

*Declassified by the Committee on Legal Affairs and Human Rights at its meeting on Tuesday 21 June 2005.*

**AS/Jur (2005) 32**

9 June 2005

ajdoc32 2005

## **Implementation of judgments of the European Court of Human Rights**

**Court judgments pending before the Committee of Ministers for  
control of execution for more than five years or otherwise  
raising important issues**

### **Working paper**

prepared by the Secretariat

### **Committee on Legal Affairs and Human Rights**

Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group

#### **Introductory remarks**

Since the adoption of its Resolution 1226 (2000) on the execution of judgments of the European Court of Human Rights, the Assembly has regularly debated the implementation of judgments of the Court on the basis of reports prepared by the Rapporteur of the Committee on Legal Affairs and Human Rights, Mr Erik Jurgens. To date, five such reports have been issued (see Resolution 1226 (2000) and Recommendation 1477 (2000), of 28 September 2000; Resolution 1268 (2002) and Recommendation 1546 (2002) of 22 January 2002; Resolution 1297 (2002) and Recommendation 1576 (2002) of 23 September 2002; Resolution 1381 (2004) of 22 June 2004, and Resolution 1411 (2004) and Recommendation 1685 (2004) of 23 November 2004). The present document is now being issued by the secretariat as a background working document for the Rapporteur's sixth report.

This document is a compilation of information relating to judgments of the European Court of Human Rights that have been pending before the Committee of Ministers for control of execution for more than 5 years, as well as other judgments (or decisions under former Article 32 of the European Convention on Human Rights (ECHR)) which raise important implementation issues, including those that have revealed structural problems (see, in this connection, Part I, last paragraph, of the Action Plan adopted at the Third Summit of Heads of State and Government in Warsaw, on 17 May 2005<sup>1</sup>).

This information is based on publicly available documents, principally the websites of the Committee of Ministers and ([http://www.coe.int/T/CM/WCD/humanrights\\_en.asp](http://www.coe.int/T/CM/WCD/humanrights_en.asp)) and the Directorate General of Human Rights (DG II) Department for the execution of the Court's judgments

---

<sup>1</sup> This paragraph reads : " We [Heads of State and Government of the Member States of the Council of Europe] underline that all member states must accelerate and fully execute the judgments of the Court. We instruct the Committee of Ministers to elaborate and implement all the necessary measures to achieve this, ***notably with regard to judgments revealing structural problems including those of a repetitive nature***" (emphasis added).

([http://www.coe.int/T/E/Human\\_Rights/execution](http://www.coe.int/T/E/Human_Rights/execution)). Most of the Resolutions referred to in the body of this text appear in a separate Addendum to this document.

## CONTENTS

### 1 case against Bulgaria

- Al-Nashif and others v. Bulgaria .....	5
--	---

### 1 case against France

- Lemoine Daniel v. France .....	6
----------------------------------	---

### 1 case against Germany

- Görgülü v. Germany.....	6
---------------------------	---

### 2 cases against Greece

- Dougoz v. Greece .....	8
- Peers v. Greece .....	8

### 2351 cases against Italy

1) 2181 cases concerning the length of judicial proceedings .....	9
2) 2 cases raising the issue of the reopening in Italy of domestic criminal proceedings which had violated the Convention.....	10
- Dorigo Paolo v. Italy .....	10
- F.C.B. v. Italy .....	11
3) 140 cases relating to the failure to enforce judicial eviction orders against tenants .....	11
- Immobiliare Saffi v. Italy, and 139 other cases.....	11
4) 3 cases relating to expropriation of property .....	12
- Belvedere Alberghiera S.R.L. v. Italy .....	12
- Carbonara and Ventura v. Italy .....	12
- F.S. No. 1 v. Italy.....	12
5) 2 cases relating to the lack of effective investigation into alleged ill-treatment in detention.....	13
- Labita v. Italy .....	13
- Indelicato Rosario v. Italy .....	13
6) 8 cases concerning the monitoring of prisoners' correspondence in Italy and the right to effective remedy against imposition of special prison regime .....	14
- Calogero Diana v. Italy.....	14
- Domenichini v. Italy .....	14
- Di Giovine v. Italy .....	14
- Rinzivillo v. Italy.....	14
- Natoli v. Italy.....	14
- Messina Antonio No. 2 v. Italy .....	14
- Madonna v. Italy .....	14
- Ganci v. Italy.....	14
7) 12 Cases revealing various problems in bankruptcy proceedings.....	15
- P.G. II v. Italy.....	15
- S.B.F. S.p.a. v. Italy .....	16
- Nordica Leasing S.p.a. v. Italy .....	16
- Bottaro v. Italy, and 6 other cases .....	16
- Saggio v. Italy.....	17
- F.L. v. Italy.....	17
8) 3 other cases raising problems.....	17
- Grande Oriente d'Italia di Palazzo Giustiniani v. Italy.....	17
- Scozzari and others v. Italy .....	18
- C.A.R. srl v. Italy .....	19

### 1 case against Latvia

- Slivenko v. Latvia .....	20
----------------------------	----

### 1 case against Moldova and Russia

- Ilaşcu and others v. Moldova and Russia.....	21
--	----

**109 cases against Poland**

1) 108 cases of length of judicial proceedings and lack of an effective remedy at national level .....	23
- Podbielski v. Poland, and 91 other cases of length of civil proceedings.....	23
- Kudła v. Poland, and 15 other cases of length of criminal proceedings and of lack of an effective remedy at national level .....	23
2) Broniowski v. Poland.....	24

**1 case against Russia**

- Kalashnikov v. Russia .....	25
-------------------------------	----

**2 cases against Romania**

- Rotaru v. Romania .....	26
- Dalban v. Romania.....	27

**111 cases against Turkey**

1) 74 cases concerning torture, ill-treatment, homicides and destruction of property by the Turkish security forces .....	27
2) 6 Cases concerning dissolution of political parties .....	29
- United Communist party of Turkey and others v. Turkey, and 5 other cases .....	29
3) Cases concerning freedom of expression .....	30
- İnçal v. Turkey, and 26 other cases .....	30
4) Loizidou v. Turkey .....	32
5) Cyprus v. Turkey .....	34
6) Hulki Güneş v. Turkey.....	36
7) Doğan and others v. Turkey.....	37

**15 cases against United Kingdom**

1) 6 cases concerning the lack of effective investigation into alleged killings by the UK security forces in Northern Ireland.....	38
- McKerr v. United Kingdom .....	38
- Finucane v. United Kingdom, and 4 other cases.....	38
2) 5 cases concerning violations of the right to a fair trial.....	38
- Murray John v. United Kingdom, and 4 other cases.....	38
3) A. v. United Kingdom .....	39
4) Hashman and Harrup v. United Kingdom .....	40
5) Faulkner Ian v. United Kingdom.....	41
6) Johnson Stanley v. United Kingdom.....	41

**1 case against Ukraine**

- Sovtransavto Holding v. Ukraine.....	42
--	----

**Addendum: Texts of Resolutions of the Committee of Ministers regarding the implementation of judgments of the European Court of Human Rights**  
(see document AS/Jur (2005) 32 Addendum)

## 1 case against Bulgaria

### - **Al-Nashif and others v. Bulgaria, 50963/99, judgment of 20/06/02, final on 20/09/02**

The case concerns the deportation of the first applicant, a stateless person, to Syria on 04/07/1999. The European Court considered that there had been a violation of the applicants' right to family life, as the applicable legal provisions did not give sufficient guarantees against arbitrariness, the first applicant having been deported on the basis of considerations of national security exclusively within the discretionary power of the Ministry of the Interior (violation of Article 8). The Court further found that the applicants had not had access to an effective remedy in this respect (violation of Article 13). The case finally concerns the fact that the first applicant had, under the applicable law, been given no opportunity to challenge the lawfulness of his detention while awaiting deportation (violation of Article 5§4).

Individual measures: By decisions of 08/05/2003 (No. 4332) and 12/05/2003 (No. 4473), the Supreme Administrative Court quashed the judicial decisions challenged by the European Court and referred the applicant's complaint back to the Sofia City Court and to the District Court of Smolian for new examination.

- In its decision adopted on 13/12/2004 the Sofia City Court declared null and void Order No. 63552 of 19/04/1999 of the Passport Department of the Ministry of Interior, revoking the first applicant's residence permit, as the department was not competent to issue such an order. This decision is final.

- In a decision of 26/06/2003 the District Court of Smolian quashed the first applicant's expulsion order and the judgment in this case was quashed by the same court following an appeal before the Supreme Administrative Court.

Furthermore, on 13/04/2005, the first applicant's lawyer indicated that he had applied to the Ministry of the Interior to have the ban on his entry into Bulgaria lifted.

Further information is awaited on the outcome of the proceedings pending before the District Court of Smolian and the application to the Ministry of the Interior. Information is also awaited on the first applicant's present legal status under Bulgarian law, as well as on the possibility for him and his family to return to Bulgaria.

General measures: The attention of the Bulgarian authorities was drawn to a number of problems in the legislation and regulations which were the basis of the violations found by the European Court in the present case. Indeed, Bulgarian law does not provide for judicial review of the lawfulness of aliens' detention in case of their expulsion on the grounds of national security, nor of the decision of expulsion itself when such reasons are evoked (cf. Article 46§2 of the Aliens Act in conjunction with Article 34-1 of the Administrative Procedure Act). The Bulgarian authorities have thus been invited to take measures in this respect possibly in the light of the experience of other countries in this matter (e.g. Chahal against the United Kingdom, judgment of 15/11/1996, Resolution ResDH(2001)119).

In February 2003 (827th meeting), the Bulgarian delegation informed the Committee that their authorities were carefully considering these issues.

On 08/06/2004 the Secretariat received the detailed comments of the Bulgarian authorities, in particular on the possibility of lodging of an application for reassessment with the Minister of Interior against measures of expulsion on the grounds of national security. Since this procedure does not correspond to the requirement of the Convention of an effective remedy before an independent authority having a minimum of competence and certain form of adversarial proceedings, the Bulgarian authorities have been invited to consider adopting further measures to abide by the judgment of the European Court.

Furthermore, reference is made in the authorities' letter of 06/09/2004, to a proposal by the Minister of Justice to the Parliamentary Committee for Constitutional Reform to introduce constitutional amendments providing judicial review for all administrative acts. This has been noted with interest. However, since the domestic law explicitly excludes from judicial review deportation orders taken on grounds of national security, it should be stressed that the most effective way to bring the domestic legislation into conformity with the Convention's requirements would be also to amend the specific law regulating this matter and to provide clear procedural rules in this field (letter sent to the Bulgarian authorities on 07/10/2004).

