeding quickly with pilot or leading cases and relying on the assumption that the respondent state in question will cooperate as this state just needs an adequate impulsion to act.

We must admit however that various “new” ideas on how to tackle the problem of repetitive cases are in fact not new at all, they have already been discussed at length and their disadvantages mentioned. As far as the issue of repetitive cases in short term is concerned, I would like to put forward one of them which, as probably all the others are, is a bit controversial and whose potential

11. See the Grand Chamber judgments in cases against Italy given on 29 March 2006.

impact is unknown and would largely depend on the will of the implementing authority, namely the Court itself.

I am talking about the idea which originated in the new admissibility criterion of Protocol No. 14 and was debated by the Council of Europe's reflection group under the abbreviation *de minimis non curat praetor*, but was finally expressed in such a timid way that it was hardly audible for anyone, the Court being no exception to this rule. Of course, it was done so for obvious reasons and I personally give weight to the NGOs' argument that governments should communicate with the Court by their observations on concrete cases rather than by resolutions of the Committee of Ministers. But for me, the idea is worth pursuing. The Czech Government incorporated it in some of their observations submitted recently although the Court has shown reluctance to accept the principle in cases against another country.¹² Our idea is that repetitive cases where according to the established case-law there is no hope for the applicant to be awarded monetary satisfaction for the damage sustained should be struck out with a possible reasonable award of costs and expenses and only the execution of the first leading judgment should be supervised by the Committee of Ministers as to the general (preventive) measures. I must admit, however, that views as to the scope of the *de minimis* principle differed in the reflection group and there was no clear consensus among states. That, nevertheless, should not prevent the Court from looking seriously at our proposal.

Whatever the merit of this idea, I cannot avoid concluding with the undeniable truth which is that the situation of the Court becomes more and more critical. There are more than 41,000 cases allocated to chambers. If chambers were able to resolve 4,100 cases a year (which they are unfortunately not), it would mean that ten years would be needed to deal only with the backlog. And the number of cases allocated to chambers has risen most among all the relevant items (the increase is of 22% compared to 14% as regards cases allocated to committees).¹³

I tend to think that we should rather start to discuss the future of the Convention mechanism without sticking to any *a priori* requirements, even the most fundamental ones, I dare say, even if we regard them as our greatest achievements. Should we have an effective European human rights protection system, we should probably say under which conditions such a system is possible and reset its parameters accordingly. I remember the words of one of our partners in the internal discussion preceding the ratification of Protocol No. 14. He said: "A court for 800 million people is nonsense." At that moment, I considered his

12. See judgments of 14 April 2009 *Ferreira Alves v. Portugal* (no. 4), application no. 41870/05, and *Ferreira Alves v. Portugal* (no. 5), application no. 30381/06.

13. Statistics published by the Court for the period between 1 January and 31 August 2009 compared to the same period in 2008.

words as an almost hostile expression of deep mistrust in the 2004 reform package. But, after all, is it realistic to expect such a jurisdiction, moved by the ambition to develop human rights continuously¹⁴ and open to hundreds of millions of people and countless moral entities, to function in real time? The core issue is whether we are able to safeguard effectively at least the human rights enshrined in the Convention and its protocols in their today's scope, if for this purpose we omit to speak about their incessant progress.

In this light, the conclusions of the Report of Wise Persons, the ensuing reflections conducted on their basis and even some new ideas put forward recently do not seem sufficiently promising for the future of the Court. I am afraid that time is ripe to go beyond today's horizons, but at the same time I do think that the "Memorandum of the President of the Court to the states with a view to preparing the Interlaken Conference"¹⁵ is a good starting point for discussions in the near future and for the progress on this issue as it rightly puts essential questions for the political level and offers certain tools which, after being elaborated upon, would enable the Court to remain an active player on the European human rights scene.

14. See for a recent example the *Scoppola v. Italy* (no. 2) judgment, (GC), application no. 10249/03, 17 September 2009, where the Court changed the well-established case-law on Article 7 of the Convention.

15. Dated 3 July 2009 and published on the Court's website.

SHORT-TERM REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS – REPETITIVE APPLICATIONS

Dr Frank Schürmann

Agent of the Swiss Confederation before the European Court of Human Rights

Ladies and gentlemen

Being the third of five speakers on the subject of repetitive applications, I am afraid that there is a certain risk of repetitive explanations on this matter. So, I will keep this very short.

What I can first add to what has already been said, are some words about the experiences in my country.

In fact, we fortunately do not have repetitive applications so far in Switzerland, maybe with one exception – depending also on the number of cases needed to enter the category of repetitive applications.

The cases were related to the concept of fair trial, Article 6 of the Convention, and it was the practice of the Federal Tribunal itself – so to say our Supreme Court – which was at stake.

According to this old practice, in the proceedings before the Federal Court, there was only one single exchange of observations between the parties. This meant that, as a rule, the applicants did not see what the other side had sent to the Federal Court in response to an appeal. Only in cases where such a response contained new elements, did the Federal Court send it to the applicant for *duplique*.

According to the case-law of the Court, “the concept of fair trial also implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed”.

The first judgment of the Court in this matter (concerning Switzerland) was rendered in 1997 (*Nideröst Huber*); afterwards six other cases were dealt with by

the Strasbourg Court, each time concerning slightly different constellation. In fact, it was not clear from the outset how the *Nideröst Huber* judgment should be implemented, especially in civil cases, where two private parties are on an equal footing. Obviously, there is a conflict in these cases, between the right to be heard and the right to deal with the cases in a reasonable time.

Let me add a few remarks of a more general nature, concerning repetitive applications of a more serious nature.

As Mr Fribergh has pointed out before, there are several approaches to addressing the problem: streamlining the procedure, encouraging friendly settlements and unilateral declarations, developing the practice of pilot judgments. These approaches have in common that, potentially, each case will be examined on the merits.

But is it the task of the judiciary to deal with cases where the outcome is clear from the outset, because the facts are the same and there is an established case-law of the Court? I do share the opinion that, from the point of view of the Court – and of any other judiciary – the answer should be negative.

Let me recall the Group of Wise Persons:

“The Group believes that the Court should be relieved of a large number of cases which should not “distract” it from its essential role. Manifestly inadmissible or repetitive cases, in particular, need to be considered in this connection.”

What to do with these applications?

A radical solution would be to declare them inadmissible, based on a revolutionary interpretation of Article 35, paragraph 2, litera b, of the Convention. According to this provision, the Court shall not deal with any application that “is substantially the same as a matter that has already been examined by the Court”: an interpretation of the Convention as a living instrument which has to be interpreted in the light of present conditions!

I am well aware that this is not a proper way to solve the problem. By the way, the French text of the Convention is completely clear (“... *la même qu’une requête précédemment examinée...*”) – but the rule of Article 35 gives nevertheless an indication that the Court should not have to deal with cases it has already dealt with before.

As to the very concrete proposals of Mr Fribergh, I think that these proposals go in the right direction. The solution of the problem of repetitive applications must not be found on the level of the Strasbourg Court, but on the level of the member states and of the Committee of Ministers in its function to supervise the execution. On the other hand, it seems clear: sending repetitive cases back home and leaving them under the responsibility of the Committee of Ministers, will resolve the problem of the Court, but will not resolve the problem as such, being at the source of repetitive applications. And this is of course what is of interest for potential applicants.

In other words, member states and the Committee of Ministers cannot be left alone. They need support. Maybe we have to discuss not only the reform of the Court, but also the reform of the execution mechanism. And maybe we should discuss the question whether the role of the Commissioner can be strengthened. Let me quote, in this context, another suggestion made by the Wise Persons: “The Group considers that the Commissioner should have the necessary resources to be able to play a more active role in the Convention’s control system.”

REFLECTIONS ON REPETITIVE APPLICATIONS AT THE EUROPEAN COURT OF HUMAN RIGHTS FROM THE PERSPECTIVE OF THE POLISH LEGAL SYSTEM AND PRACTICE

Dr Michał Balcerzak

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First of all I wish to thank the organisers of this Round Table for the invitation, warm hospitality and the opportunity to discuss and exchange experiences on the very crucial aspects concerning the repetitive applications at the European Court of Human Rights.

The aim of my presentation is to provide a brief overview of Polish repetitive cases which raise particular difficulties. While deliberately leaving apart the issue of the right to a fair trial in a reasonable time (discussed during part one of the Round Table), I wish to focus on two other systemic problems of the Polish legal system, which give rise to a vast majority of applications to the European Court of Human Rights: the length of pre-trial detention (Article 5, paragraph 3) and the conditions of detention (Article 3).

It is generally accepted that repetitive applications at the European Court of Human Rights reflect a dysfunction of a certain area of domestic law and/or practice. This phenomenon appeared for the first time with respect to applications concerning the length of judicial proceedings but it has now spread to more areas of concern from the viewpoint of the Convention's guarantees.

There are certain lessons to be learnt from the struggle against repetitive applications. Over the last years Polish authorities were trying to reduce the scale of situations giving rise to a violation of the Convention by introducing specially designed legislative and practical measures. However, despite these efforts – and a considerable degree of success – there is still some room for improvement.

In the *Kauczor v. Poland* judgment of 3 February 2009 the Court observed, *inter alia*, that: “it has recently delivered a considerable number of judgments against Poland in which a violation of Article 5 § 3 on account of the excessive length of detention was found. In 2007 a violation of that provision was found in thirty-two cases and in 2008, the number was thirty-three. In addition, approximately 145 applications raising an issue under Article 5 § 3 of the Convention are currently pending before the Court. Nearly ninety of these applications have already been communicated to the Polish Government. The latter number comprises some sixty applications which were communicated within the last twelve months with a specific question as to the existence of a structural problem related to the excessive length of pre-trial detention.” (paragraph 56 of the judgment)

The Court further noted: “It is true that the respondent State has already taken certain steps to remedy the structural problems related to pre-trial detention (...). The Court welcomes these developments and considers that they may contribute to reducing the excessive use of detention as a preventive measure. However, as already noted by the Committee of Ministers (...), in view of the extent of the systemic problem at issue, consistent and long-term efforts, such as adoption of further measures, must continue in order to achieve compliance with Article 5 § 3 of the Convention.” (paragraph 62 of the judgment)

It is true that repetitive cases concerning pre-trial detention keep coming to the Court. However, as the Court noted itself, Poland does not remain idle but undertakes certain steps to remedy this situation. This list includes measures designed to streamline criminal proceedings and strengthen the powers of the authorities to discipline the participants. A recently introduced Article 285, paragraph (a) of the Code of Criminal Procedure empowers a trial court to impose a fine on a defence counsel or a representative of a party who has failed to obey the summons of the authority conducting the proceedings or who, without the approval of the competent authority, has left the venue of the proceedings before they were completed.

It is tremendously important that the amendment to the Polish Law of 17 June 2004 on complaints about a breach of the right to a trial within reasonable time, which entered into force on 1 May 2009, instituted the possibility of lodging complaints about unreasonable length of preliminary proceedings also in the framework of preparatory proceedings, i.e. before an act of indictment was submitted to the criminal court.

On 17 May 2007 the Council of Ministers adopted the “Government Action Plan for the execution of judgments of the European Court of Human Rights in respect of Poland”. The Plan obliges the minister of justice to disseminate among judges and prosecutors, on a regular basis, information on standards concerning

the pre-trial detention stemming from the Convention and the case-law of the Court.

Although some further amendments to criminal procedure regulations are under consideration, it should be noted that the issue of the length of pre-trial detention is a problem of practice rather than a problem of law. It would be unrealistic to expect that the cases concerning the length of pre-trial detention will simply stop being filed within a year or two. As we all know, this problem is systemic and as such requires a holistic approach. In a way, it is a disease which is manageable but hardly curable.

I could speak long about the practical aspects concerning the application of pre-trial detention or the “institutional culture” which to a large extent contributes to the systemic situation. However, instead of going into details, I wish to say the following: Polish prosecutors and judges are very well aware of the Strasbourg standards concerning pre-trial detention. They apply domestic law with full knowledge of what pre-trial detention is and how cautiously should it be applied. To put it briefly, this is not a problem caused only by those who apply law. This is a complex phenomenon caused by a dozen factors in a country where institutional culture cannot be changed overnight.

I believe the situation will gradually improve. The number of cases concerning pre-trial detention will finally drop, however, as I said, let us not pretend that these cases will disappear from the Court’s docket over the next five or seven years. The applicants – well aware of their right to an individual application – will with no doubt address the Court with new complaints as many of them believe the Court may order their release. It is a separate problem: how to improve the applicants’ awareness of what the Court can and cannot do?

Having heard the presentation of Mr Fribergh this morning, I cannot but share his opinion that the European Court of Human Rights was definitely not designed to handle a large number of repetitive cases such as those concerning pre-trial detention. On the other hand, I do not consider it possible for the Court to simply “transfer them back where they belong”, i.e. to the domestic system. It appears that the idea of transferring these cases directly to the Committee of Ministers would also encounter legal and practical difficulties. Perhaps the best solution would be to address this problem in the context of the Interlaken Conference with view of setting up a special section of the Court dealing with this type of cases. The special section would need to be composed of additional judges from the states where systemic situations emerged. Apart from delivering judgments in these cases, a special section of the Court might be involved in assisting the state – along the Committee of Ministers and the Council of Europe Commissioner for Human Rights – in order to achieve a long-term solution of the systemic situation.

Finally, a short comment concerning the other type of cases which may give rise to concern, and notably the complaints about the conditions of detention. Here we do not face a pattern of violations established by the Court in a series of judgments, however, it should be noted that the situation is very serious. Many applicants indicate that the space of their cells does not meet the requirement of 3 square meters per person as provided in specific regulations. Some applicants also raise the issue of sanitary conditions.

As with other examples of systemic cases, also this one cannot be remedied over a short period of time. Various measures aimed at reducing the overpopulation of prisons and detention centres have been implemented. There are also new developments in domestic jurisprudence, and in particular a new interpretation and application of the Civil Code provisions on availability of damages for a breach of personal rights, which was set by the 2007 Supreme Court's judgment. It appears that practical steps in the area of penitentiary system, as well as an effective domestic remedy allowing the applicants to raise their claims before civil courts, should allow for some improvement in the coming years.

But again – these cases will not simply stop coming to Strasbourg. And I do not share the view that the very existence of these applications is evidence that Poland continuously fails to fulfil their obligations under the Convention. I believe that the situation is somewhat more complicated. On the one hand, the rules on international state responsibility tell us that once a violation of international norm was established, it is a duty of the respondent state to ensure that they would not happen in the future. The Convention system, and in particular the supervision of the execution of the Court's judgment's, takes that into account. On the other hand, this rule applied rigorously to the Convention system would result in a conclusion that any "next" violation of a similar kind makes the state concerned a persistent violator.

To sum up, repetitive cases show that the right of individual application – considered as a cornerstone of the Convention system – can virtually be exercised by everyone, even if a given case hardly provides a new problem. There is no doubt that the right of individual application and a direct access to the Court is a great achievement which must not be undermined. However, perhaps time has come for a more realistic approach to the role of the Court as a guardian of the rights and freedoms enshrined in the Convention. In particular, where established and clear case-law exists, should it really be the Court which delivers dozens of judgments with exactly the same line of simplistic reasoning, the same outcome and very similar sums awarded as just satisfaction? Is it a true role for a regional international court which is a central institution in the most successful human rights system in the world?

In other words, while combating the causes of repetitive applications and applying adequate tools for addressing systemic problems at home, the State

Parties to the Convention should also be interested in a more far-reaching debate on re-thinking and/or re-defining the crucial role of the Court to preserve its true value. One of the solution might be to support the set-up of a separate body (“judicial committee”) within the Court. In any event, managing repetitive applications should be one of the key points in the agenda of actions aiming at the short- and long-term reform of the Court.

SHORT-TERM REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS – REPETITIVE APPLICATIONS

Ms Nuala Mole

Director, The AIRE Centre (Advice on Individual Rights in Europe)

May I first of all express my thanks to the Slovenian Government and to the Council of Europe for the invitation to be here today and to participate in this interesting and important meeting on the reform of the European Court of Human Rights. The reform process is one in which I and many of my NGO colleagues have been involved ever since the Potsdam Colloquy back in 1997.

The main focus of our discussions here in Bled has been on the excessive caseload overburdening of the Court. As a practitioner who has been involved in over 90 cases against 14 contracting parties in the past 15 years, I feel somewhat hypocritical standing here discussing solutions to the size of the court's caseload when I am clearly a part of the problem!

More seriously, we have also talked about repetitive cases – that is cases which are clones of other cases that have already been decided by the Court and in which violations of the Convention have already been found. It is perhaps relevant to note that of the 27 cases before the European Court of Human Rights in which I am currently involved, only three do not involve the repetition of matters which the Court has already found violated the Convention (or which have been the subject of friendly settlements)

It is a particular pleasure to be working here this week with the government agents who often have the unenviable task of defending the indefensible, or of persuading the offending government departments back home that they acted in violation of the Convention or of trying to find the appropriate means to ensure that their governments fully comply with the judgements of the Court. None of these are easy tasks.

We have talked a lot in these two days about various problems difficulties and possible solutions. But we have given almost no thought to the central question which underlies all the other discussion.

Why are we here?

We are here because, when they became parties to the European Convention on Human Rights, each and every state represented here today subscribed to the sentiments contained in the preamble to the Convention.

We are here because each and every state solemnly undertook as a binding international obligation that they would: “secure to everyone within their jurisdiction the rights and freedoms set out in Section I of the Convention”.

We are here because in Article 13 each and every state also solemnly undertook to provide an effective remedy at national level in the event of there being a failure to meet the obligations undertaken in Article 1.

We are here because Article 19 stated that “to ensure the observance of the engagements undertaken” a European Court would be set up.

We are here to remind ourselves that the sole teleological purpose of the existence of the European Court of Human Rights is thus: to ensure the observance of the obligations undertaken by the high contracting parties when they became parties to the European Convention on Human Rights. It was to meet that same teleological purpose that the right of individual petition to the Court was introduced in what is now Article 34.

It is important that in discussing the ways in which the Court can be reformed we keep in the very front of our minds the hundreds of violations of human rights which continue to occur on a daily basis across the 47 member states of the council of Europe.

The eminent Dutch expert jurist Leo Zwaak noted that the volume of cases now overburdening the European Court of Human Rights does not primarily reflect the failure of the Court to deal with its caseload effectively. It directly reflects the failure of the contracting states to meet their obligations under the European Convention on Human Rights: “The ECHR is not a victim of its own success, but a victim of the general reluctance of the member states to take the ECHR seriously.”¹

Some of the complaints will be inadmissible for technical reasons such as being out of time, but the reason why these cases keep coming to the Court is that

1. Zwaak L, “Overview of the European experience in Giving effect to the protections in European Human rights instruments”, Working session on the implementation of international human rights instruments, available at: www.internationaljusticeproject.org/pdfs/Zwaak-speech.pdf

the people whose rights are at issue can see that the states are not respecting their rights. This includes the cases which are inadmissible under the present criteria.

When we are discussing the problems which the Court currently undergoes, the challenges it faces and the solutions being considered this single teleological purpose of the reform process has to be kept in mind: the sole purpose of – and justification for – the existence of the European Court of Human rights is to ensure the observance of the obligations undertaken by the contracting states.

Every proposal that we consider here this week and that we go on to consider in the weeks and months to come – especially at Interlaken in February – must be measured and assessed for its contribution to that purpose. The question that must be asked is – will the adoption of any particular proposal “ensure the observance of the obligations undertaken by the states”?

I have considerable sympathy with the problems of the Council of Europe, of the officials and judges and Registry lawyers who strive to administer the effective operation of the Court. I have considerable sympathy for the Ministers’ Deputies who are likewise engaged in this process. But let us not forget that the governments who are discussing how to solve the Court’s problems here today are the very same governments who are found on a regular basis to violate the Convention. As well as addressing the failings of the Court they need to put their own houses in order.

I am afraid that I have far more sympathy for all those injured individuals who are the victims of the failure of individual states to comply with their solemn obligations under Articles 1 and 13.

Of course, the improved efficiency of the Court should contribute to the improved protection of human rights – but it is important that this is seen as the goal and the only goal.

Occasionally violations occur as a consequence of a failure to understand the nature of the obligations engaged but more often the victims of violations of the Convention are victims of the absence of a political will on the part of states to keep their promises. Tolerance is a much lauded virtue and one to which – generally – I and everyone in this room subscribes. But we cannot go on being tolerant of those states which continue – repeatedly – to violate the Convention, to disregard the rulings of the Court and to feel that they can do with impunity. This is a state of affairs which we must not tolerate. I have very great concerns about the proposals to return cases from the Strasbourg Court to those very national courts and national institutions which have already manifestly failed to uphold the “protected” rights. We would not send a child back to the parent who had abused him and who continued to abuse other children.

Eric Fribergh’s useful paper talked about having greater recourse to the friendly settlement procedure and saw as one advantage of this that it avoided offending states being named and shamed. I am not sure that this is an advan-

tage, particularly when the violation occurred, *inter alia*, because the offending national authorities did not realise they had done anything wrong. Being condemned by the Strasbourg Court is often an important factor in the political process involved in remedying the violations which have occurred. This is particularly the case for those states which are pursuing candidacy for the EU.

I have been engaged in several of the compatibility studies which were undertaken prior to new member states joining the Convention system. Those studies were restricted to looking at the laws which were in place and not at the way in which those laws were implemented in practice. As the Court recently noted in the case of *Viasu v. Romania* problems cannot be resolved by just adopting new laws. Problems arise from bad practice – but the preferred solution seems to be to adopt new laws not to change the practice.

Perhaps this principle holds a lesson for the Court itself which must accept some of the responsibility for the volume of cases that come before it.

The Court frequently declines to follow its own jurisprudence (see *Hiro Bilani v. Spain*) and fails to rule on the complaint which is at the heart of a case brought before it preferring to sideline that issue thereby rendering it inevitable that it will keep coming back before the Court. Historically, the Court has been insufficiently strict with governments about their obligations under Article 13. If the remedy on which the government rely could, in theory, be effective, but in practice is not, then the government should be told more firmly that this is not an effective remedy. The Court has recently adopted the practice of discussing applications with governments without officially “communicating” them and then reaching a decision without hearing the applicant’s response to the governments’ submissions. So the clone cases continue to be brought. On the other hand the adoption of the pilot judgment procedure by the Court did not require any change to the law it just required a change to the Court’s practice.

The role of the Committee of Ministers under Article 46(2) can also cause problems. The Committee of Ministers will accept that the state has adopted adequate general measures to address the problem even though new cases raising the same issue continue to be being brought to the Court. I personally have at least 7 cases currently before the Court at present which are examples of this. If states are found to be operating prisons which systemically violate Article 3 (as the Court has found in several cases) then the continued operation of those prisons in those conditions must cease. As the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has often pointed out improving prisons conditions is often a matter of change of attitude rather than enormous expenditure. Where expenditure is required this is not simply a question of inadequate resources. It is a question of the lack of political will to allocate resources to address these very serious violations.

To conclude – I am one of the greatest supporters and admirers of the work of the European Court of Human Rights. I see it as the champion of the victims of human rights violations by states. I know that it must be reformed if it is to continue to carry out this important function – but may I plead with everyone here to day involved in this reform process not to lose sight of the Court’s sole reason for existing – which is to ensure the observance of the engagements undertaken by the contracting parties to promote and protect human rights in Europe.

Thank you very much for your patience.

THE CONCEPT OF CLASS ACTION

Mr Alexandre David

Magistrate, Ministry of Justice, France

Let me begin by saying that it is an honour and a pleasure for me to have been invited to participate in this Round Table. The debates of the past two days have been very rewarding, and I look forward to the publication of the contributions of the preceding speakers.

I also wish to point out that I am speaking here on my own behalf and not on behalf of the French Government.

“Class action” or “group action” can be defined as an “action brought by a representative on behalf of an entire class of people with identical or similar rights which results in the imposition of a decision having the authority of *res judicata* in respect of the members of such class”.¹

“Class action” is an old Anglo-Saxon mechanism, which was rooted in Rule 23 of the U.S. Federal Rules of Civil Procedure in 1938 and later amended, first in 1966 to give further impetus to such action, and then in 2006 to prevent certain abuses attributed to it.

In French, the term “group action” (*action de groupe*) is preferable to “class action”, which refers to a specific procedure in the United States, whereas other countries have introduced in their legal systems collective action procedures that differ from the American “class action”.

My contribution will focus on two main points:

- ▶ the challenges of initiating group action,
- ▶ the nature and scope of group action.

1. Louis Boré, *La défense des intérêts collectifs par les associations devant les juridictions administratives et judiciaires*, LGDJ, 1997, no. 353.

The aims of group action: improving access to justice and streamlining group litigation procedures

The establishment of group action is a matter of recurring and often passionate debate in European Union member states. Lately, such discussions restarted as a result of the European Commission's proposals to initiate collective action in favour of consumers and victims of competition law infringements.

Group action can be approached from two angles:

- ▶ in terms of social impact – group action being a way to improve citizens' access to law and justice;
- ▶ in terms of judiciary procedure and organisation, since group action can be conceived as a factor in streamlining litigation.

The social aspect of group action: implementing the rights of “victims”

Essentially, the debates are focused on the impact of group actions on the rights of both those who could be represented in such actions (“victims”) and potential defendants.

In general, group actions stem from the desire to reduce the disparity – especially in numerous consumer disputes – between the small pecuniary loss suffered by each victim personally and the overall profit economic actors can make from unlawful conduct with impunity.