Latest developments: In May 2005, the Bulgarian delegation indicated that, in the framework of an interdepartmental procedure to prepare a draft amendment of the Aliens Act, the Ministry of Justice has proposed the abrogation of Article 46§2 of this law, underlining that it is incompatible with Articles 5§4 and 13 of the Convention. The delegation also indicated that the proposals for amendment of the Aliens Act will be submitted to the Council of Ministers as soon as possible. In addition, it should be noted that following the judgment of the European Court in the Al-Nashif case, domestic courts have agreed in several cases to review deportation orders made on grounds of national security (see, for example, the decisions of the Supreme Administrative Court Nos. 4883 of 28/05/2004, 706 of 29/01/2004 and 8910 of 01/11/2004). Information is awaited on progress in the preparation of the draft law. Moreover, clarification is needed whether Bulgarian law at present provides for judicial review of the lawfulness of detention ordered in cases of expulsion on the grounds of national security. The confirmation of the publication of a Bulgarian-language version of the judgment is also awaited.

## 1 case against France

### - Lemoine Daniel v. France, 33656/96, judgment of 17/06/99, final on 17/09/99, Interim Resolution DH(2000)16

This case concerns the fact that the applicant could not contest before a court a decision discharging him from his post in 1988 on grounds of physical unfitness; this resulted from the fact that a non-judicial organ, a commission instituted by the French railway company (*Société nationale des chemins de fer* - S.N.C.F.), had exclusive jurisdiction in this field (violation of Article 6§1).

This special system is linked to the legal status of the S.N.C.F., a "Public Industrial and Commercial Establishment" (public establishment principally subject to private law), the staff of which comes partially under a specific regime resulting from the "S.N.C.F. Staff Rules" or of regulations having the nature of an administrative act.

The case also concerns the excessive length of the proceedings concerning civil rights and obligations (about 4 years and 5 months) from 1989 to 1996 (violation of Article 6§1).

Individual measures: Following the finding of a violation in this case, the applicant brought new proceedings before the civil courts, with a view first to annulling the decision to lay him off and securing re-employment in the S.N.C.F., and secondly to obtaining an expert opinion on his state of health. The Rennes Labour Court declared this appeal inadmissible on 04/04/2003. The Rennes Court of Appeal confirmed the Labour Court's decision on 14/09/2004. The applicant appealed this decision on a point of law. The possibility of a new appeal based on the modified rule as presented below has also been evoked (see below). Bilateral contacts are under way between the French delegation and the Secretariat concerning the individual measures which could be adopted in this case to erase the consequences of the isolation for the applicant.

General measures: - *Concerning access to a court:* on 18/04/2000, the French authorities wrote to the Secretariat indicating that, on 15/03/1999, the Minister of Transport had decided to modify Article 15 of the S.N.C.F. rules on health and the organisation of the occupational health service. Article 15 b) now provides that "(...) in the specific case of disagreement, where a staff member contests a decision taken by the company occupational health officer declaring him/her unfit for his/her job, the staff member may seize the transport labour inspector, who will take a decision after consulting the transport occupational health officer". By a letter dated 04/06/2003, the French delegation indicated that several possibilities existed to appeal against decisions by transport labour inspectors (who in fact are ordinary labour inspectors): submission for an out-of-court settlement to the inspector who took the decision; disciplinary complaint to the Minister of Transport; submission for a legal settlement before the administrative court. It should be noted that the applicant has informed the Secretariat that this modified rule does not concern his situation, as the decision declaring him unfit for his job was not taken by the occupational health officer. The Secretariat is clarifying this question with the French delegation.

- *As far as the length of the proceedings is concerned:* general measures have been adopted in the framework of the execution of the Hermant case (application No. 31603, Final Resolution ResDH(2003)88)

## 1 case against Germany

### - Görgülü v. Germany, 74969/01, judgment of 26/02/04, final on 26/05/04

The case concerns the violation in 2001 by the Naumburg Court of Appeal of the applicant's right to respect for his family life, in proceedings relating to the applicant's custody of and access to his child born out of wedlock in 1999 and living with a foster-family. The European Court considered that the Court of Appeal's decision not to give custody to the applicant failed to take into consideration the long-term effects on the minor child of a permanent separation from his biological father. With regard to the suspension of the applicant's visitation rights, in respect of which states have a narrower margin of appreciation, the European Court found that the Court of Appeal's decision was insufficiently reasoned and rendered any form of family reunion impossible, thus not fulfilling the positive obligation imposed by Article 8 to unite biological father and son (violations of Article 8).

Individual measures: According to the §64 of the European Court's judgment, the applicant should at least have access to his child. Although some progress has been made, in particular thanks to three rapid decisions of the Federal Constitutional Court, one of them explicitly granting the applicant access to his son, the applicant can still not regularly exercise his visitation rights. On the custody issue, on 05/04/2005 the Federal Constitutional Court quashed the decision of the Naumburg Court of Appeal and referred the case back for thorough reconsideration by a different chamber.

Summary of the judicial proceedings in this case following the European Court's judgment: In March 2004, the *Amtsgericht* Wittenberg, the court of first instance, in a judgment which referred to the judgment of the European Court, found in the applicant's favour in proceedings in which he renewed his application for custody and asked for interim measures granting him visitation rights.

On 30/06/2004 and 09/07/2004, the 14th Civil Chamber (3rd Chamber for family law matters) of the Naumburg Court of Appeal issued orders not to give the applicant access to his child, rejecting the interim order of the court of first instance. In so doing, the Court of Appeal indicated that it did not consider itself bound by the judgment of the European Court, reasoning that only the German state, as a party to the Convention, can be bound. Thus it did not take into account the findings of the European Court's judgment.

On 14/10/2004, the Federal Constitutional Court, upon a request of the applicant (*Verfassungsbeschwerde*), quashed the decision of the Naumburg Appeal Court of 30/06/2004 as far as the applicant's visitation rights were concerned. On 05/04/2005, the Constitutional Court quashed the decision denying the applicant custody. The court referred both issues back to a different chamber of the Naumburg Court of Appeal for retrial. In its decision on visitation rights, the Federal Constitutional Court explained the relationship between the German Constitution (*Grundgesetz*) and the European Convention, in particular stating that German courts must observe and apply the Convention in interpreting national law. The full text of the judgment as well as a press release in English can be found on the web site of the Federal Constitutional Court: [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).

In November 2004, the chamber of the Naumburg Court of Appeal to which the case had been referred considered that the appeal against the interim order of the District Court of Wittenberg, granting visitation rights to the applicant, had been inadmissible. The Youth Welfare Office of Wittenberg, as *ex-officio* guardian of the child (*Amtsvormund*) and its representative for the proceedings (*Verfahrenspfleger*) withdrew their appeals.

The applicant then filed a new application for interim measures granting visitation rights with the District Court as the court of first instance, as the order of March 2004 by the *Amtsgericht* Wittenberg had expired.

On 2/12/2004 the District Court passed an interim order giving the applicant the right to see his son every Saturday for two hours in the presence of a specially appointed guardian (*Umgangspfleger*). Upon appeal of the child's *ex-officio* guardian and legal representative, the 14th Chamber of the Naumburg Court of Appeal again quashed the decision of the District Court on 8/12/2004. On 20/12/2004, after the applicant had filed a second constitutional complaint, the Naumburg Court of Appeal repealed that decision and issued a new decision, ordering the District Court to decide quickly on the merits and again prohibiting all contact between the applicant and his son until a final decision on the merits had been issued.

On 24/12/2004 the applicant's lawyer filed a third constitutional complaint together with a request for interim measures. On 28/12/2004 the Federal Constitutional Court quashed the Appeal Court's decision of 20/12/2004 and granted temporary visitation rights to the applicant, starting on 8/01/2005, thereby reinstating the order of the District Court (BVerfG, 1 BvR 2790/04 of 28/12/2004). In its summary decision, the Federal Constitutional Court stated that the Naumburg Court of Appeal had once again failed sufficiently to take into account the judgment of the European Court and that its decision seemed arbitrary in the light of the entire treatment of the case by that Chamber. In § 28 of its decision, the Federal Constitutional Court held that "domestic courts must make due allowance for a judgment of the European Court when taking a case up again and when the judgment of the European Court can be acknowledged without violating the law. In doing so, a domestic court must discuss in a coherent manner how the pertinent constitutional right (here Article 6 of the Basic Law) may be interpreted in conformity with the international obligations of the Federal Republic of Germany." In § 31, the Federal Constitutional Court held that "it is of decisive relevance that in this matter the European Court of Human Rights has already decided that the applicant must have access to his son and that according to the decision of the Federal Constitutional Court of 14/10/2004, this judgment [i.e., that of the European Court] must in principle be followed." The Federal Constitutional Court furthermore asserted that there is no evidence that contact between the biological father and his son would endanger the child's well-being. A press release and a full translation of the above decision were circulated for the 928th meeting (June 2005) of the Ministers' Deputies.

On 7/01/2005 the applicant's lawyer received a medical certificate to the effect that the child has to stay in bed because of illness. The applicant's lawyer has also received a "clarifying memorandum" from the Naumburg Court of Appeal, issued by the 14th Chamber on 4/01/2005, explaining their second decision of 20/12/2004. The judges state that "with regard to a high-level risk for the well-being of the child or a possible violation of the mental or indirectly of the physical integrity of the child caused by visits of the unknown father" their decision of 20/12/2004 was justified.

On 17/01/2005, the applicant's lawyer received a letter from the lawyer of the *ex-officio* guardian informing her that the Youth Welfare Office, relying on an expert opinion of 28/12/2004 which it had commissioned, had directed the foster-parents not to grant the applicant access to his child. Furthermore, the local Youth Welfare Office, the foster-parents and the representative of the child for the proceedings lodged objections to the 28/12/2004 decision of the Federal Constitutional Court granting the applicant access to his child for two

hours each Saturday. The Federal Constitutional Court dismissed their objections for lack of standing, the decision being made public shortly after the Ministers' Deputies' 914th meeting (February 2005). In addition to the Ministry of Justice of Saxony-Anhalt, the Ministry of the Interior and the Ministry for Health and Social Affairs of the Land of Saxony-Anhalt have started examining the case with an expressed view to do justice to the interests of all concerned. On 12/02/2005 the first contact for three years between the applicant and his son took place in the presence of the specially appointed guardian (*Umgangspfleger*) and of a senior official from the Regional Administrative Office (*Landesverwaltungsamt*) acting as superior authority to the youth welfare office since 10/02/2005. This senior official has entrusted another official of the Wittenberg youth welfare office to fulfil the duties of the ex-officio guardian for the child. Additionally, on 28/02/2005 he asked the District Court to appoint another suitable person as specially appointed guardian for the visits (*Umgangspfleger*). On 17/03/2005 he asked the same court to review the modalities for future visits. According to the applicant's lawyer, the foster-parents have, since the one contact in February, systematically obstructed the visits despite the presence on all but one occasion of an official of the Regional Administrative Office.

Meanwhile the specially appointed guardian for the visits has advised the Regional Administrative Office that she does not recommend visits of the applicant to his child under the present circumstances. Thus, in order not to confront the child with the conflict and not to risk its well-being, the applicant is currently refraining from the exercise of his visitation rights. However, he has instituted enforcement proceedings against the foster-parents with the District Court of Wittenberg. These proceedings are currently stalled as the foster-parents' lawyer again launched a complaint of bias against the district court judge at a hearing on 15/04/2005 in the presence of an official of the Regional Administrative Office.