Such action necessarily results in allowing those concerned the recognition of the rights they might otherwise neglect for lack of pursuing an individual remedy, or would not be granted because the wrongdoer would not spontaneously take the general consequences of individual judicial decisions.

Legal actions, which may lead to convictions with costly damages and extensive media coverage, can contribute to the regulation of economic activity. Complementing the actions of public authorities, judicial proceedings started on a private initiative and aimed at defending individual rights would penalise acts that are against the law and prevent their repetition.

Group action is thus likely to prompt new litigation strategies by unions or associations with regard to matters currently not necessarily characteristic of what is known as “serial” litigation.

Critics of group action, mostly representatives of companies, put forward the costs of such litigation for the defendants and the disproportion between the costs of proceedings and the amounts of compensation actually awarded to victims. They also claim that group action is not sufficiently respectful of the rights of defendants, who are unable to identify their opponents. In brief, according to

its critics, group action is allegedly an ineffective, expensive and procedurally unacceptable remedy.

The effects of group action on the rights of stakeholders cannot be examined without an assessment of its impact on the administration of justice.

The organisational aspect of group action: streamlining the handling of mass claims

Group action has two procedural characteristics:

- ▶ legal action is taken on behalf of a large number of people in a similar legal situation;
- ▶ the people on whose behalf the group action is carried out are not parties to the trial and are not necessarily identified.

Group action provides a procedural alternative to “serial” litigation, ensuring both increased legal certainty (better apprehension of the question of principle without the risk of omitting specific situations) and material economy (avoiding concrete handling of multiple identical requests that require the same response).

From this perspective, the objective of group action is to attain efficiency that in its essence is aimed at improving the service provided to litigants and, at the same time, reducing the procedural costs for the community, either for the courts or the administrations that appear before them.

Nature and scope of group action

The typical feature of group action – ruling on the rights of persons not represented at trial – requires adaptations of the traditional civil procedure rules.

There are several group action models, which differ in the specific choices made either in favour of the effectiveness of the procedure or in favour of the respect of each individual’s right to sue.

Purpose of the action

The action aims at recognising individual rights in favour of the members of a group.

A group action can address the subjective rights of individuals represented and bring about the fixing of compensation in favour of the group. This is particularly the case for the “class action” in the U.S., and the *recours collectif* in Quebec.

However, it would be conceivable to limit the scope of group action to the objective rights of group members. In such a case, the proceedings would result in decisions of principle. The judge could either issue a statement of responsibility, or cancel an illegal clause in a contract signed by many persons. He/She would not decide on the truth, or the quantum of loss suffered by the “victims”.

The latter could be compensated directly by the wrongdoer or, alternatively, act before the courts of customary law.

Group representation

Several methods are possible.

- ▶ The group is represented by a person authorised by law, such as a consumer association. In this case, control of the right of the qualified entity to bring action is limited.
- ▶ A lawyer authorised to act on behalf of several persons may file a class action lawsuit in his capacity as the representative of “victims”. In this case, the judge is expected to verify the qualities of the person designated to represent the group of victims. In a U.S. “class action”, the representative must be able to prove that he himself has brought an individual action similar to those which would be brought by other members if they referred the matter to the court, and that his action is mainly based on pleas of fact and law identical to those of the others that he wishes to represent. He must also prove that he is able to equitably and effectively protect the interests of the group, which means, in practice, that he can bear the cost of the procedure, and he must also prove that his lawyer is specialised in this type of action.

Defining the group and informing group members

Defining the group

The group is defined by the court. When defining the group, one may take into account the sharing of similar interests, i.e. consumers who have suffered damage as a result of actions by an economic operator, or have been faced with the same legal situations, such as citizens who have been denied a certain right.

There are two possible mechanisms for forming a group: opting-in and opting-out.

In the opt-in mechanism, the group comprises only those who expressed their willingness to take part in an action.

In the opt-out mechanism, the group comprises all those who may be potentially affected by action, except those who have expressed a desire to be excluded.

The method of defining the group will certainly have an impact on the effectiveness of action, because the group will be larger in an opt-out system.

Informing group members

Arrangements for informing the members of a group depend largely on the mechanism of defining the group (opt-in or opt-out).

The members of the group may be informed by a representative of the group before initiating action.

Such a mechanism provides for the protection of an individual's right to sue by ensuring that action will be initiated only after the person concerned has been duly informed. In this context, it is imperative that the representative of the group should notify every member of the group accordingly. Thus, he will be deemed to be acting with the tacit consent of the person he represents.

In an opt-out system, the representative of the group informs the members of the group about group action after this has been deemed admissible. The members may either opt out of the group or intervene in the proceedings and accept the final judgement. The content of the notification by the representative is verified by the judge.

Notification may be made in different ways. An individual notification may prevail when group members are easily identifiable, but the prevailing principle is that the notification should be adapted as far as possible to the circumstances. Therefore, if the judge considers it necessary, given the cost of individual notification or the difficulty of identifying victims, he may instruct the representative to use the press, radio or audiovisual media, and even to post the notification in the defendant's shops or print it on the latter's products.

Authority of res judicata of the decision

The method of defining the group (opt-in/opt-out) largely depends on the fate of individual actions introduced concurrently with the group action and the scope of the authority of the *res judicata* of the decision on the latter.

- ▶ In the opt-in mechanism, the decision has the authority of *res judicata* in respect of those group members who, expressing their willingness to join the action, agreed to be bound by the decision to intervene.
- ▶ In the proceedings of "class action" in the U.S., the decision has the authority of *res judicata* in respect of the persons belonging to the group considered, even though they have not expressly indicated their willingness to be part of this group, and it is unclear whether they were informed of the action taken on their behalf. Such a mechanism may seem to infringe on the individual's liberty to sue and would probably be declared unconstitutional in France.

However, it could be argued that such an infringement may be limited if the judge determines the way of notification, and there are many cases where victims would not appear individually.

A compromise solution is conceivable, i.e. to give the members of the group the right to invoke the decision on their behalf. Thus, a decision of rejection would not be enforceable against a person who could better argue his claim in court than the representative of the group and obtain satisfaction in cases where group action has failed.

Conclusion

Group action has two main objectives: to be an alternative to “serial” litigation which is submitted to the court, and to create the possibility of new rights and actions.

The effectiveness of group action as it exists in the United States and Quebec has been demonstrated. It facilitates access to justice for many victims in the event of risk, because they share the costs of the proceedings and can be effectively represented in an action under the control of a judge. Breaking with the individualistic approach to action, the action is designed to adapt to the collective dimension of the damage typical of a society of production and mass consumption. It also contributes to the democratisation of the judicial system by making it more accessible, particularly to isolated and impoverished litigants who, without the ability to be part of a group, would renounce the possibility of enforcing their rights.

These merits explain the reasons which make the procedure of group action so popular, as well as the numerous projects intended to introduce this procedure into the legal systems of various states and at the EU level.

However, it should be noted that the effectiveness of a “class action” suit in the United States is due largely to a combination of the characteristic features of the judicial and legal systems of the country, such as the procedure of “discovery”, the mechanism of punitive damages and the method of remuneration of lawyers. This procedure is also based on the active role of the judge, who has wide powers, including that of determining the admissibility of action after having evaluated whether it was appropriate for the litigation in question. It is not at all clear whether group action would have the same success if transferred to other legal systems.

REFLECTIONS ON THE INTRODUCTION OF CLASS ACTIONS

Prof. Dr Andrea Gattini

University of Padova

1. The pros and cons of class actions

1.A *The pros:*

- ▶ enhancement of the efficiency of the process in terms of costs and time;
- ▶ possibility to bring to the fore issues of general interest, for which individual plaintiffs do not have a sufficient incentive to sue;
- ▶ avoidance of contradictory judgments;
- ▶ equitable share of damages compensation in “limited fund” cases.

1.B *The (possible) cons:*

- ▶ risk of forum shopping;
- ▶ risk of “legal blackmail” (i.e. forcing the defendant to agree to a pre-trial settlement for fear of costs and bad publicity, instead of defending himself/herself in the merits);
- ▶ risk of attorney’s abuses (exorbitant contingency fees, so called “coupon settlements”);
- ▶ problem of financing the action: up-front costs for opt-in actions, unacceptability of opt-out actions in a “loser pays” jurisdiction;
- ▶ risk of unduly restricting the individual’s right of action, in cases of an opt-out class action, or vice versa of frustrating the advantage of efficiency, in cases of an opt-in class action.

2. Pros and cons applied to the European Court of Human Rights procedure

Preliminary observation that a collective/class action can only be a temporary *Ersatz* to the preferred solution of the state abiding by its obligations under Article 46, i.e. implementing the general and specific measures indicated by the European Court of Human Rights and supervised by the Committee of Ministers. Yet room for discussion whether some mechanisms of collective redress could offer the double advantage of helping the European Court of Human Rights to solve the problem of its case overload and of improving its overall protection of human rights.

2.A. *The pros*

Whereas the first two arguments could prove true also for the European Court of Human Rights, the third is (or should be) irrelevant for the Court, being no such risk of an inconsistent jurisprudence. As for the fourth argument, it is more difficult to evaluate, keeping in mind that the scope of the Convention's judicial protection is to ensure future compliance by states more than according compensation for past wrongs. The answer to the fourth point is ultimately dependant on the overall development of the "equitable satisfaction" policy (see 3.A).

2.B. *The cons*

Whereas none of the first four risks or undesirable consequences detailed before are relevant for the European Court of Human Rights, the last argument poses a major problem, the individual right of action being the core right of the Convention's judicial protection (Articles 1,6 and 34). That was the main reason why the Reflection Group on the Reinforcement of the Human Rights Protection mechanism had discarded the introduction of class actions in 2001 (Activity Report of 15 June 2001, CDDH-GDR (2001)10, Annex II, paragraph 37). See, however, the *Lithgow and Others v. United Kingdom* judgment (8 June 1986, European Court of Human Rights, Series A, Volume 102), for the argument that the existence of a collective system for settlement of compensation disputes (in the case an Arbitration Tribunal the access to which was reserved to the Stockholders' Representative) is not per se contrary to Article 6 of the Convention, provided the interests of each individual are safeguarded, albeit indirectly (i.e. the limitations must not "restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right of access is impaired", paragraph 194).

Some more possible undesirable consequences/objections:

- ▶ increase of the volume of litigation;

- ▶ undue emphasis on the compensatory aspect rather than on general measures to be taken;
- ▶ unsuitability of the mechanism for truly repetitive cases.

The risks are there, but it is up to the European Court of Human Rights to see to it that the first two risks are avoided or checked in balance. As for the third objection, there is the preliminary need to clarify the kind of situations suitable for class actions. Whereas the utility of a comparison with European Commission's current proposals on consumer protection, anti-trust, environmental issues, might be doubtful, a comparison with the current pilot judgment procedure might be more promising. Not unsurprisingly in its first pilot judgment *Broniowski v. Poland* (22 June 2004, European Court of Human Rights (GC) 2004-V, 1) the European Court of Human Rights spoke of the potential applicants as of an "identifiable class of citizens" (paragraph 189). Again unsurprisingly, the uncertainty in the identification of a case as suitable for a pilot judgment procedure is the main cause of criticism of the procedure as such (see Dissenting Opinion of Judge Zagrebelski in *Hutten-Czapska v. Poland*, European Court of Human Rights (GC) 19 June 2006). In the Convention system the class action solution seems most suitable for some of the actual or potential repetitive cases types, where the requirements of commonality and predominance are clearly recognisable. Other such cases would be expropriation cases, cases dealing with conditions of detention, casualties caused by war crimes, group discrimination, etc. A class identification would be more difficult in cases where individual issues predominate (arguably security forces abuses cases), and even more so in cases of "genuine" systemic problems (e.g. excessive length of civil/criminal process). For this latter type of cases the limited contribution of class actions could only be, apart from some beneficial effect of process economy, an additional pressure on states to address (and solve) the underlying systemic problem.

3. Possible scenarios

3.A Without Convention reform

Maximum obtainable result: some sort of opt-in class action.

- ▶ Class certification: the European Court of Human Rights could actively encourage the presentation of applications by "non-governmental organizations or group of individuals" under Article 34 of the Convention, as a preferable alternative to the already existing possibility of joinder or simultaneous examination of applications. For example, an amendment of Rule 41 could make clear that this kind of cases would enjoy the priority track. An amendment of Rule 36 could clarify the conditions under which the Court would

recognise an organisation as representative of the applicants (as distinct from “indirect victim”) for the purpose of class certification. In analogy with the Collective Claims procedure of the Protocol to the Social Charter, the Rule could refer to a list of organisations whose representativeness is granted on general terms or set the guidelines for a recognition on a case by case basis, based on the practice followed in applying Rule 44.2 (a) on third-party intervention. It would be difficult, however, to dispose of the requirement of Article 35, paragraph 1, of the previous exhaustion of local remedies for any individual member of the class.

- ▶ Interim measures: through a class action-like procedure the Court could reinforce its practice of interim measures “in the interest of the parties” (Rule 39), e.g. according injunctive relief for the protection of collective interests (analogously to EC Directive 98/27 on injunctions for the protection of consumers’ interests, EC Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage).
- ▶ Friendly settlements: pending the entry into force of Protocol 14, Article 39 in combination with Article 46 still requires a judgment by the European Court of Human Rights in order to permit the Committee of Ministers to supervise its implementation. Yet, the Court could further develop its guidelines (possibly in Rule 62) on the conditions upon which a friendly settlement would be endorsed under Article 37, paragraph 1, letter (b) or (c), as to make clear that it would favour a friendly settlement reached with a class of plaintiffs rather than individual friendly settlements. Appropriate changes in the Rules could also suffice to ensure that the Court is duly informed of the reasons of the opposition of a congruous number of individuals before it takes its decision to strike out the case of the list.
- ▶ Awards for just satisfaction: just satisfaction being an equitable remedy, the European Court of Human Rights could encourage the presentation of class actions by developing a jurisprudence under Article 41 (or possibly an amendment of Rule 75) which would envisage for this kind of applications some aspects of exemplary damages against the state party which is unwilling (not incapable) to bring to an end the situation giving rise to the claims giving rise to the claims, be it an underlying systemic problem or a case of actual violations. The underlying rationale for this kind of “positive” discrimination could be found in the public interest of a collective action, and the exemplary damages could be earmarked for activities related to the organisations/associations goals. The question of exemplary damages had been discussed in the framework of the reform of Article 46 in Protocol No. 14 (financial sanctions for the high contracting party refusing to abide by a final judgment) and eventually discarded (Explanatory Report to Protocol No. 14, paragraph 95), but the normative ratio would here be obviously different.

- ▶ Enforcement: although, strictly speaking, the aspect of enforcement is not peculiar to the introduction of class actions, another incentive for the presentation of class action-like applications could be the conscious development in class action judgments of the still somehow erratic jurisprudence on general measures. Option 1: traditional pattern. Declaratory judgment and Committee of Ministers supervision, and eventually Article 41 award in a second phase, especially in the case of inaction of the State; option 2: maximisation of deterrent effect. Declaratory judgment plus Article 41 partial award with exemplary damages (being the actual inaptness of the state's internal system to provide for a complete reparation in *re ipsa*).

3.B With Convention reform

Feasibility of opt-out class actions. Feasibility of the entry into force of a Protocol for each agreeing high contracting party.

- ▶ Clear legal basis for class certification, possibly based on a double system (state lists of eligible associations, supplemented by Committee of Ministers and/or the European Court of Human Rights' own list/s). Irrelevance of the local remedies rule for the class members. Clear legal basis for injunctive reliefs.
- ▶ Friendly settlement with a more proactive role played by the Court and opposable in principle to all class members, with some device for still permitting (but possibly discouraging) individual subsequent actions.
- ▶ Judgments: to the already mentioned options 1 and 2, a new Protocol could add a new option 3: inter-judicial co-operation. Declaratory judgment and referral to the domestic courts for the (global or individual) quantification of damages. This solution would have the advantage of anchoring in the Convention the obligation for domestic judges of recognising direct effect to a previous Court judgment (at least for this special case of class actions' judgments), besides the traditional mechanism of the Committee of Ministers supervision of the State's general and/or specific measures. Though, it could have the side-effects of permitting loopholes for some states, development of different domestic jurisprudence, inefficiencies, etc. with the ensuing boomerang effect of new claims for the violation of Articles 6 and 13.

COLLECTIVE COMPLAINTS – THE EXPERIENCE UNDER THE EUROPEAN SOCIAL CHARTER

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Introduction

Iwould like to begin by expressing thanks for the invitation to participate in today's Round Table, which is part of the preparations for the Interlaken Conference on the future of the European Court of Human Rights and is dedicated to a debate on whether the methods of the Court's functioning should also be complemented with a collective action. My task is to outline for you the mechanism of collective complaints, which is one of the two supervisory procedures provided for under the European Social Charter (ESC). This presentation should facilitate a reflection on whether the collective complaints procedure may be a source of inspiration to complement the Court's work methods.

I must admit that the purpose of today's debate on the collective complaints procedure differs from that of similar debates in which I have had the opportunity to participate so far. In recent years, the world has seen a number of international expert meetings on human rights, with particular focus on the European Social Charter. This is not only due to the fact that for the time being, the Charter is a treaty supplementing the European Convention on Human Rights, and as such the only international legal instrument in Europe guaranteeing, at the general level, a relatively wide set of social rights, thus covering all important areas of our daily life. The Charter serves as an example of an international legal instrument, which, through the collective complaints procedure, contributes significantly to the effective enforcement of social rights. This would imply

enforcement in the broadest sense. Practice shows that social rights may also be the subject of judicial or quasi-judicial protection¹ and that it is no longer acceptable to insist on the once prevalent doctrinal and political positions on economic and social rights as being no more than programme principles, and on their non-enforceability. Such views provided the basis for the adoption of two different instruments on human rights in Europe and, as a result of such dichotomy, the role and importance of social and economic rights for the all-round development of every society was sometimes underrated. It is due to such views that the debate on human rights is still initiated by emphasising that all human rights are universal, indivisible and interdependent, which means that all must be dealt with on an equal footing and be afforded the same protection.

Today's outline of the collective complaints procedure is therefore not intended to prove that social rights may also be guaranteed judicial protection, or at least quasi-judicial protection, but to examine whether some solutions used in this procedure might also be used in proceedings before the Court.

Collective Complaints Procedure

The collective complaints procedure is one of the two supervisory procedures under the ESC carried out by the European Committee of Social Rights (ECSR). It was introduced by the 1995 Additional Protocol providing for a system of collective complaints and is unique in international law. It was introduced in order to complete the traditional reports procedure and reinforce the control mechanism and/or to improve the implementation of rights provided for by the Charter.

Collective complaints may be brought against those Parties to the 1961 Charter, which have ratified the 1995 Additional Protocol or against states that have ratified the revised Charter and made the declaration provided for in Article D, indicating that they accept the collective complaints procedure.

Who is entitled to lodge a collective complaint

Collective complaints must be “collective” in terms of both substance and procedure. They may not be lodged by individuals. The collective complaints

1. We sometimes forget that obligations under the treaties rest primarily on state parties and on their legislative and other bodies. The enforceability of such treaties is only one of the modalities of international law application – by the judge. It depends on whether the domestic legal system applies the principle of monism or dualism. In the system of monism, the enforceability also goes beyond the direct effect of international norms, as a judge may only apply treaties by e.g. interpreting domestic law in the light of its conformity with international norms, or exercise control over the “international legality” of domestic law. Our debate is certainly focused on the second aspect of enforceability – enforceability at the international level.

procedure entails the examination of the situation of concern to more people in a respective country. A collective complaint is submitted against a state and is related to the practice in that state. The possible information provided by the complainant, which is related to the position of individuals, is regarded as an illustration only.

One of the objectives of the revitalisation process of the Charter was to strengthen the participation of the management, labour and non-governmental organisations in the supervisory mechanism and in this way bring the Charter nearer to people. In conformity with this objective, collective complaints against any state that has accepted the procedure may be lodged by:

- ▶ international organisations of employers and trade unions participating in the work of the Governmental Committee; and
- ▶ international NGOs, which have a consultative status with the Council of Europe and are included in a special list drawn up by the Governmental Committee.

In addition, the following organisations may lodge complaints against the states in which they operate:

- ▶ representative² national organisations of employers and trade unions within the jurisdiction of the state concerned; and
- ▶ national NGOs within the jurisdiction of the state concerned if they have competence in matters governed by the Charter and if the state against which they wish to act had made an optional declaration recognising that NGOs are entitled to lodge collective complaints.³

We can see that the 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints does not establish any action or complaint which can be brought by anybody (*actio popularis*). The collective element of the complaint functions as a personal restriction in its admissibility. It is also important to underline that there is no need for any personal or substantive involvement of the complainant in the object of the complaint.⁴

2. It is up to the European Committee of Social Rights to decide whether an organisation is representative or not. There is no list of representative organisations for each party. The national concept of representativeness is not taken into consideration. In practice, the number of members and the role of the organisation in national negotiations are taken into consideration.

3. To date, only Finland has made such an optional declaration.

4. Nevertheless, some believe that collective complaints could represent a limited *actio popularis* (beschränkte Popularklage) due to the separation of the right of complaint from the personal involvement of the complainant. See Rolf Birk, "The Collective Complaint: A New Procedure in the European Social Charter", *Labour Law and Industrial Relations at the Turn of the Century*, Kluwer 1998, p.263.

Procedure

The procedure is carried out in two stages:

1. the procedure before the ECSR; and
2. a follow-up to the decision of the ECSR.

Procedure before the ECSR

When a complaint is filed, the ECSR first examines whether it is admissible. According to the 1995 Additional Protocol, three admissibility conditions must be met:

1. the complaint must be lodged in writing and, in principle, in one of the official languages of the Council of Europe;
2. the complaint must relate to a provision of the Charter accepted by the Party concerned;
3. it must indicate in what respect the Party has not ensured the satisfactory application of the Charter.

Before the decision on admissibility is taken by the ECSR, the president of the Committee may ask the state concerned for written information and observations on the admissibility of the complaint.

Once the complaint has been declared admissible, the ECSR examines its merits. Submissions from both parties must be examined. The parties to the Collective Complaints Protocol may also submit their comments. In addition, international organisations of employers and trade unions are given the possibility to submit their observations on the complaint. The procedure is a written one and in accordance with the adversarial principle. The ECSR may decide to organise, in the course of the examination of the complaint, a hearing with the representatives of the parties.

The procedure is concluded by the adoption of a decision on merits. The ECSR draws up a report containing its decision on whether or not the state concerned has complied with the Charter. The decision on merits is reasoned in detail. The report is forwarded to the parties concerned and to the Committee of Ministers.

Follow-up to the decision of the ECSR

On the basis of the report of the ECSR, the Committee of Ministers adopts a resolution. If the ECSR has found a state to be in breach of the Charter, the Committee of Ministers may recommend that the state concerned takes specific measures to bring the situation in line with the Charter.

As regards the follow-up to the decisions of the ECSR on collective complaints, the following can be pointed out: in cases where violation of the Charter was established, the government is obliged to present, within the reporting system,⁵ information on the measures taken to bring the situation into conform-

ity with the Charter. Thus, the ECSR also plays an important role in ensuring a better follow-up to decisions on non-compliance with the Charter and contributes to more effective domestic implementation of the Charter.

General characteristics of the collective complaints procedure and its effectiveness

Fifty-nine collective complaints have been lodged since 1998. This is not much, but it must be taken into account that the 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints has been ratified by only 14 Council of Europe member states. As to the substance of collective complaints, it should be pointed out that they refer to various social rights such as: employment (freedom to form organisations, the right to strike, fair working conditions as regards pay and working hours, the right of children to day care); housing (e.g. Roma, tenants of denationalised flats); the right of persons with disabilities to social integration and participation in the life of the community (education of mentally handicapped children and autistic children); the right of children to social, legal and economic security (e.g. protection of children against violence or exploitation); the right to social and health care (e.g. for children of illegal migrants). As a general rule, the complainants claim that, apart from the relevant article of the European Social Charter, the state also violates the prohibition of discrimination under Article E of the revised Charter.⁶

The following characteristics may be mentioned in relation to the collective complaints procedure:

1. the ECSR acts to a certain extent as a quasi-judicial body. It is the exclusive legal authority in investigating collective complaints and making legal assessments of the law and practice in a respective party. Its decisions are reasoned in detail;
2. the procedure is a written one and in accordance with the adversarial principle. However, the ECSR may organise, in the course of the examination of a complaint, a hearing with the representatives of the parties;
3. the procedure is public;
4. the *res iudicata* and *ne bis in idem* principles are not applied in this procedure. A complaint may be declared admissible even if the same or similar case has already been submitted to another national or international body. Any violation of a right guaranteed under the Charter may not be alleged without previously exhausting domestic remedies, even if the issue has already been the subject of a prior conclusion and/or decision of the ECSR;⁷

5. Periodic reports fall within the monitoring system under the Charter.

6. Article E, which was included in Part V of the Revised Charter, contains the “horizontal” clauses applicable to the generality of the Charter’s substantive clauses.

5. Individual complaints are not allowed;
6. As regards the two bodies involved in the follow-up procedure, the Committee of Ministers and the ECSR, the latter is the one responsible for adopting decisions of legal nature, and it is up to the Committee of Ministers to ensure that the decisions of the ECSR are honoured.