**Information required:** In view of the escalating situation, information is expected as to what steps have been taken or are envisaged to ensure that the foster-parents will make possible regular contacts by the applicant with his son. In particular it is important to ensure that the child is free from any psychological influence preventing him from seeing his father and to provide psychological support to all parties concerned to ensure that the visits will take place in good conditions.

**General measures:** The European Court's judgment has been distributed to the courts and justice authorities directly concerned. It has been published in *Neue Juristische Wochenschrift* (NJW) 2004, p. 3397 - 3401 and in *Europäische Grundrechte Zeitschrift* (EuGRZ) 2004, p. 700 - 706. In view of the present situation information is awaited on possible other general measures envisaged.

## 2 cases against Greece

- **Dougoz v. Greece, 40907/98, judgment of 06/03/01, final on 06/06/01**

- **Peers v. Greece, 28524/95, judgment of 29/09/99, final on 19/04/01, Interim Resolution DH(2005)21, 07/04/05**

The first case concerns the conditions of the applicant's detention in 1997, in the Alexandras Avenue (Athens) Police Headquarters and the Drapetsona (Piraeus) police detention centre, which amounted to degrading treatment (violation of Article 3). The case also concerns the fact that the applicant's detention pending expulsion was not in accordance with a procedure "prescribed by law" within the meaning of the Court's case-law (violation of Article 5§1). Finally, the case concerns the fact that the domestic legal system did not afford the applicant an opportunity to have the lawfulness of his detention pending expulsion determined by a national court (violation of Article 5§4).

The second case concerns the conditions of the applicant's detention in 1994, in Korydallos prison, which amounted to degrading treatment (violation of Article 3). The case also concerns the opening by the prison administration of letters addressed to him by the Secretariat of the former European Commission of Human Rights, a measure considered by the Court as unnecessary in a democratic society (violation of Article 8).

**Individual measures:** The applicants are no longer detained in Greece. They were expelled in 1998.

**General measures:** As regards the violations of Article 5§§1 and 4 in the *Dougoz* case, the respondent state has informed the Secretariat that the detention and expulsion of aliens following a court order are now regulated by Inter-ministerial Decision 137954 (OJHR B 1255/16.10.2000), issued under Immigration Law 1975/1991 and making express reference to Article 5§1f of the Convention. According to this Decision, the detention of aliens under expulsion following a court order is now subject to control by the public prosecutor and the courts.

As regards the violation of Article 8 in the *Peers* case, the Penitentiary Code (Art 53§§ 4 and 7 of Law 2776/1999) may now be regarded as providing sufficient safeguards for the protection of prisoners' correspondence.

Finally, *as regards the common violation of Article 3*, the respondent state has informed the Secretariat that: the Alexandras Avenue (Athens) Police Headquarters are no longer used for the detention of aliens under expulsion; measures have been to improve detention conditions at the Drapetsona (Piraeus) police detention centre; with regard to Korydallos prison, necessary maintenance work is carried out on a regular basis.

By Interim Resolution DH(2005)21, adopted on 07/04/05, the Committee of Ministers welcomed the comprehensive measures adopted or being taken by Greece to improve detention conditions. It also notably invited the competent Greek authorities, in particular the Ministry of Public Order and the Ministry of Justice, to continue and intensify their efforts to align the conditions of detention with the requirements of the Convention as set out in particular in the Court's judgments and to look into the question of ensuring the availability of effective domestic remedies. The cases will be re-examined by the Committee not later than October 2006.

## 2351 cases against Italy

### 1) 2181 cases concerning the length of judicial proceedings in Italy

a. 118 cases mainly concerning proceedings before administrative courts

b. 1569 cases mainly concerning proceedings before civil courts

c. 1 case concerning civil proceedings requiring exceptional diligence

d. 364 cases mainly concerning proceedings before labour courts

e. 7 cases mainly concerning civil proceedings concerning enforcement of judgments

f. 122 cases mainly concerning proceedings before criminal courts

Interim Resolutions DH(97)336, DH(99)436, DH(99)437 and ResDH(2000)135

In all the 2181 cases against Italy, violations of Article 6§1 were found on account of the excessive length of civil proceedings (1569 cases), execution proceedings (7 cases), labour proceedings (364 cases), administrative proceedings (118 cases), criminal proceedings (122 cases) and civil proceedings requiring exceptional diligence (1 case). Approximately 178 other similar cases concluded with a friendly settlement have been up to now examined by the Committee of Ministers.

It is recalled that the special monitoring procedure, on the basis of a comprehensive report to be presented each year by the Italian authorities, was set up in October 2000 by Interim Resolution ResDH(2000)135. In 2001, 2002, 2003 and 2004 the Committee thus examined the three first reports, covering mainly the period 2000-2003.

During the examination of the **third annual report (2003)** in September 2004, the Committee of Ministers:

- noted with concern that an important number of reforms announced since 2000 was still pending for adoption and /or for effective implementation and reminded the Italian authorities of the importance of respecting their undertaking to maintain the high priority to the reforms of the judicial system and to continue to make rapid and visible progress in the implementation of the reforms;
- deplored the fact that no stable improvement could be seen yet as regards the effectiveness of the measures adopted so far: with a few exceptions, the situation generally worsened between 2002 and 2003 with the increase in both the average length of the proceedings and the backlog of pending cases;
- confirmed its willingness to pursue the monitoring until a reversal of the trend at the national level is fully confirmed by reliable and consistent data;
- incited Italy to deploy new significant efforts notably as regards the implementation of measures concerning the internal organisation of tribunals, their modernisation and the strengthening of their resources;
- regretted the fact that, in spite of the prolongation for a further year of the mandate of the *sezioni stralcio*, the latter did not appear to be able to finish within the fixed deadlines the very old civil cases which had been devolved to them in 1998 and incited the Italian authorities to take all necessary measures ensuring that these cases are finished without any further delay;
- encouraged Italy to ensure the respect of the Convention's requirements on the reasonable length of judicial proceedings by interpreting and applying the Pinto law as well as other relevant Italian laws in conformity with the case-law of the Strasbourg Court and to pursue the study of further measures in order to accelerate proceedings.

In the light of this situation, the Committee of Ministers took note of the information provided by Italy concerning a follow-up plan aimed at ensuring the respect of the expected execution objectives. It invited Italy to submit rapidly the complementary information requested as well as to complete the above-mentioned follow-up plan by an action plan.

The examination of the **fourth annual report (2004)**, initially scheduled at the latest in April 2005 (922nd meeting) was deferred to the 928th meeting (June 2005) because the fourth annual report and the action plan were not available. The Deputies took note of the efforts made by the Italian delegation to submit, although after the deadline, certain necessary information and of its commitment to supplement it, if necessary, before the end of April (see Press Release of 8/04/2005).

The information provided by the Italian delegation in April 2005 (only available in Italian, no formal report was submitted) do not make it possible to conclude that the average length of proceedings and the backlog of pending cases in Italy are diminishing. The situation of the Courts of appeal is particularly worrying, having in particular worsened since 1998 with an average length in 2004 of over three years for civil cases. Furthermore, the *sezioni stralcio* have not been able to bring the oldest cases to an end within their mandate; with the result that, at the end of 2004, 76 789 cases were still pending at first instance, after more than ten years.

The Action Plan to address these problems remains to be established.

## **2) 2 cases raising the issue of the reopening in Italy of domestic criminal proceedings which had violated the Convention**

**- Dorigo Paolo v. Italy, 33286/96, judgment of 28/10/98, final on 28/01/99, Interim Resolutions DH(99)258 of 15/04/99 (finding of a violation)<sup>2</sup>, ResDH(2002)30 and ResDH(2004)13 (adoption of individual measures)**

The case concerns the unfairness of certain criminal proceedings as a result of which the applicant was condemned in 1994 to more than thirteen years' imprisonment for, among other things, his alleged involvement in a terrorist bomb attack on a NATO military base in 1993. His conviction was based exclusively on statements made before the trial by three "repented" co-accused, without the applicant having been allowed to examine these statements or to have them examined, in conformity with the law in force at the relevant time (violation of Article 6§1 taken together with Article 6§3d).

Individual measures: At the time of preparing this document, Mr Dorigo was still serving the prison sentence arising out of the unfair trial to which he had been subjected. Since 23/03/2005, however, he has been under home detention for health reasons, following a decision of the competent judicial authorities (*tribunale di sorveglianza*). Although this decision does not erase the consequences of the violation, information on its scope might be useful.

The information available gives no indication of measures by Italy to carry out its obligation to erase the serious negative consequences of a violation found as long ago as April 1999, despite repeated appeals by the Committee of Ministers (Interim Resolutions ResDH(2002)30 of 19/02/2002 and ResDH(2004)13 of 10/02/2004) and the Parliamentary Assembly (Oral questions No. 14 by Mr Jurgens of 5/10/2004 and No. 15 by Ms Bemelmans-Videc of 26/01/05, Recommendation 1684(2004) and Resolution 1411 (2004) of 23/11/2004).

In accordance with the decisions adopted by the Deputies at their 897th and 906th meetings (September and December 2004), on 18/01/2005, the Chairman of the Committee of Ministers wrote to the Italian Ministry for Foreign Affairs asking for prompt, concrete measures to be taken in favour of the applicant so that Italy can comply with its obligations under the Convention. The Italian Ministry for Foreign Affairs merely recalled, in its reply dated 28/01/2005, that reopening of proceedings contrary to the Convention remained impossible in Italy and indicated that the Ministry of Justice was considering the possibility to grant the applicant presidential pardon.

The need for appropriate individual measures to erase the consequences of the violation has been recognised by the Committee of Ministers since 1999, considering the circumstances of the case and the situation of the applicant. In particular, the Committee of Ministers has taken account of the fact that the violation caused very serious negative consequences, from which the applicant still suffers and which could not be erased by the payment of just satisfaction. The Committee also took into account that the violation of the applicant's right of defence threw serious doubt on the safety of his conviction; he has constantly protested his innocence and demanded the opportunity for a fair hearing at re-trial.

With regard to the identification of individual measures enabling Italy to carry out its obligation of execution in this case, two alternatives have been raised to date before the Committee of Ministers: (a) re-opening or review of the unfair proceedings; or (b) adoption of *ad hoc* remedies.

<sup>2</sup> It is worth recalling that the Committee of Ministers is supervising the execution of this case under former Article 32 of the Convention, which notably provides that "the Committee of Ministers shall prescribe a period during which the High contracting party concerned must take the measures required by the decision of the Committee of Ministers" and "if the High contracting party has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide" by a majority of two-thirds of the members entitled to sit on the Committee "what effect shall be given to its original decision".