The collective complaints procedure is assessed as a relatively effective one. The procedure is comparatively fast.⁸ It is easily accessible for the organisations concerned. The democratisation in the field of social rights has been assessed as positive. The procedure stimulates the control and engagement by the civil society. It has an impact on the public opinion and thus contributes to the visibility of the Charter, which has not been achieved within the reporting procedure. The collective complaints procedure dispels the image of the Charter as a remote text with little impact on everyday life.

As already mentioned above, the collective complaints procedure is a good illustration of “how the rights of the Charter could be justifiable and how a ‘violation approach’ could be adopted in situations, which have so far been considered inappropriate for such an approach”⁹

The procedure also enables the ECSR to intervene in specific and practical cases and to complete its interpretations of the Charter adopted within the reporting procedure. Several collective complaints can serve as an illustration of how this procedure contributes to the development of the interpretation of the Charter. According to the ECSR, “the implementation of the Charter requires the Parties to take not only legal but also practical action to give full effect to the rights recognised in the Charter”¹⁰ In connection with the means of ensuring steady progress towards achieving the goals laid down by the Charter, the ECSR emphasised “that the implementation of the Charter requires the Parties not only to take legal action but also to make available the resources and to introduce the operational procedures required to give full effect to the rights specified therein”¹¹ It is important to note that, through the collective complaints procedure, the ECSR has set out the nature of the states’ obligations imposed by the Charter. The obligations of the means have been transformed into the obligations of the result.

7. Both the reporting procedure and the collective complaints procedure are independent.

8. The decision on the merits is usually adopted within 18 months.

9. Olivier De Schutter, *The European Social Charter*, p.436

10. *Autism Europe v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, para. 53.

11. *International Movement ATD Fourth World v. France*, Complaint No. 33/2006, decision on the merits of 5 December 2007, para. 61.

The ECSR interprets the Charter in the light of the rules set out in the 1969 Vienna Convention on the Law of Treaties and takes account of any relevant rules of international law applicable in the relations between the parties.

Some parties pay special attention to collective complaints, regarding which the ECSR reiterated “that the restriction in paragraph 1 of the Appendix refers to a wide variety of social rights and impacts them differently. Such a restriction should not have unreasonably detrimental effects if the protection of vulnerable groups of persons is at stake”.¹² By such decision, the personal scope of the Charter has been enlarged to also cover children of illegal immigrants.

Final remarks

I have no doubt that adequate measures should be adopted and methods of work of the European Court of Human Rights supplemented as soon as possible. This Court should also take into account the right to a trial within a reasonable time. I cannot say whether the use of the known types of collective complaints might help preserve the effectiveness and quality of the Court’s work. However, I can repeat the ideas already presented by individual members of the European Committee of Social Rights on how to reform the methods of work of the Court, which were formulated as a result of the increasing number of applications filed with the Court. As certain applications filed with the Court do not differ greatly from collective complaints addressed to the European Committee of Social Rights, the Court could transfer some of the cases to the Committee. This could be done for example in cases when applications are declared inadmissible, but do not differ from collective complaints in terms of substance or applicants. In case an individual files an application with the Court, since it cannot be filed with the European Committee of Social Rights, the Court could also advise such applicants to change their applications to a collective complaint that could be dealt with by the European Committee of Social Rights. The above solutions are mainly short-term or medium-term ones. In the long term, I am convinced that the existing system of judicial and quasi-judicial protection of all human rights, not only those enshrined in the European Convention on Human Rights but also those under the European Social Charter, should be closely examined within the Council of Europe. Sooner or later, a debate will have to be re-launched on the need to ensure that the system of individual complaints is also ensured for social rights, which the member states have opposed so far. Individual complaints relating to social rights under the Charter would certainly give rise to the need to examine the issue of sharing competence between the Court and the ECSR.

12. FIDH v. France, Complaint No. 14/2003, decision on the merits, para. 30.

PRELIMINARY COMMENTS ON PROPOSAL TO ADD A COLLECTIVE COMPLAINTS AND/OR CLASS ACTION PROCEDURE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS CONTROL MECHANISMS

Ms Jill Heine

Legal Advisor, Amnesty International

I am honoured to be here with you in Bled on behalf of Amnesty International.

We are most grateful to the Slovenian authorities for the invitation to be part of this two day Round Table, and in particular to present some initial comments on the proposal to introduce collective complaints and/or class actions into the Convention's control system.

Amnesty International, and the group of non-governmental organisations (NGOs) with whom we have been working closely on the proposals to reform the Court over the last nine years, attach great importance to reflections on ways to address challenges posed by un-remedied systemic or endemic problems which have resulted in repetitive violations of the human rights of individuals in Council of Europe member states and repetitive applications to the European Court of Human Rights.

We agree that these challenges require addressing.

Mr Fribergh's paper¹ and presentation indicate the enormity of the challenges. The statistics that he presents indicate that:

1. Presentation by Erik Fribergh, Registrar of the European Court of Human Rights to Bled (Slovenia) Round Table, 21-22 September 2009, "Bringing Rights Home or How to deal with repetitive applications in the future." Available at: www.echr.coe.int/NR/rdonlyres/F4E1DAB4-9382-4CF1-8407-EE82A92A275A/0/ErikFriberghBledspeech.pdf

- ▶ more than 50% of the Court's judgments in the last 50 years have been on repetitive cases; and that
- ▶ more than one quarter of its some 100,000 pending cases are cases that raise issues which are the subject of well-established case-law.

The proposal by President Costa, to explore the idea of class actions and collective complaints in the current discussions of reform, as possible tools for addressing and potentially lightening the load of repetitive applications to the Court is, indeed, an interesting one.

As we have heard, both of these mechanisms, class actions and collective complaints, are tools for collective redress.

Proposals to add mechanisms for collective redress into the Convention's control system are not entirely new.

As some of you may recall, and as mentioned by Professor Gattini in his article in 2007, "Mass Claims at the European Court of Human Rights", during the 2000-2004 discussions on reform, we debated a proposal for the Council of Europe's Commissioner for Human Rights to bring actions in cases revealing a pattern of violations of systemic or transnational character, in the nature of an *actio popularis*.

The proposal was, however, rejected at the time by representatives of the Council of Europe member states for two principal reasons:

- ▶ that it would be a major departure from the current system, in which the individual right of action is at the core of the Convention's supervisory mechanisms; and
- ▶ that it risked changing the nature of the Commissioner's relations with member states.

Although proposals for adding collective redress mechanisms to the Convention's control mechanisms are not entirely new, we consider that this proposal, and as well as others that were discarded or have not yet been implemented, should be considered anew.

Perhaps representatives of the Council of Europe member states may be willing to explore in more detail proposals to add tools for collective redress to the system, given the development of the pilot judgment procedure, following the 2000-2004 reform discussions.

Class actions and collective complaints procedures have some similarities but differences to the developing pilot judgment procedure.

One obvious difference is: who first proposes that the complaint about the particular alleged Convention violation is addressed by the Court in this amalgamated way.

In the early cases of the pilot judgment procedure, it was the Court which proposed the handling of the case in this manner. In contrast, in class actions and

collective complaints it would be those who bring the case (on behalf of the class or the collective) who would bring the case in this manner.

Between themselves, class actions and collective complaints have some notable differences too.

One, among them, being that while class actions would presumably seek reparation for violations of the rights of the group of individuals in the class which have already occurred, collective complaints may be more preventative in nature seeking a remedy to prevent future violations of rights of more than one person.²

We consider that this proposal to grant the Court jurisdiction to consider class actions and/or collective complaints merits further study and discussion.

Each could be additional effective tools to seek collective redress for systemic or endemic violations of the Convention, in addition to:

- ▶ the rarely used tool of inter-state cases (under Article 33 of the Convention);
- ▶ the developing mechanism of pilot judgments; and
- ▶ cases brought by groups of individuals under Article 34 of the Convention.

Amnesty International recommends that the Reflection Group and the Committee of Ministers Steering Committee for Human Rights (CDDH) familiarise themselves more thoroughly with the nature of both class actions and collective complaints, with the benefit of information about the operation of these procedures from experts including those on the panel today: Mr David, Professor Gattini and Professor Končar. The study of this proposal, which the President of the Court indicated that the Court would undertake,³ will surely also be of great interest and assistance.

The three presentations today about class actions and collective complaints have been rich and have raised many interesting questions which could be explored during the future reflections on reforming the Convention's control system. Among them are:

1. What types of cases would be best suited to this type of action?

Perhaps class actions might be appropriate, for example, in:

- ▶ cases about discrimination against Roma children to access to education?
- ▶ cases involving a mass violation of human rights, such as a targeting a group of civilians with a bomb in the context of a conflict?

2. It should be noted that we would expect however that, in appropriate circumstances, the execution of a judgment finding a violation on a collective complaint would require the establishment of an effective retro-active domestic remedy for individuals aimed at redressing past violation(s) which are the subject of the complaint.

3. Memorandum of the President of the European Court of Human Rights to the states with a view to preparing the Interlaken Conference, 3 July 2009 at page 8 (Section III, B.2 (3)): www.echr.coe.int/NR/rdonlyres/34D3FB15-BE9E-4095-A68C-B4D60D5C38B4/279203072009_Memo_Interlaken_anglais.pdf

- Perhaps a collective complaint would be an effective and efficient way to challenge a statute which is discriminatory on its face or in its implementation?
2. In a class action how would the Court define and certify the class?
 3. Who should be allowed to represent the class or bring the collective complaint (NGOs, lawyers?)
 4. How would such cases be financed? Who would bear the burden of the costs?
 5. Would the Court have the duty in a class action to ensure that the class was adequately represented?
 6. How would a class action affect the right of an individual who was not part of the class/case but shared a common grievance?
 7. What rules of admissibility should apply to such actions?
 - ▶ would the requirements of exhaustion of domestic remedies and the six-month rule apply to class actions or collective complaints under the Convention?
 - ▶ or would different rules apply, as in Inter-State cases under the Convention or the lodging of a collective complaint under the Social Charter?
 8. What, if any, other changes would be required⁴ to the Convention?
 9. Are states prepared to give the Court (more) responsibility not only for adjudicating on the violation but to identifying its cause and devising the remedy? Would it be necessary and advisable to amend of Article 41 of the Convention more along the lines of Article 63 of the American Convention on Human Rights, which, as Professor Gattini has noted, gives the Inter-American Court of Human Rights broader powers to rule on the remedy required for the violation identified?⁵

4. For a collective complaint to be admissible under Article 4 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, it must, *inter alia*, be in writing, made by an organisation competent under the Protocol to do so and in the required language, and indicate in what respect a state party to the Charter has not ensured satisfactory application of a provision of the European Social Charter that the state has accepted. See also Rules 23 et seq., of the Rules of the European Committee of Social Rights, available at: www.coe.int/t/dghl/monitoring/socialcharter/ESCRrules/Rules_en.pdf.

5. See Professor Andrea Gattini, "Mass Claims at the European Court of Human Rights", in *Human Rights, Democracy and the Rule of Law*, p. 277.

Article 41 of the European Convention on Human Rights states: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." While Article 63(1) of the American Convention on Human Rights states: "If the [Inter-American] Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

11. Would such judgments have an extended legal effect in the state concerned?
12. What, if any, legislation would be required in the member states to ensure implementation of remedies ordered by the Court?
13. Should any required changes to the Convention be included in an amending Protocol? Or should they be incorporated into a separate and optional protocol or the Rules of Court or a statute (if one is drawn up)?

And finally, and perhaps most importantly:

14. Would the addition of either or both of these two tools for collective redress lessen the Court's expenditure of time and resources in addressing systemic or endemic problems or be more demanding of the Court's time and resources in analysis and decisions on procedural issues (i.e. class certification) and remedy?

We look forward to discussing these and other questions with you in the time remaining today, in the months leading up to Interlaken, and thereafter.

We urge you to ensure that you hold consultations about reforming the Court in your countries, with people who represent applicants to the Court, with NGOs, associations of lawyers and other members of civil society. We urge you to do so because we consider that the 800 million people in the Council of Europe member states have an interest which is at least equal of that of the government representatives, in ensuring the long-term effectiveness of the European Court of Human Rights.

I conclude with the hope that this and other proposals presented aiming to address the problem of systemic and endemic violations, which have been a pre-dominant focus of the Court since its establishment, will be evaluated against four criteria.

Will the proposed reform:

- a) result in the fair and expeditious resolution of cases presenting repetitive violations of the European Convention on Human Rights?
- b) lead to a resolution of the root cause of the violation by the state concerned and effective measures to prevent future violations of this kind?
- c) ensure a remedy to the individuals whose rights have been violated?
- d) preserve the right of individual petition, which lies at the heart of the Convention's enforcement systems?

We consider that our common aims with respect to repetitive applications should be on both addressing the root causes through effective general and ensuring effective domestic remedies; not reducing access to justice (before the Court) for those whose rights have been violated.

DISCUSSION 2

Michael Apossos (Greece)

I would like to comment on friendly settlements. More proposals for friendly settlements should be initiated by the Court... by... the declaration for signature, especially in cases that refer to a reasonable time of proceedings. Because the proposals usually made unilaterally by the governments are not accepted by the applicants, while the government in most cases accepts the settlements, proposed by the Court. But, one remark: since we refer to the procedure for friendly settlements, this means that settlements should be made from both sides. The declaration should include reasonable amounts of money and not excessive ones, especially in collective applications.

Thank you.

Inga Reina (Latvia)

I would really like to thank Ms Mole for her presentation. It is always a pleasure to have you and hear your opinion. I have a few comments on what I have heard from the speakers, and I would like to start with what Mr Fribergh has said. First of all, I agree that your personal opinion expressed today, indeed, I think, merits further discussion. But the problem is that it shifts the problem from the shoulders of the Court to the shoulders of the Committee of Ministers. And I am afraid, well, I firmly believe, which is my personal opinion, that in its present state, the Committee of Minister is not fit to deal with repetitive applications, for two reasons: first of all, it is a political and not a professional body. The level of discussion in the Committee of Ministers is political and not legal. And secondly, the Execution Department may not or is not able to do the quality check for all the states for the simple reason that it does not have lawyers from every state of the Council of Europe. That is the major difference between the Court and the Execution Department. I find it extremely difficult to explain to the lawyer, let us say, coming from Finland, with all due respect to their legal background, what the constitutional system of the Republic of Latvia is. It is a total nonsense, I must say, that we work in such circumstances, which brings me to the conclusion that if we want to speak about the effective reform and for the past few years, we are

speaking about the reform of the Court, I believe we are not really going anywhere. Further, because if I were to speak about the present case, I would agree that perhaps it would not be very appropriate for the Court to deal with small applications, although I do not know what is worse – to have one application which costs 5,000 euros or 5,000 applications worth 100 euros. What is the total amount? But still, I would believe that on the matter of principle, it would be necessary to think of another level. But then, we would need to think about the reform, not only of the Court, but also of the Council of Europe. Because we need to think of a professional and better supervision of co-operation, whatever you call it – supervision of the measures taken by the state. But in this present state, I believe that the Committee of Ministers will not be able to perform this task. Perhaps, this is something we can discuss in Interlaken because our current mandate, if I speak of the city Riga, does not go that far, we are still concentrating on the reform of the Court. One other issue that I wanted to mention is if we are to speak about the national level and bringing back cases to the national level, we still lack clear guidelines on just satisfaction. This is something that we have discussed for years, and we are still in square one. The last remark that I would like to make is part of the problem why we are having, maybe, poor quality judgments: because we have poor level of legal representation. If whenever... has at least one really high quality NGO that is working on cases before Strasbourg who will have better quality of applications, meaning that we will have better quality of judgments because very often, when I write government observations, we see the underlying problem, but it is not being addressed in the application. So it will never be addressed in the judgment, because the Court does not have the power *ex officio* to add complaints. It has the power *ex officio* to qualify a complaint under another article. The last thing that I would really like the Court to read again is the Lord Wolfe's report which, I think, has been unduly forgotten, and there is one remark that we have started to use in our observations, which, I believe, is a very important remark made by Lord Wolfe, a very experienced judge, that is, to really look into the issue what constitutes an application. We understand that the problem may be interesting, but if the application lacks the very basic details, it should not be communicated. If we take the proportion of cases, which we receive, it is quite a high number; it does make the statistics. Maybe it will not be 50%, but 10% will be a large number in this case.

Thank you.

Andrej Auersperger Matić (European Parliament)

I will ask the question for Mr Fribergh in English. I should say that I was delighted with his presentation as well as with that of Ms Mole. As regards the reasons why we have these difficulties in enforcement, I think that he has very correctly and honestly identified where the problem lies. Indeed, I tried to raise this yesterday with the Committee of Ministers officials. I have two specific questions for you. Yesterday, we discussed at length the question of delays in proceedings and some of the speakers pointed to the fact that the Court itself makes very general statements about what the contracting states must do to comply with the requirement of trial without undue delay. Would you be open to the idea of the Court making more specific recommendations about what reforms the member states must undertake to comply with that requirement? I would find that a big step forward but I understand that it may be controversial, since legal reforms tend to be highly controversial. On the other hand, some speakers also underlined the fact that it may be very difficult for member states or legal reformers to have enough political power to achieve this objective without the Court making much more concrete requests, more specific ideas.

And secondly, my job also involves advising the European Parliament on issues of human rights and, in particular, on the issues of compliance with human rights jurisprudence of the Strasbourg Court. The difficulties that we have in this regard is that it is very difficult to digest the exact content of obligations for the member states and for the European Union institutions from the different cases that the Strasbourg Court publishes, because the judgments tend to be very fact-specific, they have a large content in terms of legislation and fact patterns for each case, but very little explanation of why the court has actually come to its conclusions. So there is very little reasoning. In a typical case, the Court would simply say, for example, that because of such and such a circumstance, proportionality has not been respected. Would you be open to the idea of the Court making more elaborate judgments, for instance, as are adopted by the United States Supreme Court, to make a more specific doctrine on particular issues, such as civil law, criminal law, asylum requests, immigration, etc. to facilitate this transposition of the obligations into national legislation? Thank you.

Thank you, Mr Chairman.

Arto Kosonen (Finland)

A couple of points: firstly, it is for the contracting states to take care of their human rights. The State and the responsibility of states there and, of course, the Committee of Ministers is helping; there are all the other contracting states that are involved, sort of, as in the environment. As regards the Court, to my mind,

we need it only for interpretations, and there is no interpretation needed, e.g. for the length of proceedings in cases, while the Court might say that this and that got delayed a little bit on this and that authority, and show it up but this is not a sort of real interpretation. Therefore, we do not need the Court very often, or we should not need it very often, and perhaps this could be the mode to follow. Some other points: I think we should all... Civil servants in my country, they have the responsibility and judges are also civil servants, and as such, they have the responsibility to act so that the cases on their tables will be dealt with rapidly and smoothly and reasonably and within a reasonable time. If they do not do so, they have to take responsibility and nowadays, I think that ... of justices is prosecuting judges who have delayed a certain case or several cases for a long time. But of course, you cannot prosecute a small judge if your director is saying that you cannot, that you are the only one here and that you have to do everything and that there is no money to hire new personnel. So you have to go up, up, up and finally, there is the government, of course, which has to be responsible. And the third point: this sending the cases back home – I do not know whether this is a very good idea. It is much easier for the Court, or is the Court saying that you are sending 1000, 100 cases back, and are you then saying that there is a violation, just one phrase or something, or not. If not, then it creates difficulties and money-wise, how do we know how much to pay. It is difficult already now, concerning, for instance, unilateral declarations of our own, for instance. One last point: how much of the Court's time is taken up by the interim measures and what is the share, without further examination cases, of the total of the Court's activities and work. Is it 40%? Does it take 40% of the hours or 60%, or what is the situation?

Thank you.

Alan Uzelac (Croatia)

I just wanted to comment briefly on one very interesting proposal expressed by the Registrar of the Court. I think that he articulated the problem really well by the statement that the flood of cases which is now reaching the Court is not primarily the problem of the Court but the problem of the countries not fulfilling their obligations under the Convention. But then, I had a real problem with the second step proposed by Mr Fribergh, where his idea of bringing rights home actually meant sending cases back home. This is something that, at least prima facie, looks like a capitulation of the whole mechanism of the Convention. And, well, although some of the participants in this discussion were critical of the Court, and said that the problems of the Court have to be resolved by the Court, I think that this criticism is not fully justified. The Court has so far been very suc-

cessful in serving 800,000,000 people. With only 47 judges having such impressive practice, it is an efficiency that may be envied by a number of countries which have thousands of judges who have difficult time serving only a couple of million of people. Therefore, the comments with respect to the inefficiency of the European Court mechanism are a bit exaggerated. Precisely because of that, the proposal to change the rules and have the Court that will only make decisions of principle and not decisions in individual cases is something which seems, in a way, as a conversion of the European Court from a real court into a philosophical court. If this would be adopted, we would speak of the European Court as of a court which was once upon a time a decision-making body and now has become only a policy-making body. The question is whether this really should be the function of the real Court. The message which is thereby being sent to the governments might be misunderstood. And then, there is also a number of practical problems which may be envisaged with the mechanisms that Mr Fribergh proposes. If I understood him properly, according to his proposal once the Court would identify a violation and the nature of the problem, all future cases of the same sort would have to be rejected. What does that mean? Does it mean that the future applicants should be diverted from the Court to the Committee of Ministers and the state? What if the Committee of Ministers has a different understanding? What about the problem of determining repetitiveness? How to identify whether the case is fully repetitive or whether there is something new in the case? What if a part of the problem in a particular case is a repetition of the problem that has already been identified as a violation by the Court, but a part of the case raises new problems? What if the Court wishes to change its point of view on the repetitive cases? How should the Court maintain the control of the interpretation of his "decisions of principle"? Finally, what if the country does not fulfil its obligation and does not provide appropriate redress at home? Would the applicants be sent back to the Court? Under which conditions could they address the Court again? In my opinion, such a system would only add to the maze of various remedies that have to be exhausted at all levels. It might turn an already complex system into a real labyrinth of ineffective remedies. In the end, this might only add to the work of both the European and the national courts and other bodies. Therefore, it seems that a proposal like this one made by Mr Fribergh does not have a positive potential to really improve the current situation. In this form, the idea of bringing rights home by remitting cases (by sending them back home) is something that I cannot live with.

Thank you.

Jakub Wołásiewicz (Poland)

Thank you very much. This is a very interesting discussion as well as a few minutes ago, there was an interesting presentation. The first question: the Committee of Ministers DH format. I am supporting Ms Inga Reina. During the debates at the Committee of Ministers in DH format there is rather lack of serious and deep discussion about the legal aspect of the implementation of the judgments. Instead of this we have a political mechanism of discussion on legal matters connected with monitoring of the process of implementation of judgments. So, instead of dealing with the problem of how to prevent future violations in similar situations not only in respect to the respondent state the Committee is reaching political consensus about the process of monitoring only in connection to the respondent state. Therefore, quite often in similar situations the Committee has a different approach. From the very beginning of my participation in DH format proceedings, I asked government agents as persons who have better and wider knowledge to participate in those meetings. But it does not work, frankly speaking – only a few delegations are sending to the Committee of Ministers the government agents. I also raised once upon a time the idea that meeting of the Committee of Ministers in DH format should be in future reorganised for the government agents' meetings, which could discuss exactly problems of implementation, which decisions will be approved by the Committee of Ministers.

Another question – repetitive cases. It is understandable that this is one of the crucial elements for the future of the Court. I still have a feeling that there is a lot to do with the concept of a pilot judgment as well as another idea: the so-called legal peace. The first concept is very well known. The second one, legal peace I can illustrate by an example. In some situations like, for instance, prison conditions, it is very difficult to achieve immediate effect by one remedy. Changing the prison conditions takes at least a kind of an action plan or a programme for a long term. It is not possible to achieve in quick time a positive result. Therefore it should be a procedure which gives the government time to concentrate in solving a general matter instead of reacting only for individual cases. In management theory this approach is named as concentration on the main target. As the Government Agent, I'm trying to build the understanding of this approach by the Court on cases on overpopulation in Polish prisons. I believe successfully, because within the dialogue with the Registry in which an action plan was created and the judgment in main case opens the avenue for that approach.

Coming back to pilot judgments. I have the feeling that taking into account only the length of the proceedings cases, which are created approximately 40% of all registered cases, by 25 pilot judgments the Court can solve the problem of a backlog of the court by 50%. Thank you very much.