- (a) as far as *re-opening the proceedings* is concerned, the Committee has noted that Italian law does not permit re-opening of proceedings not in conformity with the Convention. While it is true that a Bill (No. 2441/S) making it possible to re-open domestic procedures found not to be in conformity with the Convention, has been before the Italian Parliament since 2001, its adoption is not anticipated in the short term. Moreover, this Bill could not be applicable to the Dorigo case as it excludes the possibility of reopening trials in cases concerning mafia or terrorist offences. A new draft law (No. 3354/S) providing *inter alia* the possibility of re-examining proceedings which have violated the Convention, was introduced before Parliament on 22/03/2005. The applicability of this draft law, if adopted, to the Dorigo case remains to be clarified since it only refers to violations of the Convention established by the European Court of Human Rights.
- (b) The possibility that the applicant might obtain a *presidential pardon* has also been before the Committee since July 2004 and at the 978th meeting (September 2004) the Italian delegation informed the Deputies that a formal investigation was being conducted into the possibility of offering a presidential pardon to the applicant at the initiative of the Ministry of Justice. Granting a pardon could bring forward the applicant's release (scheduled for April 2007) but would not wipe out the conviction or provide any reparation for the prejudice suffered by the applicant through not being able to obtain a new, fair trial and being kept in detention even after the finding of the violation. Accordingly, the possibility of complementary measures to erase the consequences of the violation was discussed by the Deputies at the 906th (December 2004), 914th (February 2005) and 922nd meetings (April 2005).

General measures: Constitutional and legislative amendments were introduced in November 1999, February 2000 and March 2001 to ensure respect of the adversarial principle and thus prevent new violations of the right to fair criminal proceedings similar to that found in this case. See Resolution ResDH(2005)28 adopted in the case of Craxi No. 2 against Italy for details.

#### **- F.C.B. v. Italy, 12151/86, judgment of 28/08/91, Resolution DH(93)6**

This case concerns the unfairness of certain criminal proceedings: the applicant was sentenced, *in absentia*, in 1984, to twenty-four years' imprisonment without the domestic court having ascertained whether he had effectively intended to waive his rights to appear and defend himself (violation of Articles 6§1 and 6§3.c).

In March 1993, the Deputies adopted Resolution DH(93)6, closing the examination of this case, on the basis of the information given by the Government of Italy on the general measures adopted in order to prevent new similar violations. The question of the individual measures was not raised, *inter alia* because the impugned judgment did not seem likely to be enforced.

Individual measures: In October 1999, the applicant's lawyer indicated that the violation found by the Court had not been remedied and that the applicant still ran the risk of serving the 24-years sentence imposed in the proceedings impugned by the European Court as his extradition had now been sought. The Secretariat drew the attention of the Italian authorities to the problems that imposing this sentence would raise as to Italy's compliance with the Court's judgment and the question of the reopening of the proceedings was raised. In September 2000, the Italian authorities informed the Committee of Ministers that the Ministry of Justice had revoked its request for the applicant's extradition. According to the applicant's lawyer, however, the applicant still runs the risk of being expelled from any country where he might wish to settle because he has no valid identity documents following his conviction. Subsequently, in 2001, the Permanent Representation of Italy forwarded to the Secretariat a draft bill, aimed at introducing into Italian law the possibility to reopen cases following serious violations of the Convention. The question of adoption of such legislation still remains outstanding. (For details, see the abovementioned case Dorigo against Italy, 33286/96).

### **3) 140 cases relating to the failure to enforce judicial eviction orders against tenants**

#### **- Immobiliare Saffi v. Italy and 139 other cases, Interim Resolution DH(2004)72**

These cases mainly concern the sustained impossibility for the applicants to secure the enforcement of judicial decisions ordering their tenants' eviction principally on account of the implementation of legislation providing for the suspension or staggering of evictions. The European Court concluded that a fair balance had not been struck between the protection of the applicants' right to peaceful enjoyment of their possessions and the requirements of the general interest (violations of Article 1 of Protocol No. 1). In most of these cases, the Court also concluded that, as a result of the legislation at issue rendering eviction orders nugatory, the applicants had been deprived of their right to have their disputes decided by a court, contrary to the principle of the rule of law (violation of Article 6§1).

106 further cases similar to these, having led to the conclusion of friendly settlements have been examined to date by the Committee of Ministers.

Individual measures: Information is expected on measures envisaged to allow the applicants in the cases of C.T. II (354287/97, judgment of 09/01/2003) and Carbone Anna (48842/99, judgment of 22/05/2003), to recover possession of their apartments and thus put to an end the violations found. In the other cases, the applicants recovered their apartments between 1992 and 2003, i.e. between 4 and 17 years after the eviction decisions had been issued.

General measures: The following general measures have been considered by the Committee with a view to remedying the structural problems at the basis of violations found in the present cases:

(a) Finding effective alternative measures (instead of continuous legislative interventions suspending or staggering evictions) for tackling the public-order problems in the housing sector (see §§73-74 of judgment in Immobiliare Saffi), especially in densely populated cities. Law 431/98 on renting and repossession of housing has to some extent liberalised the renting system and provided for measures to increase a housing offer. However, this Law appears to be insufficient given a continuous flow of new cases brought to the European Court and a number of new violations found. Additional general measures would therefore appear necessary and all the more urgent given that the Constitutional Court held on 24 May 2004 (judgment No. 155) that continuous legislative interventions to delay the enforcement of judgments are unconstitutional.

(b) Adoption of legislative measures for ensuring the effective compliance of the administration and civil servants with final judicial decisions. Law 431/98 set, *inter alia*, conditions and deadlines for the enforcement of judicial eviction decisions. However, this law has not proved effective as it is still difficult in Italy to have eviction decisions enforced. The Constitutional Court judgment of 05/10/2001 (333/01), which annulled a restriction of the right to have a judicial eviction order executed, may be an important step towards solving the outstanding problems, but the real effect and practical implications of this judgment remain to be clarified.

(c) Providing for compensation, if necessary by the state, to flat-owners in cases of protracted non-execution for consequent financial losses. Thus, state and tenants' civil liability could also be envisaged (§57 of the judgment). Italian case law has recognised the right to compensation in cases of illegal administrative actions (Court of Cassation judgment 500/99), as well as the right to compensation in cases of unreasonable delay in the execution of judicial eviction orders, by virtue of the "Pinto law" (89/01) on excessive length of judicial proceedings (Court of Cassation judgment 14885/02). Information is awaited on the actual effects of the above case-law and whether the respondent state has granted compensation to aggrieved flat owners. The Secretariat has noted that lower Italian courts have applied "Pinto Law" in an effective manner in cases regarding non execution of judicial eviction orders (see e.g. the decision of the European Court on admissibility in the case of *Provvedi v Italy*, 02/12/04).

Finally, as regards publication, the Secretariat has only been informed of the publication of Immobiliare Saffi judgment in the academic law journal *Rivista internazionale dei diritti dell'uomo* (No. 1/2000, pp. 252-265).

The Committee adopted Interim Resolution Res DH(2004)72 in the present cases at the 906<sup>th</sup> meeting (December 2004).

#### 4) 3 cases relating to expropriation of property

- **Belvedere Alberghiera S.R.L. v. Italy, 31524/96, judgment of 30/05/00, final on 30/08/00 (merits) and of 30/10/03 final on 30/01/04 (just satisfaction)**

- **Carbonara and Ventura v. Italy, 24638/94, judgment of 30/05/00 (fond) and judgment of 11/12/03 (just satisfaction)**

- **F.S. No. 1 v. Italy, 19734/92, judgment of 18/02/98, final on 18/05/98, Interim Resolution DH(98)209 of 10/07/98**

These cases concern violations of Article 1 of Protocol No. 1 on account of the applicants' being deprived of property, between 1970 and 1994, through the case-law rule of "constructive expropriation", according to which public authorities acquire from the outset title to land, before formal expropriation if, after they have taken possession of the land for public works purposes, work has already been carried out on the land.

In particular, the transfer of title to the property in favour of the administration is retroactively validated by effect of this principle, irrespective of any finding by the competent courts that the occupation is illegal, any injunction ordering interruption of work or the restitution of land or any indication that the illegality of the occupation is due to the absence or expiry of a legal title of expropriation (*occupazione acquisitiva*) or the absence of general interest (*occupazione usurpativa*).

The European Court has maintained that "constructive expropriation" as applied in Italy constituted an arbitrary interference and did not fulfil the requirement of predictability (in particular in the Carbonara case, where the applicants had been deprived of any protection and of the possibility of compensation following the retroactive application in 1993 of a five-year limitation period which had already expired, and which had not been in force in 1980 when their action had been brought). In particular in the Belvedere and Carbonara cases the Court found that "constructive expropriation" did not conform with the principle of the rule of law, since it enabled the authorities to benefit from an unlawful situation in which the landowner was presented with a *fait accompli*. The Court stated in this connection that this was not an interference that would have

been legitimate but for the failure to pay fair compensation: the more so since the compensation procedure was in any case not in conformity with the Convention.

Indeed, the *F.S.I.* case raised the fact that Italian law failed to guarantee rapid compensation as, in order to receive compensation, two distinct procedures had to be engaged before administrative and civil courts. Neither did compensation erase the damage completely. In this regard, in the *Belvedere* case, where the expropriation was not in the public interest, the Court stated that the best compensation would be, not just payment of compensation for material and moral damages, but restitution of the land by the state.

General measures: the various problems raised in these cases since 1998 and 2000 have yet to be solved, despite the entry into force, on 30/06/2003, of a legislative consolidated expropriations code (*Testo Unico*, D.P.R. No. 327 of 08/06/2001, with amendments), insofar as this text codified in law the practice of "constructive expropriation" as developed in case-law. Article 43 of this law actually confirms the possibility for the administration irrevocably to acquire any property illegally occupied. In the case of expropriation following an illegal occupation it remains necessary, at least in certain cases, to seise both administrative and civil courts to establish the right to compensation and quantify its amount. Besides, restitution of land illegally occupied remains impossible where the administration vetoes it, even when the occupation is not justified by the public interest. When restitution is not possible, the expropriated landowner may obtain compensation to an amount equal to the value of the property plus the interest accruing during the period of occupation. The applicable prescription term is 5 years from the adoption by the administration of an act of acquisition.

The *Belvedere* judgment has been published in a number of legal journals (including *Rivista internazionale dei diritti dell'uomo* No. 3, 2000).

**Information is expected:**

- on the measures envisaged to ensure for the future that illegal occupations are prevented and repressed. Measures which could be considered include: the introduction of a system of coercive fines or of punitive damages; the reinforcement of the responsibility of the civil servants in case of illegal occupation; the annulment, at least in certain cases, of the absolute right of the administration to veto the reinstatement and restitution of the land;
- on the interim measures envisaged while waiting for the adoption of the above;
- on the conclusions of a seminar organised by the Supreme Judicial Council on 4-5/10/2004 as well as on the specific measures taken to draw the attention of the Constitutional Court, the Court of Cassation, the Council of State and local and regional authorities to the requirements of the Convention relating to the issues raised by the European Court in respect of expropriation.