Jill Heine (Amnesty International)

Thank you and thank you, Mr Chair. We very much value the extra time because this is really the first time that we have had the opportunity as civil society as well as representatives of governments to discuss some of these new proposals, including some that were in Mr Fribergh's paper some parts of which are not new, but others are. So I would like to turn to some of those immediately. Talking about unilateral declarations, I know that this is something that the Steering Committee for Human Rights (CDDH) was encouraging and that the Court is encouraging and that you yourself are encouraging in your paper, Mr Fribergh. What I can say from an NGO point of view is that we have seen some..., we have got some concerns about it, because we have seen cases of a unilateral declaration where the individual measure, including Article 3 cases, is not complete or completely provided for so, for example, on two Article 3 cases that we know of, there was no investigation that was required or the state in part of its unilateral declaration which was approved by the Court did not require such an investigation. Now, we are really concerned about that and that is inconsistent with the Court's own case-law. Furthermore, we are concerned that with respect to unilateral declarations, when we are talking about cases where there is a systemic and endemic problem, some of those cases, well they provide an individual with a remedy. If there is no undertaking to address the general measure by the state, how will this practice ultimately prevent future violations and thus, how will this practice prevent future applications to the Court if that is what you are aiming to do by this mechanism? So, we would really like to see these questions addressed and also some caution, more caution by the Court and the Registry, and also more caution by the States when making these unilateral declarations. Certainly, the Court is the one accepting them and we feel that the Court really does have a duty to ensure that both individual measures and general measures are addressed if it is going to accept a unilateral declaration. Secondly, I want to ask, whether the Court is planning an impact study on the three-judge procedure. The reason I ask this is that I think, with respect to Interlaken, we now have some time, and the Court's memo indicates that lots of studies need to be and will be done. I would advise that we actually use the time to ensure that we study all of the proposals in detail and study their effects or they potential effects so that we look at the proposal 360 and look at the pros and the cons and get as much of information about the proposal as we can before we make the final decision on the proposal and start redrafting the Convention. I am afraid we did not do this, really, with Protocol No. 14. We had some great ideas, but I think they were not on the basis of hard data or true study and I think that the Interlaken process provides us with that time. So, one of the specific questions again is: does the Court plan to study the impact of the three-judge committee on repetitive cases? If so,

when will the material be ready and what other studies is the Court planning to undertake? And when I say Court I mean the Court and the Registry as well. Turning thirdly to your proposal on repatriating cases back to the state and the Committee of Ministers' involvement, I can only echo concerns that have already been raised by Mrs Heine and Mr Wołásiewicz and others about this, about a lack of guidelines on just satisfaction and a lack of competence, if you will, of the current constituency, who is charged with executing judgments in the Committee of Ministers as well as a lack of resources, through no fault of their own, of the Department of Execution. Again, what this would require is an input of more money and the question is, are states ready to do that. And without that, I think it would be irresponsible. I also think it would be irresponsible on another of other issues that are not addressed by your proposal, Mr Fribergh, and so I am wondering whether you have thought about and maybe could address these issues. Are we missing a step in your proposal about ensuring that the remedy ordered by the Court is indeed implemented and that it is indeed effective before repatriating any cases. If your proposal is that the Court would not formally declare a violation on cases repatriated, what is the incentive for a state to deal with these cases. Will they actually have the budget to deal with these cases, will they be allowed to deal with these cases, per their legislator because perhaps their legislator only gives them a budget to deal with cases where there is a judgment. And secondly, the other point of this is, can we really talk about the referral back mechanism before we ensure that all 47 member states have adequate legislation which allows reopening of cases, both criminal and civil, on a judgment from Strasbourg. We heard from Vít Schorm, for example, that notwithstanding all his wonderful work on the recommendation as Chair of DJPR that his Government of the Czech Republic does not have the possibility for reopening civil cases. So are we talking about... are you talking, Mr Fribergh, about amending the Convention to require states to have legislation that allows the reopening of cases. Is that a new obligation that you want to create for States in your proposal and will they allow that? So I think I will stop there on my questions but I think they are quite specific and quite concrete. And as we in civil society have not been given a lot of opportunity to have this kind of dialogue, for which we very much thank the Slovenian Government for this opportunity, we would really appreciate very specific answers to these questions.

Thank you.

Inger Kalmerborn (Sweden)

I am an acting agent for the Swedish Government. I will be brief since lunch is approaching rapidly. First I would like to take this opportunity to thank the Slovenian authorities for organising this event, which is very interesting. And to all of you who have made speeches, thank you for your interesting contributions. I would like to underline that in Sweden we are very much looking forward to the Interlaken Conference, which will be an important event. The topic we are dealing with now is repetitive applications, and I understand that we are talking about repetitive well-founded cases and not repetitive ill-founded cases. I entirely agree with Mr Fribergh that it is the states' responsibility to take measures, both general and individual, to avoid repetitive cases coming to Strasbourg. This principle of subsidiarity, or the sharing of responsibility, as it is referred to in President Costa's memorandum concerning the preparation of the Interlaken Conference, is crucial for the well-functioning of the Convention system. I find Mr Fribergh's proposal interesting. However, some concerns have been raised in the discussion today and I must say that when discussing this issue at home, we were somewhat hesitant. But I find the idea worth looking into. We should not rule it out before it has been studied and explored. There may be some potential in it. There are of course issues that have to be solved. These are both of a practical and a legal nature. For instance, if the state and the applicant cannot agree on a friendly settlement, what will happen to the case? Will it go back to the Court? Who will decide on the amount of compensation if the state and the applicant cannot agree? The Committee of Ministers does not have that power at present. It would be necessary to amend the Convention to give the Committee of Ministers such power. It is true that the Court would benefit from "repatriation" of cases, but applicants with well-founded applications of a repetitive nature could suffer as a result. We know that the Committee of Ministers has difficulty supervising the execution of judgments under the present circumstances. In fact we believe that, also without introducing a system of "repatriation" of cases, it is probably necessary to reinforce the supervision mechanism to make it more efficient. To also confer on the Committee of Ministers the task of dealing with repetitive applications, without a judgment from the Court, is not possible at present. This would not be possible without substantial reinforcement of the supervision mechanism.

Thank you.

Erik Fribergh (European Court of Human Rights)

Thank you very much. There are so many questions that I could probably go on for quite some time, but I will try to make it short and take the essential aspects as I see them. I am glad to hear that many of you say the Court has done very well so far and why not go on like this. I think the problem is that we cannot go on like this. We have now 25,000 repetitive applications pending before the Court. If we deliver 1,000 judgments a year, you can see how long it would take to deal with only what is in stock now. I think we must look into measures which could alleviate the burden of the Court. The proposal which I have made is based on something which is rather simple. If the Court has found a violation in a case, I think it is the responsibility of the state and the Committee of Ministers to see to it that individual measures are taken to provide a remedy for what the applicant has suffered and to ensure that general measures are taken to avoid that similar violations happen again. This may mean introducing remedies at home for people who need to have a remedy. The responsibility for this lies with the State. It is for the Committee of Ministers to supervise this. If the Committee of Ministers is so unable to do anything about the enforcement of judgments as I have heard today, then I think it is really time we start to look into how to improve that. I have talked about this before. I spoke about it more than a year ago in Stockholm; I think there are many things to do in the area of execution of judgments. We cannot just sit down and say: this is a political issue, the implementation of judgments regarding repetitive applications, is a political matter. We heard you say today, it is a question of priority in the states. I have a feeling that we could summarise this and say to the states: take the rights and the Convention seriously and then settle these problems. If one accepts the principle about the different responsibilities which the Court, the Committee of Ministers and the state have under the system, then I think what the Court is doing in respect of repetitive applications is simply compensating, if I may say so, for the unwillingness of the other two to do the work under the system. My proposal, as I outlined it, is to try to correct that. We probably need to look into the way the Committee of Ministers operates. If not, we will have to introduce changes in the Convention and give the Court more powers to order measures under the Convention. The Court has slowly taken on more powers in terms of the execution of judgments. You can argue it is wrong from the principle point of view because it is the Committee of Ministers' job, but I think the Court has done that – on the one hand because the Committee of Ministers has not done its job and also because the Committee of Ministers itself has encouraged the Court to give indications: look at what has happened in the pilot judgment procedure which started from a recommendation from the Committee of Ministers. To answer one of the questions: yes, I think the Court could give more detailed instructions as to what should be

done in particular cases, and I am sure the Court will do that. I take the opportunity to answer other questions. Someone said that the Court had not been very courageous on Article 13. I agree with you on that. In a different context I have argued strongly in favour of the Court being much more severe with states as regards Article 13. Why? Because it is the same basic approach – subsidiary. The Court should be firm on Article 13 and say there must be a remedy in the State which allows the applicant to vindicate his or her rights on the basis of Convention arguments. I think that the Court can still develop its case-law and I am quite convinced that the Court will develop its case-law on that score. Then there were many detailed questions: is the Court going to do a study on three-judge committees and single judge? Yes, we will of course look into this; but what do we want to know about this? If we want to know how many cases the Court would have dealt with if it did not have three-judge committees? How many cases would the Court have dealt with if it did not have single judge decisions? Are there more or less than before? Obviously, there will be many more cases dealt with if it is only a single judge instead of three judges to decide a case. But to draw direct comparisons is difficult. It is to compare a hypothetical situation with a factual situation. There were other issues I noted down. I think I have responded to or at least outlined some essential issues. I just wanted to say about court fees and the idea that the Court would order states to pay some sort of punitive damages or perhaps even contribute to financing the Court if there are many repetitive cases. At first, I find this a very tempting proposal to say that, in a repetitive application, the Court would add 100,000 euros for the state to pay for the Court, and then we can recruit more staff to deal with more cases. In the long term, I do not think this is a very good solution because the Court would soon be “dependent” on repetitive applications. Imposing Court fees for applications is something which has been discussed for years, and it will certainly come up again in the Interlaken discussion – I have no strong feeling about that, one way or the other – I think I should stop there.

Thank you.

Nuala Mole (AIRE)

I just want to address the point which was made by our Greek colleague about friendly settlement offers by the Court rather than by the government, and why I do not think that the proliferation of that practice is a good idea. Firstly, because friendly settlement offers made by the Court rather than by the government are offers that the Court makes with the purpose of disposing of the case quickly. Most people who take cases to the European Court of Human Rights are not interested in money. They are really angry that their rights have been violated.

There are some people who are taking cases to the European Court of Human Rights because they think it will be really lovely to get 1,200 euros. That is fine. But most people are not interested in financial compensation primarily because the financial compensation that is offered by the Court is so miniscule that it is not worth litigating. This is one point. But the other point is that if the friendly settlement offers come from the Court rather than from the government, the government is not obliged to focus on its sins. I had a Catholic upbringing, you know, you were taught how you have to focus on the wickedness which you have done and examine your conscience to see whether you have done wrong things. If the government is not required to think about that and how much it is prepared to pay to compensate for its sins, it will continue with the unserious and cavalier attitude towards its Convention obligations. I would also like to take issue with a couple of the points in Eric Fribergh's paper, paragraphs 17 and 18, where he says that one of the benefits is that a settlement will avoid the government stigma of a high number of violations. You do not want to avoid the stigma of a high number of violations. If the government has violated 4,353 people's rights, we do not want to hide this; we want it publicly stated that they are serial offenders. We do not want it all pushed under the carpet so nobody will know how naughty they have been. And we do not want them to avoid putting the member states to the expense of preparing observations because again, this focuses their minds as to what the problem is, what the case has gone to Strasbourg about. And I just want to refer also to paragraph 18 of Eric Fribergh's report about the unjustified refusal by the applicant to settle the case. Unjustified refusal by the applicant to settle the case, as Jill Heine has already pointed out, is something which the Court has already had to address when it tried to impose settlements in the Turkish disappearance cases without ever actually dealing with what the application was all about, which was getting an investigation into the death or the disappearance. And I think it is extremely important that cases should not be struck off the list when the underlying problem has not been solved. And I am all in favour of doing whatever we can to streamline the procedures before the Court, to make it easier for the judges to their job, to make it easier for the Registry lawyers, but not at the expense of safeguarding the rights of the individuals, whose Convention protected rights have been violated.

Thank you.

Jakub Wołásiewicz (Poland)

Thank you very much, I will be very brief. This is, frankly speaking, an answer for Prof. Gattini and I would like to mention one thing concerning pilot judgement. The most important thing in pilot judgement is exactly the possibility to

negotiate general measures. And when the state and applicant in the presence of the Registry have successfully negotiated the friendly settlement, of course, the general remedy should be effective. Talking about my experience in cases of *Broniowski* or *Hutten-Czapska*, at the starting point of negotiations we thought about different kinds of remedies, but this doesn't mean that all of them were effective. Only during the negotiating process parties decide which one will be the best in the context of its effectiveness. For example, in *Broniowski* and clone cases, the starting point for the calculation of the compensation scheme was 100% of the amount of lost property. But this calculation, which could create a scheme for hundreds of thousands of potential applicants, was not acceptable from the point of view of state treasure and social justice. After the presentation of arguments of all parties, the final solution was that 20% is a reasonable amount. Higher compensation could create the situation that the government obligation could never be fulfilled. But this kind of solution was possible only thanks to negotiating the format of pilot judgment.

Thank you very much.

Corinne Amat (Council of Europe)

If you will allow me, there is one point concerning this morning's speeches to which I would like to return. I regret the departure of Mr Fribergh, but I would have wanted to intervene briefly on a number of statements that were made this morning concerning the capacity and role of the Committee of Ministers in the matter of execution of judgments. It was notably stated that the Committee of Ministers, sitting in DH formation, ensured political control and not legal control. I must say that I do not at all share this view. From our experience of the Committee of Ministers' meetings, when sitting to supervise the execution of judgments, this is not the case; on the contrary, one very often hears speakers pointing out the need to address all the questions that arise in this forum on a strictly legal level. Furthermore, a certain number of delegations that sit on the Committee of Ministers in its DH formation are composed of lawyers, even judges.

On the other hand, I share the fears of those who have spoken about the capacities of the Committee of Ministers and of the Execution Department responsible for assisting it, in terms of resources, notably when it comes to adding a further task with the repatriation of all repetitive cases towards the Committee of Ministers.