## 5) 2 cases relating to the lack of effective investigation into alleged ill-treatment in detention

**- Labita v. Italy, 26772/95, judgment of 06/04/00**

**- Indelicato Rosario v. Italy, 31143/96, judgment of 18/10/01, final on 18/01/02**

These cases concern the absence of a thorough and effective investigation into the applicants' allegations of ill-treatment during their detention in the Pianosa prison in 1992 (violations of Article 3);

The *Labita* case furthermore concerns various aspects of the detention on remand and the conditions of release of the applicant - suspected of being a member of a mafia-type organisation -, namely:

- the lack of reasonable grounds for his continued detention pending trial: the European Court found this detention excessively long (2 years and 7 months, between 1992 and 1994) (violation of Article 5§3);
- the unlawfulness of the detention for 12 hours after the applicant's acquittal (in November 1993), owing to the absence of the competent officer (violation of Article 5§1);
- the unlawful monitoring of the applicant's correspondence during his detention, this measure having been at times applied in violation of internal law, which in any case does not comply with the criteria required by the Convention (violation of Article 8);
- the insufficient grounds for placing the applicant under special police supervision after his acquittal (violation of Article 2 of Protocol No. 4) ;
- the unjustified disenfranchisement of the applicant after his acquittal (violation of Article 3 of Protocol No. 1).

Individual measures: By letter of 26/07/2002, the Italian authorities indicated that the proceedings specifically concerning the Pianosa prison authorities, at issue in the *Labita* and *Indelicato* cases, were discontinued in 2001 owing to prescription of the alleged ill-treatment offences. Pianosa prison was closed in 1998. The preventive measures against Mr *Labita* ceased to apply on 18/11/1997.

General measures: The issue of general measures needed to prevent new violations similar to those found in these cases was addressed in detail in a letter by the Director of Human Rights of 24/08/2000. The Italian authorities indicated that the *Labita* judgment had been transmitted to the Supreme Judicial Council and published in Italian in several legal journals, including *Documenti giustizia*, 2000, No. 1/2; the *Indelicato* judgment was transmitted to the Public Prosecutor of Livorno and to the Public Prosecutor's Office at the Court of Cassation.

*Violations of Article 3:* Since 1998 administrative measures have been taken to improve the effectiveness of procedures relating to the follow-up of complaints of ill-treatment in prison, in particular through a modification of the register of medical comments and the issue of circulars and guidelines. Documents CPT/Inf(2003)16 and 17 issued in January 2003 by the Committee for the prevention of torture (CPT) contain detailed information on the measures taken to address the shortcomings found.

The effectiveness of the measures adopted is currently being examined.

A general inquiry aimed at assessing the results of proceedings directed against prison authorities charged with ill-treatment found that, out of the 52 and 138 such proceedings started respectively in 1999 and 2000, 145 were still pending in January 2003, 42 had been discontinued and 3 had ended in acquittal.

Updated data for 2000-2004 have been requested concerning the number of proceedings instituted in response to allegations of ill-treatment in prison as well as the outcome of such proceedings.

Information would also be useful as regards the further measures taken, particularly following the latest CPT recommendations, relating to the follow-up of ill-treatment allegations.

It may be noted that a new visit by the CPT took place in December 2004 and a new report is expected soon.

*Violation of Article 8:* As regards this aspect and the measures under way in order to prevent new, similar violations, see the outstanding issues raised in the framework of the examination of the case of Calogero Diana, Interim Resolution ResDH(2001)178.

*Violation of Article 5.1:* see Resolution ResDH(2003)151 adopted in the Santandrea case, detailing the measures taken to prevent new, similar violations.

*Violation of Articles 2 of Protocol No. 4 and 3 of Protocol No. 1:* By letter of 10/05/2004, the Italian delegation indicated that the Labita judgment had been sent out to the judicial authorities concerned. Furthermore, a seminar was organised by the Supreme Judicial Council in February 2005 concerning the case-law of the European Court in the field of criminal law drawing *inter alia* the attention of judges and Public Prosecutors to the need to interpret domestic law on preventive measures in accordance with the criteria emerging from the Labita judgment.

*Violations of Articles 5.3:* By letters of 10/05/2004 and 5/07/2004, the Italian delegation indicated that Articles 274 and 292 of the Code of Criminal Procedure (CCP) had been modified in 1995 and now provide that a judicial decision ordering pre-trial detention may be annulled *ex officio* if its necessity is not justified in the light of specific criteria. Article 299 of the CCP provides for the revocation of pre-trial detention if the reasons justifying it no longer exist and the case-law has clarified that the time already elapsed should be taken into account when assessing the need to maintain a person in detention. In addition, Article 303 of the CCP sets the maximum duration of pre-trial detention in the different cases.

#### **6) 8 cases concerning the monitoring of prisoners' correspondence in Italy and the right to effective remedy against imposition of special prison regime**

- Calogero Diana v. Italy, 15211/89, judgment of 15/11/96, Interim Resolution ResDH(2001)178
- Domenichini v. Italy, 15943/90, judgment of 15/11/96, Interim Resolution ResDH(2001)178
- Di Giovine v. Italy, 39920/98, judgment of 26/07/01, final on 26/10/01, Interim Resolution ResDH(2001)178
- Rinzivillo v. Italy, 31543/96, judgment of 21/12/00, final on 21/03/01, Interim Resolution ResDH(2001)178
- Natoli v. Italy, 26161/95, judgment of 09/01/01, Interim Resolution ResDH(2001)178
- Messina Antonio No. 2 v. Italy, 25498/94, judgment of 28/09/00, final on 28/12/00, Interim Resolution ResDH(2001)178
- Madonia v. Italy, 55927/00, judgment of 06/07/2004, final on 06/10/2004
- Ganci v. Italy, 41576/98, judgment of 30/10/03, final on 30/01/04

These cases mainly concern violations of Article 8 of the Convention on account of the lack of clarity of the Italian law on the monitoring of prisoners' correspondence (law No. 354/75), which was then in force and left too much leeway to the public authorities, particularly in respect of the duration of monitoring measures and the reasons justifying such measures, authorised the monitoring of correspondence with the organs of the European Convention on Human Rights and provided for no effective remedy against decisions ordering the monitoring of correspondence (violations of Article 13 in cases Diana, Domenichini and Messina (No. 2), violation of Article 6 in the case of Ganci).

In the Domenichini case, the Court also found a violation of Article 6§3(b) because one of the applicant's letters to his lawyer had been intercepted while criminal proceedings were still pending, thus impairing his defence rights.

General measures: On 05/12/2001 the Committee of Ministers adopted Interim Resolution ResDH(2001)178 which took stock of the interim measures adopted by Italy, such as the circular letters by the Ministry of Justice to presidents and public prosecutors of appeal courts, drawing their attention to the requirements of Article 8 of the Convention and to the prison authorities, giving them guidelines on how to comply with these requirements. The Interim Resolution also urged Italy to adopt legislative reforms in order to prevent new, similar violations.

Following this Interim Resolution, Italy adopted a new Law on monitoring of prisoners' correspondence (Law No. 95, in force as from 15/04/2004) which remedied many problems highlighted by the judgments.

As regards the violation of Article 8: The new law laid down clear substantive and time limitations to the control or restriction of detainees or prisoners' correspondence. The Law also formally exempted from monitoring prisoners' correspondence with Convention organs (new Art. 18-ter§2 of Law 354/1975), thus confirming the previous regulations adopted to that effect (article 38§11 of presidential decree 230/2000 - see Interim Resolution ResDH(2001)178).

As regards the violation of Article 6§3(b) (Domenichini): New Article 18-ter§2 of Law 354/1975, also formally exempts from control or restriction prisoners' correspondence with their defence counsel. This exemption, however, was already provided by the texts in force at the time of the Domenichini case (*inter alia*, Article 103 of the Code of Criminal Procedure – see § 20 of the judgment), but there was a failure to apply it effectively in practice. The Italian authorities suggested sending a new circular to the penitentiary administration to ensure that the newly adopted provisions are effectively implemented. Information in this respect is awaited.

As regards the violation of Article 13 and of Article 6: The procedure for judicial review of the authorities' decisions imposing the monitoring of correspondence or other restrictions have not been changed by the new Law. Yet the effectiveness of the appeal provided for by existing Article 14-ter of Law 354/1975 was clearly challenged by the Court in its judgments. The Court concluded in particular that "the systematic failure to comply with the statutory ten-day time-limit [for judicial review] considerably reduced, and indeed practically nullified, the impact of judicial review of the decrees" imposing restrictions on the prisoners. (see Messina No. 2 judgment, §96) The measures taken so far do not appear to have solved this problem. Information is accordingly needed on further measures taken or envisaged, in particular with a view to ensuring respect for the legal deadline. In this connection, statistical data indicating the average time for examining such appeals would also be useful.

## 7) 12 cases revealing various problems in bankruptcy proceedings

### - P.G. II v. Italy, 22716/93, Interim Resolutions DH(97)18 of 28/01/97 (finding of a violation) and ResDH(2002)58 of 16/04/02 (questions concerning general measures)

The case concerns the impossibility in Italian law to rehabilitate a person declared bankrupt before a minimum 5-year term has expired (Article 143 of the Royal Decree No. 267 of 16/03/1942). The applicant was thus refused an earlier rehabilitation, in spite of the fact that he had been declared bankrupt while he was a minor and de facto had no appointed guardian or legal representative. Thus until the lifting of the bankruptcy (i.e. from the age of 16 until he was 22), the applicant was subjected to supervision of his correspondence and could not leave his house without the authorisation of the Commissioner in Bankruptcy. Moreover until his rehabilitation at the age of 27, he was barred from voting or from standing for election, from exercising judicial functions, from acting as a guardian, as manager, administrator, liquidator or auditor of a joint-stock company and from belonging to a professional body (violation of Article 8).

Individual measures: No measure has been requested in particular as the applicant's bankruptcy has been lifted, the 5-year term having expired before the violation was found.

General measures: Following the adoption in April 2002 of Interim Resolution (ResDH(2002)58) inviting the Italian authorities to adopt the necessary measures without further delay, to prevent new violations similar to that found in this case, the Italian authorities indicated that they were not contemplating any specific measures with regard to the rehabilitation of bankrupts. They did point out however that the ongoing reform of bankruptcy law (draft law No. 1234/S) could resolve many of the problems related to bankruptcy proceedings which have given rise to the finding of various violations of the Convention in a number of cases (see Parisi, S.B.F. S.p.a. and Nordica Leasing, F.L., Saggio, Bottaro, and other similar cases). In particular they noted that Article 39 of the draft law would abrogate the provision on rehabilitation at the origin of the violation in the this case, although the text does not make it clear which of the above restrictions would continue to apply, for how long and under what conditions, once the new law was in force. Accordingly, further details have been requested on this and on the anticipated timetable for the enactment of the draft law.