Allow me to underline in this connection that it is not only a matter of resources in Strasbourg, at the institutional level, but also a question of resources at national level, notably at that of the structures which – at the national level –

are responsible for co-ordinating issues related to the execution of judgments. One notes already today, with the existing workload of the Committee of Ministers, enormous difficulties in some of these structures, which must often, with few resources, both present observations before the Court and deal with the complex issues that arise concerning execution. If, then, there is a deficit of supervision and of capacity at the level of the Committee of Ministers in the exercise of its collective responsibility, it would in my opinion rather be in that aspect, insofar as it must be recognised that in the bulk of cases, most states do not currently have the possibility of taking a close interest in cases concerning other states. This is unfortunately a big omission, because we need – during debates within the Committee of Ministers and, in a general way during the follow-up of the execution of judgments – effective, collective participation in the examination of execution measures proposed by respondent states. To conclude this point, I would refer to the recommendation that the Committee of Ministers adopted at the beginning of 2008 (Rec(2008)2) on the means to be allocated at national level for issues of execution, recalling that in the discussions that led to the drafting of this recommendation, these questions were very widely and very often broached.

Brigitte Ohms (Austria)

Thank you. This is a bit outdated... I'm the Deputy Government Agent from Austria and we have had only a short discussion in Austria so far concerning the Interlaken topics. The President of the Court of Human Rights gave us, in his memorandum so to say some homework, and for many remarks which were already made, I can simply join, our Latvian colleague, our Polish colleague, they were quite right in the spot and to the point and have addressed the problems we are facing. So, me too, I have a strong feeling that we are trying to address political problems with legal means. Very often, I'm quite hesitant when I hear a new idea and have some reluctance when I try to look into the future and see how these proposals would work in practice. Would they really solve the political problems we are facing? I'm a bit worried about ... We are coming back again and again to the point what should we do with the right of individual application. Very often we say, "We don't want to touch it – even to touch it. It's the core, it's the crown, it's the crown jewel". But on the other hand, we have the dilemma about the very numerous applications the Court is struggling with. But when we focus on the situation of the applicants, we should not give the international remedy away, for, in my mind – at the moment – I have a very vague hope that the Court will be in a situation to deal with all the applications in the future. It's a really funny situation that we come back again and again to certain old ideas

and old solutions, our predecessors in the expert meetings have already drafted and proposed, and which even now are on the table. When we have a look in Protocol No. 11 the subsidiarity principle is laid down and sometimes we have forgotten this principle when we have this merged procedure instead of the practice of the two step procedure. There are nearly no admissibility decisions now and admissibility decisions, for instance, were a clear signal for the states: “Yes, you have something to do.” Not only the communication of an application but the admissibility decision itself was a clear signal and very often, in Austrian cases, there were some hints when these quoted the decisions and judgements. Maybe, when the Court is coming back from time-to-time to hear former practices and reflect also the good in it... Because, I’m quite happy, I have to admit, with the practices of finding friendly settlements; at least for Austria, I can say that we are doing it in a good phase. There’s nothing bad in it. It’s a good solution and even, quite frankly to say, there is something wrong in our procedure, or there has been a failure so far, so there is nothing to hide behind the curtain. Very often the only possibility for a state is to admit a failure and to pay, simply to pay. I can imagine that even a judgement given by the Court can be a better remedy for an applicant than a friendly settlement. So it’s a bit late but here are some ideas how to go into these new discussions and be quite earnest in this situation.

Jill Heine (Amnesty International)

Thanks. Mrs Ohms, just to respond to you directly. We definitely agree that there are some cases that are more appropriate than others to be dealt with by friendly settlement. It’s not all cases are friendly settlements that we are concerned about. Unilateral declaration is something that by nature takes us by surprise and raises concern, but there are particular reasons as well for the concern when you have disappearance cases or Article 3 cases where the Court is accepting payment of money to the individual without a promise of an investigation. And we think that this means preferring – if you will – a rapid financial solution to addressing a very grave violation of human rights and ignoring its own case-law by insisting on the continuing nature of the violation until an effective investigation has been completed. So, we don’t think that friendly settlements or unilateral settlements are appropriate for all cases, and we don’t think they are not appropriate for all cases. That is our view of it and our statements are urging both states and the Court and the Registry to exercise more caution and care when using these procedures. So, that was on that issue. I’m just trying to see whether there is another issue that was raised so far in the discussion. We agree with you, Mrs Amat, that if we are looking at anything relating to execution that we need to, again, look 360, we need to look at the states, the national delegations and

national competencies, and willingness and unwillingness, rather than making broad statements about its politics. We need to study in here people who are involved like yourselves before any decisions are made, so that any decisions about execution are made in partnership with those carrying out executions, both government agents, the secretariat, the people at the national level – and also applicants, representatives – looking at how we could do this better, and where resources are needed. They may not just be needed in one place, they may be needed in several. But you know what I was trying to address is, I think it's time – and the nature of the problem is very serious – and it's time to look at the proposals in a serious manner and not in an exclusively – at least initially – political manner, to really see before making any decisions about them, what they are and what they could really change. Then we can get into the politics. We're urging slowness and study and caution and professionalism, and we have the experts, the best expert available to us, so why don't we use them.

Thank you.

Andrea Gattini (Italy)

What Ambassador Wołásiewicz told us made me think about another comparative advantage or disadvantage of pilot judgement procedure compared to possible class actions. I have to confess that I was a little influenced by the very strong criticism expressed by our Italian judge Mr Zagrebelski in his dissenting opinion in the *Hutten-Czapska* case, in which he didn't really see the point of having a pilot judgement procedure, and questioned the transparency of this procedure – why this case and not other possibly comparable ones – and the coherence of the Court position as a whole. But now, after having thought about it and after having had the honour to speak with Ambassador Wołásiewicz I see a reason why one would prefer one solution rather than the other, and that is that in the pilot judgement procedure, the government is placed in a much more comfortable position, because it is given more time to find a friendly settlement solution. You can argue whether this is a good thing or not, but anyway, there is a difference compared with possible class actions where the government is put under a stronger pressure, because of the fact, which also Ms Heine pointed at, that the initiative doesn't come from above, i.e. from a diplomatic dealing between the Court and the respondent state, but from the bottom, i.e. from the class, that is the organisations representing the people bringing the case. Is it preferable to allow the respondent government more time to find out if it is there a real perspective of a good solution for the general interest of the country, or is it preferable to exert as much pressure as possible on the government in order to quickly and effectively redress a certain problem? As you see, there are both

advantages and disadvantages in both ways, but the disadvantages could be overcome by taking a middle path, permitting class actions and encouraging at the same time friendly settlements envisaging general measures which go further than the mere satisfaction of the class.

GENERAL CONCLUSIONS

1. The participants underlined the high contracting parties' obligations under Articles 6 and 13 of the European Convention on Human Rights to resolve the problem of excessive length of proceedings at national level.

2. To this end, they supported and encouraged the Committee of Experts on effective remedies for excessive length of proceedings (DH-RE) in its work on a draft Recommendation¹ intended to assist member states in fulfilling these obligations through both prevention and effective legal remedies in accordance with the case-law of the European Court of Human Rights.

3. It was recognised that the excessive length of proceedings is only one example of a situation that may arise from structural or systemic problems in member states.

4. The participants appreciated that the repetitive applications that may result from such situations are a grave threat to the effective functioning of the Convention system at both national and European levels.

5. They considered that procedures allowing for class actions or collective applications may represent a way of addressing this situation.

6. They therefore welcomed and supported the Interlaken Conference to be organised by the Swiss Chairmanship of the Committee of Ministers in February 2010, at which these and all other proposals that might help the Court and strengthen the Convention system should be further and fully considered. Any such reforms should stem from the viewpoint of effective protection of rights and freedoms of natural and legal persons, whilst also reinforcing the legitimacy of the European Court of Human Rights.

1. Under the provisional title of "Draft Recommendation of the Committee of Ministers to member states on effective remedies for excessive length of proceedings".

PROGRAMME

of the Round Table

Monday, 21 September 2009

Part One: Ways of protection of the right to a trial within a reasonable time – countries' experiences

09.30 Registration

10.00 *Welcome address: Mr Aleš Zalar, Minister of Justice of the Republic of Slovenia*

10.15 *Introduction: Moderator of Part One: Mr Peter Pavlin, Secretary, Ministry of Justice of the Republic of Slovenia*

10.30 *Presentations of countries' experiences/practices concerning the right to a trial within a reasonable time (Articles 6, paragraphs 1 and 13 of the European Convention on Human Rights):*

Italy, Dr Marco Fabri, Acting Director, Research Institute on Judicial Systems (IRSIG-CNR), Bologna

Poland, Mr Jakub Wołásiewicz, Ambassador of the Republic of Poland, Government Agent of the Republic of Poland before the European Court of Human Rights

The Netherlands, Dr Pim Albers, Senior Policy Advisor, Ministry of Justice

Czech Republic, Dr Vít A. Schorm, Government Agent of the Czech Republic before the European Court of Human Rights

Croatia, Prof. Dr Alan Uzelac, Faculty of Law of the University in Zagreb

Slovenia, Prof. Dr Aleš Galič, Faculty of Law of the University of Ljubljana

11.45 Coffee break

12.15 Discussion

13.00 Lunch

14.30 *Continuation of presentations of countries' experiences/practices concerning the right to a trial within a reasonable time*

Views of the Council of Europe bodies/representatives:

Mr Jakub Wołásiewicz, Chairperson of the Committee of Experts on effective remedies for excessive length of proceedings (DH-RE)

Dr Bogdan Lucian Aurescu, European Commission for Democracy through Law, Secretary of State for Strategic Affairs, Ministry of Foreign Affairs of the Republic of Romania, substitute member of the Venice Commission

Ms Corinne Amat, Head of Division, Department for the Execu-

tion of Judgments of the European Court of Human Rights, Council of Europe

15.45 Coffee break

16.15 Discussion

17.30 Guided tour of Bled (short walk through the town and boat trip to the island in the middle of Lake Bled)

20.00 Departure for dinner at restaurant *Avsenik* (by bus)

20.30 Dinner at *Avsenik*

Tuesday, 22 September 2009

Part Two: Between Madrid and Interlaken – Bled discussions

Short-term reform of the European Court of Human Rights

09.30 *Introduction: Moderator of Part Two, Mr Roman Završek*, Attorney at law

09.45 *Statements:*

Ms Simona Drenik, Head of the International Law Division at the Ministry of Foreign Affairs of the Republic of Slovenia

Mr Erik Fribergh, Registrar of the European Court of Human Rights

Dr Almut Wittling-Vogel, Vice-chairperson of the Steering Committee for Human Rights (CDDH)

Dr Frank Schürmann, Agent of the Swiss Confederation before the European Court of Human Rights

10.45 Coffee break

11.00 *Repetitive applications*

Introductory presentations:

Mr Erik Fribergh, Registrar of the European Court of Human Rights

Dr Vít A. Schorm, Member of the Bureau of the Steering Committee for Human Rights (CDDH)

Dr Frank Schürmann, Agent of the Swiss Confederation before the European Court of Human Rights

Prof. Dr Michal Balcerzak, Independent expert, Faculty of Law and Administration, Nicolaus Copernicus University, Toruń, Poland

Ms Nuala Mole, Director, The AIRE Centre (Advice on Individual Rights in Europe)

12.00 Discussion

12.30 Lunch

14.00 *“Class actions” or collective applications*

The concept of “class actions”:

Mr Alexandre David, Magistrate, Ministry of Justice, France

“Class actions” in the perspective of the European Convention on Human Rights system: **Prof. Dr Andrea Gattini**, University of Padova

Collective complaints – the experience under the European Social-Charter: **Prof. Dr Polonca**

Končar, President of the European
Committee of Social Rights

*Comments from a representative of
a non-governmental organisation:*

Ms Jill Heine, Amnesty Interna-
tional

15.00 Coffee break

15.15 Discussion

16.15 End of the Round Table

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Bled (Slovenia), 21-22 September 2009

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The round table on *Protection of the right to trial within a reasonable time – national experiences and on the short-term reform of the European Court of Human Rights* was co-organised by the Slovenian Ministry of Foreign Affairs and Ministry of Justice in co-operation with the Council of Europe Secretariat. It was one of the most important events during the Slovenian chairmanship of the Committee of Ministers of the Council of Europe. The meeting was one of the events held before the high-level conference on the future of the European Court of Human Rights (Interlaken, Switzerland, February 2010).

The discussion – attended by more than 80 participants from Council of Europe member states – focused on national practices concerning the right to a trial within a reasonable time, possible developments in practice regarding “class actions”, collective applications and repetitive applications, as well as new ideas and the short-term reform goals of the European Court of Human Rights. Among other things, the Registrar of the Court presented new features of the Court’s activities arising from the Madrid Agreement and from Protocol No. 14 *bis* to the European Convention on Human Rights.



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