**- S.B.F. S.p.a. v. Italy, 26426/95, Interim Resolution DH(97)599**

**- Nordica Leasing S.p.a. v. Italy, 51739/99, judgment of 14/10/04, final on 14/01/05**

These cases concern the violation of the applicant companies' right of access to a court in proceedings they had brought to obtain an adjudication of culpable bankruptcy of their debtors - an individual entrepreneur in the case of S.B.F. and a non-registered company in the case of Nordica Leasing. In 1993 (in the case S.B.F.) and 1999 (in the case Nordica Leasing) the applicant companies lost the opportunity to recover their financial claims by such means, as the competent court had not given its ruling within the deadline prescribed by Italian law (one year from the cessation of the debtor's activities) on account of delays by the competent court and of the authorities responsible for tax investigations (Guardia di Finanza) (violations of Article 6§1).

Individual measures: the applicants might recover their credit through alternative civil judicial proceedings, such as execution proceedings (see §35 of the Nordica Leasing judgment).

General measures: The Italian authorities indicated that they were not contemplating any specific measures with a view to ensuring the effective respect of deadlines set for obtaining an adjudication of culpable bankruptcy. They did point out however that the ongoing reform of bankruptcy law (draft law No. 1234/S) could resolve many of the problems related to bankruptcy proceedings which have given rise to the finding of various violations of the Convention in a number of cases (see Parisi; P.G. II ; F.L. ; Saggio ; Bottaro, Luordo and other similar cases). In this context, it should be noted that according to the draft law, the one-year limit for obtaining an adjudication of bankruptcy runs from the date of cessation of activity for individual entrepreneurs and from the date of striking-out from the companies' register for registered companies. It is unclear which provisions will apply to non-registered companies, as in the Nordica Leasing case. Details on this issue would accordingly be useful as well as of the schedule for the entry into force of the reform of bankruptcy law. It would also be helpful to have details of any administrative measures taken or envisaged in the framework of the organisation of tribunals and of the tax authorities, to accelerate case-management and ensure that legal deadlines are respected. The Nordica Leasing judgment was translated into Italian and forwarded, together with an explanatory note on the violations found, to the judicial authorities including the Court of Cassation.

**- Bottaro v. Italy, 56298/00, judgment of 17/07/03, final on 17/10/03, and 6 other cases**

These cases concern disproportionate restrictions of the applicants' rights in the context of bankruptcy proceedings. In order to protect the rights of others, the Italian law on bankruptcy (Royal Decree No. 267 of 16/03/1942) provides that bankrupts are, inter alia, deprived of their right to administer and dispose of their possessions, that their correspondence should be monitored, that they are prohibited from bringing judicial proceedings and prevented from leaving their place of residence without judicial permission. Although such restrictions are not open to criticism in themselves, they become less necessary with time. Thus, when the length of the bankruptcy proceedings is excessive, as in these cases (between 12 and 24 years) they upset the balance between the general interest in payment of a bankrupt's creditors and the interest of the individual.

The European Court accordingly found violations of the applicants' right to the peaceful enjoyment of their possessions (violations of Article 1 of Protocol No. 1), their right of access to a court (violation of Article 6§1), their freedom of movement (violation of Article 2 of Protocol No. 4) and their right to respect for their correspondence (violations of Article 8). Furthermore, no effective remedy was available as regards the last of these rights (violation of Article 13 in Bottaro case).

Individual measures: Information is expected as regards the acceleration of the proceedings in Neroni (judgment of 20/04/2004, final on 10/11/2004) and S.C., V.P., F.C. and E.C. (judgment of 6/11/03, final on 6/02/04), which have been pending for more than 19 and 12 years respectively, and the lifting of the impugned restrictions which are still imposed on the applicants. The need for these measures has been repeatedly recalled at the Committee of Ministers' meetings and in the Secretariat's letters to the Italian delegation.

At the 922nd meeting (April 2005), the Italian delegation confirmed that the proceedings at issue were still pending. The delegation undertook to urge the competent authorities to bring them to an end without further delay and to inform the Committee of the progress in this sense at the present meeting.

In all other cases the domestic proceedings have been terminated since the Court's judgments and the impugned restrictions accordingly lifted.

General measures: A reform of the bankruptcy legislation is under way. According to the information available to the Secretariat, the draft law was last modified on 23/12/2004 and the government indicated its intention to have the reform adopted by the end of 2005. In the meantime, the Secretariat has received from the Italian delegation some statistical data indicating that the average length of bankruptcy proceedings is about ten years.

The Luordo and Bottaro judgments have been published in Italian in the Ministry of Justice's Bulletin, No. 1 of 15/01/2004 and have been brought to the attention of the competent authorities.

- **Saggio v. Italy, 41879/98, judgment of 25/10/01, final on 25/01/02**
- **F.L. v. Italy, 25639/94, judgment of 20/12/01, final on 20/03/02**

The cases concern the lack of effective remedy to claim the payment of salary arrears from a company placed under extraordinary administration (Saggio case) or administrative liquidation (F.L. case) and to challenge the liquidators' acts: according to the applicable legislation (Law 95/79 in *Saggio* case and Royal Decree No. 267 of 16 March 1942 in *F.L.* case), judicial proceedings were only possible after the final liquidation balance sheet and the scheme for distribution have been established (violations of Article 13).

Individual measures: The authorities have been invited, in the light of the judgments, to put an end to the violations found by ensuring that effective domestic remedies are available to the applicants. The applicants' present situation and possible remaining effects of the violations are being clarified.

General measures :

Law No. 95/79 on extraordinary administration, which was at the basis of the violation in the Saggio case, has been amended. The new provisions (Law No. 270/99, in force from August 1999) henceforth allow any creditor to challenge before domestic courts the action of a liquidator in extraordinary administration proceedings initiated after the entry into force of the law. Furthermore, the judgment of the European Court was published in the Official Bulletin of the Ministry of Justice, No. 13 of 17/07/2002 and brought to the attention of the judicial authorities.

The Royal Decree No. 267 of 16 March 1942, which was at the basis of violation in *F.L.* case was, however, not amended. According to this text, judicial proceedings to claim payment of sums from a company under administrative liquidation or to challenge the liquidators' acts can only be taken once the final liquidation balance sheet and the scheme for distribution have been established. The Italian authorities were invited to solve this problem in the context of the general reform of bankruptcy legislation or to envisage other measures preventing new, similar violations due to the provisions at issue. Information on this question is awaited.

### **8) 3 other cases raising problems**

- **Grande Oriente d'Italia di Palazzo Giustiniani v. Italy, 35972/97, judgment of 02/08/01, final on 12/12/01, Interim Resolution ResDH(2004)71**

The case concerns in particular a disproportionate interference with the freedom of association of the applicant, an Italian Masonic association affiliated to the Universal Freemasons, on account of the obligation for candidates to public office in the Marches region to declare that they are not members of the Freemasons. The European Court concluded that this restriction, established by Article 5 of Marches Regional Law No. 34 of 1996, was not necessary in a democratic society nor was it justified by the character of the public office concerned by the law (violation of Article 11).

Individual measures: The applicant association complained, by letters of 29/01/2003 and 17/05/2004 that it would continue to suffer from the restrictions contrary to the Convention as long as the law at the origin of the violation found was not modified, and accordingly solicited the adoption of the appropriate general measures (see below).

General measures: On 8/12/2004 the Committee of Ministers adopted Interim Resolution ResDH(2004)71 urging the competent Italian authorities to take the necessary measures to guarantee the rights enshrined in Article 11 of the Convention concerning appointment to certain posts in the Marches Region. A law amending Marches Regional Law No. 34/1996 was adopted in February 2005 (L.R. No. 10 of 23/02/05), but the provision found to be contrary to the Convention was not modified. It is recalled that the abrogation or modification of Article 5§2, point (e) of Marches Regional Law No. 34/1996 has been expected since December 2001. In this connection, a letter was sent to the Italian authorities on 14/11/2003 requesting information on measures under way to bring the Marches regional law in conformity with the Convention. A draft amendment to the law, aiming at bringing it in conformity with the Court's judgment, was rejected by the Regional Council in February 2003, according to the latest information provided in July 2003. The Italian delegation has indicated that the pertinent laws of other regions do not seem to raise the same problems found by the Court in this case.

Information required: Information is expected as to what steps have been taken or are envisaged to put Marches Regional Law No. 34/1996 in conformity with the Convention. It should be noted in this context that the applicant association has drawn the attention of the Committee of Ministers to the possibility for the President of the Republic, under article 126 of the Italian Constitution, to dissolve the regional council in case of serious violations of the law and the Constitution. The confirmation of the publication of the judgment of the European Court in Italian and of its transmission, with a circular, to the Marches Regional Council is also expected.

**- Scozzari and others v. Italy, 39221/98, judgment of 13/07/00 (Grand Chamber), Interim Resolutions ResDH(2001)65 and ResDH(2001)151**

The case concerns two violations of Article 8 of the Convention related, first to the continued placement, since 1997, of the two children (born 16/07/1987 and 27/02/1994 respectively) of the first applicant (mother) in the "Forteto" community after they had been taken into public care and, secondly to the authorities' failure to maintain opportunities for the mother and her children to re-establish family bonds, through the organisation of regular contact visits. The Court took particularly into consideration:

- the fact that certain leading personalities of the "Forteto" with serious previous convictions (not least for ill-treatment and sexual abuse of handicapped people placed in the community (§§32-34)) still played an active role in bringing up the children (§§201-208);
- the fact that the implementation of the Youth Court's decisions had been deflected from their intended purpose of allowing visits between mother and children to take place as a result of the attitude of the social services (§§178-179 & 213) and of some of the leaders of "Il Forteto" (§211), who had delayed or hindered the implementation of such decisions (§209) and exercised a mounting influence on the children to distance them from their mother (§210);
- the doubt about who really has effective care of the children (§211);
- the insufficient level of control on the social services and the "Forteto" (§§179-181 & §§212-216);
- the risk of the children's long-term integration into the "Forteto", which - in the Court's opinion - is contrary to the objectives of a temporary placement and the superior interest of the children (§§215-216).

In a letter of 4/02/2005, circulated to the Ministers' Deputies at their 914th meeting (February 2005), the Italian delegation asked that the examination of the case be closed, in relation with an alleged attempt to kidnap the children in January 2005. The Secretariat is of the opinion that this issue is not ready for consideration, in view of the number of outstanding questions (concerning individual and general measures as well as the payment of default interest due) which remain to be solved to ensure the execution of the judgment irrespective of whether or not Ms Scozzari was involved, which has in any event not been established at the time of drafting this document. On this score, the Belgian authorities have provided documentation calling into question the reliability of the allegations concerning her possible involvement.

Individual measures - outstanding issues: According to the information available, the main problems highlighted by the Court in connection with the placement and the organisation of visits are still outstanding (cf. also the Director of Human Rights' letter of 8/07/2002 and the abovementioned letter of 30/03/2005) and the adoption of appropriate measures is accordingly expected in conformity with the Court's judgment (see also Interim Resolutions ResDH (2001)65 and (2001)151) to remedy the shortcomings found (see above) and to preserve the possibility of restoring the family bonds between the mother and her children. It is to be noted in this context that the elder child will become of age in July 2005.

- *As regards the issue of the uninterrupted placement of the children in the "Forteto"*, this is still in force for an unlimited period, notwithstanding a final Court of Appeal judgment of 30/10/2002 setting a final time-limit on 30/06/2003.

In this decision, the Court found new mismanagements of the case by the Youth Court and confirmed the risk of long-term integration of the children in the "Forteto", identified by the European Court, also in the light of the attitude of the social services and the members of the "Forteto" which did not contribute to a positive evolution of the mother/children relationship. The Court of Appeal did not rule on the question of the role of the convicted persons in relation to the children or on the inspections made in the "Forteto" (in this connection, see "General measures", below).

In view of these findings, confirming those at the origin of the violation, the judgment had set 30/06/2003 as the final deadline for the placement of the children in the "Forteto". Despite this judgment, the Youth Court has not set a new deadline, or justified the tacit prorogation of the placement in conditions which both the European Court and the Florence Court of Appeal had found not to correspond to the best interest of the children. Different proceedings engaged by the applicant's lawyer and aimed at remedying these shortcomings appear to be under way. In the light of these elements, information is expected on the urgent measures taken to redress the shortcomings found, not least with regard to respecting a time limitation on the placement in the "Forteto" in accordance with the judgments of the European Court and of the Court of Appeal.

- *As regards the visits*, at the time of drafting this document, they had been temporarily suspended by a decision of the Florence Youth Court of 21/01/2005, pending the outcome of an inquiry into the circumstances and responsibilities of an alleged attempt to kidnap the children. Hearings of the children and the applicant were scheduled on 8/03/2005, 15/03/2005 and 17/05/2005. Information is expected on the decision taken by the Florence Youth Court with a view to maintaining family bonds between the applicant and her children.

Before the suspension, regular visits had been organised since December 2001, at first on a monthly basis, then three times per month (following the decision of the Florence Court of Appeal of 30/10/2002) and finally on a weekly basis (following a new decision of the Florence Youth Court of 6-19/07/2004). Furthermore, a psychological guidance programme aimed at helping the applicant to restore good relations with her children was set up in conformity with a decision of the Florence Youth Court of 22/08/03. Obstacles to the organisation of visits on account of the attitude of the social services or of the "Forteto" members have been addressed by the Florence Youth Court: for example, in December 2000 the Tribunal ordered the replacement of the social service staff responsible for setting up the visit programme and in July 2004 it allowed the visits to take place outside the "Forteto".

General measures - questions outstanding: In November 2003, the Italian authorities indicated that seminars would be organised in 2004 for social service workers and youth court judges to raise their awareness of the requirements of the Convention, as interpreted in the Strasbourg case-law, in the area of family law. Details have been requested.

As regards Italy's obligation to ensure effective and regular supervision of the placement of children, the Committee of Ministers has been informed of an opinion of the CSM given in October 2003 find that, in general, the system of reinforced inspection laid down by Law No. 149 of 2001. In the light of the specific criticisms made in October 2002 by the Court of Appeal concerning the conditions of placement of the children in "Forteto", information is nonetheless expected about the results of the latest official inspections of the "Forteto". Copies of the relevant reports would be useful. This inspection is also relevant to the individual measures (see above) required in this case to make sure that the placement of the children, who are also applicants, respects the requirements of the Convention and of Italian Law.

General measures - measures taken: As regards the question of how it happened that people convicted of sexual abuse and ill-treatment were still managing a community entrusted with the care of children, the CSM indicated in its decision transmitted on 30/10/2003, that the persons at issue in the judgment were no longer entrusted with activities putting them into contact with children and, in particular, with Ms Scozzari's children. Furthermore, no new negative element had been raised concerning these persons and the "Forteto" community since the convictions at issue. The CSM indicated that special attention and supervision should apply in case of placement of children with convicted persons and that, in future, such a decision should be explicitly motivated. It also indicated the need to strive to identify any element which might raise doubts about the adequate character of a placement as well as the need explicitly to state in the placement decisions any useful element of response to the legitimate worries of the people concerned.

The Judgment of the European Court has been translated into Italian and published in the legal journal *Rivista Internazionale dei Diritti dell'Uomo*, No 3/2000, p. 1015-1046.

#### **- C.A.R. srl v. Italy, 23924/94, judgment of 17/10/97, final on 17/01/98, Interim Resolution DH(98)154**

The case concerns a violation of the applicant company's right of peaceful enjoyment of its possessions, related to the fact that, in order to preserve public order, the Prefect of Latina refused, from 1991 until 1994, to provide police assistance to evict a number of Somali refugees who occupied its buildings without title, in spite of the existence of a judicial eviction order. The European Commission of Human Rights (Report of 10 September 1997) noted that the absence of any compensation for the material damage that the applicant company had suffered broke the necessary balance between the protection of the applicant company's right to property and the requirements of public order (violation of Article 1 of Protocol No 1, affirmed by the Committee of Ministers -Interim Resolution DH(98)154).

General measures: At the time, Italian law did not provide any possibility of compensation relating to state liability for an action or omission of public authorities justified by public order requirements. Since then, however, a number of developments in the legislation and case-law suggest that an individual may today obtain such compensation. These include the following:

(a) Following the entry into force of the "Pinto Law" (Law 89/01) which provides a right to compensation in cases of unreasonable delay of judicial proceedings in violation of Article 6§1 of the Convention, the Italian Court of Cassation underlined in its judgment 11046/02 of 18/06/2002 (affirmed by judgment 14885/02 of 22/10/02) that the "Pinto Law" is applicable to cases where the violation of the right to a reasonable duration of a proceeding emanates from a state action, including delays or failures of execution of judicial eviction orders. Lower Italian courts have applied the "Pinto Law" in an effective manner in cases regarding non-execution of judicial eviction orders (see e.g. the decision of the European Court on admissibility in the case of *Provvedi v Italy*, 02/12/04).

(b) Moreover, the Court of Cassation has further reinforced the individual right to compensation for damage incurred, in the context of Article 2043 of the Italian Civil Code. By its judgment 19200 of 24/09/2004 the Court of Cassation established in Italian law a kind of objective civil liability, that is to say, an individual right to compensation for material and moral damage which has been actually caused by an illegal act of another person (or legal entity), irrespective of the latter's intention. As a consequence, whenever aggrieved persons may prove that they have in fact suffered material or moral prejudice by the illegal act of another person (or legal entity), the former is entitled to compensation by the latter.

c) Finally, the Court of Cassation by its judgment 3873 of 26/02/2004 established the principle that in cases lodged by flat owners against the administration in order to obtain compensation for damage suffered as a consequence of a delayed, or failure of, execution of eviction orders, it is the administration, and not the owners, who has to prove that it was impossible to offer police assistance for the eviction.

**Information expected:** on the actual effects and application of the above Court of Cassation case-law of 2004 by lower courts as well as on the administration's compliance with this jurisprudence. Examples of cases where compensation has been awarded by the state to physical or legal persons for damage suffered as a consequence of an action or omission of public authorities, justified by public order requirements would be particularly useful.

## 1 case against Latvia

### - Slivenko v. Latvia, 48321/99, judgment of 09/10/03 (Grand Chamber) CM/Inf(2004)13

The case concerns the deportation of the applicants, former Latvian residents of Russian origin, to Russia. The first applicant, whose father was an officer in the Soviet army, had lived in Latvia all her life. The second applicant, the daughter of the first applicant, was born in Latvia and lived there until she was expelled at the age of 18. In November 1994 the applicants' registration (as "ex-USSR citizens") in the Latvian residents' register was annulled relying on the Latvian-Russian treaty of 1994 on the withdrawal of Russian troops. The applicants' deportation was ordered in August 1996. They also lost the flat where they had lived. The applicants unsuccessfully challenged their removal from Latvia before the domestic courts. Following several forced deportation attempts, the applicants moved to Russia in July 1999 to join the first applicant's husband and subsequently obtained Russian citizenship. The applicants' deportation order prevented them from returning to Latvia for 5 years (this prohibition expired on 20/08/2001) and then limited their visits to 90 days a year.

The European Court found that the expulsion of the applicants could not be considered as necessary in a democratic society, in that they were at the material time sufficiently integrated into Latvian society where a part of their family (parents or grandparents) continue legally to reside. The Court added that the applicants' presence in Latvia could not be construed as a threat to national security simply through belonging to the family of a retired Soviet soldier who was not himself considered to present such a danger and had remained in the country on retiring in 1986 (violation of Article 8).

Individual measures: The need to ensure *restitutio in integrum* for the applicants expelled from Latvia in violation of Article 8 of the Convention has been stressed on numerous occasions before the Committee of Ministers. The applicants requested in this context that the government reinstate them as permanent residents of Latvia.

The Latvian government, for their part, informed the Committee that, following the European Court's judgment, the Citizenship and Migration Authority had requested the reopening of judicial proceedings relating to the applicants' deportation. The Supreme Court granted this request on 10/08/2004 and referred the case to the District Administrative Court of Riga for retrial. On 24/12/2004, the latter court declared unlawful the administrative decision of 29/11/1994 annulling the applicants' registration in the Register of Latvian residents. However, the court refused to quash this unlawful decision and to order of the applicants' reinstatement in the Register. The court also dismissed the applicants' request to quash the deportation order issued on 20/08/1996 by the immigration authorities in their respect.

Claiming that no adequate redress was granted, the applicants lodged on 24/12/2004 an appeal against this decision before the Riga Court of Appeal. At the same date, the Citizenship and Migration Authority also lodged its appeal against the said decision. The first hearing was scheduled for May 2005. The appeal proceedings seem to be delayed by the fact that the applicants have still not received the full, reasoned text of the District Court decision (according to the applicants' lawyers' letter of 28/04/2005). The translation (in English or in French) of the full official text of this decision was also requested by the Secretariat in January 2005 but has not yet been provided by the authorities.

The applicants' lawyers have repeatedly stressed before the Committee (most recently by letter of 28/04/2005) the urgency of rapidly obtaining a new permanent residence status, particularly to allow access to the applicants' elderly parents/grandparents living in Latvia, who are in precarious and deteriorating state of health (as demonstrated by recent medical certificates) and thus in great need of care and assistance by their next-of-kin. Given these circumstances and the increasing length of judicial proceedings, the applicants are requesting an urgent administrative decision to restore their permanent residence permit, thus putting an end to the violation of Article 8 found by the Court one and a half years ago. They indicate in particular that no legal obstacle to such a decision appears to exist in Latvian law.

General measures: Information is awaited concerning publication, in Latvian, and dissemination of the European Court's judgment to authorities competent for deportation matters so as to allow them to apply the principles established by the Court in future, in similar cases. Information on further measures taken or envisaged is also awaited.

## 1 case against Moldova and Russia

### - *Ilașcu and others v. Moldova and Russia*, 48787/99, judgment of 08/07/2004 (Grand Chamber), ResDH(2005)42

The case concerns events occurring in the “Moldavian Republic of Transdniestria” (“the MRT”), a region of Moldova known as Transdniestria, which declared its independence in 1991 but is not recognised by the international community. It concerns the unlawful detention of the four applicants (three of whom are now Romanian citizens), following their arrest in 1992 and subsequent trial by the “Supreme Court of the MRT”, and the ill treatment inflicted on them during their detention.

The Court's findings: As regards the responsibility of Moldova, the Court found (paragraphs 330 to 335 of the judgment) that:

330. ...the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, does not exercise authority over part of its territory, namely that part which is under the effective control of the ‘MRT’. ...

331. However, even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention. ...

335. Consequently, the Court concludes that the applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention but that its responsibility for the acts complained of, committed in the territory of the ‘MRT’, over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention.

It further noted (paragraphs 348 and 352 of the judgment) that:

348. The Court does not have any evidence that since Mr Ilașcu's release in May 2001 effective measures have been taken by the authorities to put an end to the continuing infringements of their Convention rights complained of by the other three applicants. ...

352. The Court accordingly concludes that Moldova's responsibility is capable of being engaged under the Convention on account of its failure to discharge its positive obligations with regard to the acts complained of which occurred after May 2001.

As regards the responsibility of the Russian Federation, the Court concluded (paragraph 382 of the judgment) that:

“the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria, which is part of the territory of the Republic of Moldova[, and] that even after the ceasefire agreement of 21 July 1992 the Russian Federation continued to provide military, political and economic support to the separatist regime..., thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy vis-à-vis Moldova.”

It further noted (paragraphs 392 to 394 of the judgment) that both before and after 5 May 1998 (the date of the ratification of the Convention by the Russian Federation):

“392. ...the ‘MRT’... remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event...it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.

393. That being so, the Court considers that there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate, as the Russian Federation's policy of support for the regime and collaboration with it continued beyond 5 May 1998, and after that date the Russian Federation made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998. ...

394. In conclusion, the applicants therefore come within the ‘jurisdiction’ of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility is engaged with regard to the acts complained of.”

As to the facts alleged, the Court found that the ill treatment inflicted on the first applicant and the conditions in which he was detained while under the threat of execution constituted torture (*violation of Article 3 by Russia*) and that the ill treatment inflicted on the second applicant and the conditions in which he was detained also constituted torture (*violation of Article 3 by Moldova and Russia*). It further found that the ill treatment inflicted on the third and fourth applicants and the conditions in which they were detained constituted inhuman and degrading treatment (*violation of Article 3 by Moldova and Russia*).

With respect to the right of individual petition, the Court noted the difficulties experienced by the applicants in lodging their application, the threats made against them by the Transdniestrian prison authorities and the deterioration in their conditions of detention after their application was lodged.

It noted that the Russian authorities had requested Moldova to withdraw certain observations it had submitted to the Court in October 2000 concerning the responsibility of Russia. It found that such conduct on the part of the Russian Government was likely to seriously hinder the Court's examination of an application lodged in exercise of the right of individual petition, thereby interfering with this right (*violation of Article 34 by Russia*).

In addition, the Court noted certain remarks made publicly by the President of Moldova following the release of the first applicant, which made an improvement in the other applicants' situation depend on withdrawal of the application, and thus represented direct pressure intended to hinder the exercise of the right of individual petition (*violation of Article 34 by Moldova*).

As regards the applicants' deprivation of liberty, the Court found that none of the applicants had been convicted by a "court" within the meaning of Article 5. Furthermore, a sentence of imprisonment passed by a judicial body such as the "Supreme Court of the MRT" at the close of proceedings like those conducted in the present case could not be regarded as "lawful detention" ordered "in accordance with a procedure prescribed by law". That being so, there had been a violation of Article 5§1 of the Convention until May 2001 as regards the first applicant (*violation of Article 5§1 by Russia*), and *there had been and continued to be a violation of that provision as regards the other applicants, still detained (violation of Article 5 § 1 by Moldova and Russia)*.

Furthermore, the Court held, unanimously, that "*the respondent States [were] to take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release*" (paragraph 22 of the operative part of the judgment). Moreover, it emphasised the urgency of this measure in the following terms (paragraph 490):

*"any continuation of the unlawful and arbitrary detention of the...applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46§1 of the Convention to abide by the Court's judgment."*

It should further be emphasised that this is the first time that the Court has ruled on a potential breach of Article 46 § 1.

Examination of the case by the Ministers' Deputies: Given the terms of the judgment, the Deputies decided at their 894th meeting (9 September 2004) to continue examining the urgent measures ordered by the Court not only at their meetings devoted mainly to supervision of the execution of judgments ("DH" meetings) but also at their regular meetings. The Committee has examined the case at most of its meetings since 9 September 2004.

According to the information available to the Secretariat, only two of the four applicants have been released to date. Mr Ilaşcu was released in May 2001 (as noted by the Court) and Mr Leşco at the expiry of the sentence imposed on him by the "Supreme Court of the MRT", on 2 June 2004. The other two applicants, Messrs Ivanţoc and Petrov-Popa, are still imprisoned.

On 22 April 2005, at the 924th meeting of the Deputies, the Committee of Ministers adopted an interim resolution concerning this case (ResDH(2005)42). In this resolution, the Committee took note of the measures taken to that date by the respondent States towards the execution of the present judgment, in particular the payment of just satisfaction by both respondent States, the publication of the full text of the judgment by the Moldovan authorities and the publication of a summary of the judgment in the Bulletin of the European Court of Human Rights (Russian edition). In addition, stressing that it was evident that the continuation of the unlawful and arbitrary detention of two of the applicants for more than 9 months after the Court's judgment failed to satisfy the Court's demand for their immediate release, and noting in addition that the steps taken to date have not been sufficient to secure the release of Mr Ivanţoc and Mr Petrov-Popa, the Committee urgently invited the Russian authorities to comply fully with the judgment; invited the Moldovan authorities to continue their efforts towards securing the release of the two applicants who are still imprisoned; and decided to resume its examination of this case at each of its meetings until the applicants' release.

Observations of the respondent states regarding the steps taken since the adoption of Interim Resolution ResDH(2005)42 to secure the release of the applicants who are still imprisoned: At the 925th meeting (4 May 2005), the Permanent Representative of Moldova referred to the statement made by Ambassador Dumitru Croitor, Permanent Representative of Moldova to the United Nations Office at Geneva, at the 61st session of the Commission on Human Rights in April 2005. In this statement, Ambassador Croitor recalled the present judgment and the need to execute it in full – noting, however, that the individual efforts of the Moldovan authorities would not suffice to achieve this. He called upon the member and observer States of the Commission to use every means available to them to support the execution of the judgment and to denounce the unlawful detention of the applicants. In addition, the Permanent Representative of Moldova to the Council of Europe reiterated at the same meeting his authorities' commitment to comply fully with the judgment and invited his counterparts to indicate any further measures that his authorities might so far have failed to identify in this respect.

Observations of other delegations: At the 924th meeting (20 and 22 April 2005), the Permanent Representative of Luxembourg expressed the satisfaction of the member States of the European Union regarding the adoption of an Interim Resolution concerning this case (ResDH(2005)42). He stressed, however, that two of the applicants were still imprisoned and that their imprisonment had already lasted a number of years. He expressed the firm hope that the Interim Resolution which had just been adopted would provide an additional incentive for the relevant parties in order to secure the release of these applicants.

At the 925th meeting (4 May 2005), several delegations called upon both respondent states to comply with Interim Resolution ResDH(2005)42 by fully executing the judgment. They emphasised that every constructive means of obtaining the release of the applicants, who are still imprisoned, should be used.

At the 926th meeting (11 May 2005), the French and Romanian delegations again called upon both of the respondent states to take all necessary measures to secure the applicants' release, and recalled that their release was also necessary on humanitarian grounds.

Observations of the Secretariat: At the 924th meeting (20 and 22 April 2005), the Director General of Human Rights welcomed the adoption of an interim resolution (ResDH(2005)42 concerning the execution of the judgment, and stressed that the Secretariat hoped that this resolution would rapidly produce concrete results. He also recalled that the Committee of Ministers is responsible for ensuring the execution of the Court's judgments and that, even though the Committee is the executive organ of the Council of Europe, in the context of the execution of the Court's judgments its action is based on the European Convention on Human Rights. Consequently, the Director General invited the Deputies to reflect on the manner in which the present case had been dealt with to date and consider what lessons may be learned for the future.

## **109 cases against Poland**

### **1) 108 cases of length of judicial proceedings and lack of an effective remedy at national level**

- **Podbielski v. Poland, 27916/95, judgment of 30/10/98 and 91 other cases of length of civil proceedings**

- **Kudła v. Poland, 30210/96, judgment of 26/10/00 (Grand Chamber) and 15 other cases of length of criminal proceedings and of lack of an effective remedy at national level (for instance in the Kudła case)**

These cases concern the excessive length of certain proceedings concerning civil rights and obligations before the civil and administrative courts, as well as the excessive length of certain criminal proceedings (violations of Article 6§1). Some of the cases concern the lack of effective remedies to enforce, at national level, the right to a hearing "within a reasonable time" (violation of Article 13).

Individual measures: The Polish authorities have provided information on the stage reached by the proceedings in the above mentioned cases, as well as on the measures aiming at the acceleration of some of them (e.g.: some cases were placed under the administrative supervision of the president of the court and of the Ministry of Justice; in some others, the presidents of the competent courts were urged by the Ministry of Justice to give priority to the applicants' cases).

Information is expected on the acceleration of the proceedings in those cases where the European Court stressed that the proceedings should have been dealt with special diligence (e.g. cases brought by elderly applicants, cases concerning compensation claims for injuries sustained by the applicants, etc.).

General measures:

Concerning the general structural measures aimed at speeding up the duration of court proceedings and reducing the existent backlog, the Polish authorities have provided information on issues such as: the reform of the court system; changes in the rules governing the court's procedure, in view of simplifying them; the recruitment of new judges and assessors, as well as the recruitment of judicial assistants « referendarze sądowi »; a better administrative organisation of the courts and case-management; improvement of the activity of court experts; improvement of the system of execution of judgments; implementation of the information technology resources; the adoption of special measures aimed at reducing the backlog of some specific court (particularly in Warsaw), etc.

The Ministry of Justice is also involved in analysing the causes of delay in judicial proceedings in the framework of the exercise of its competence of administrative supervision of courts' work.

The Secretariat is in contact with the Polish authorities in order to assess the efficiency of these measures, also on the basis of the statistics provided in this respect.

As regards the violation of Article 13, during the first examination of the Kudła case (732nd meeting, December 2000), the Committee noted the scope of this judgment: for the first time the Court had applied Article 13 of the Convention in order to affirm that contracting states must provide effective domestic remedies to resolve the problem of excessive length of proceedings. The Committee also took note of the fact that the remedies required in this regard by Article 13 could be both compensatory and preventive (§159 of the judgment).

At the 854th meeting (October 2003), the Polish delegation submitted a memorandum concerning:

- a draft law of 20/08/2003 providing an effective remedy against the excessive length of judicial proceedings;
- a draft law of 08/04/2003 on amendments to the Civil Code concerning the civil liability of the State Treasury for actions or omissions of public authorities; and
- a decision of the Constitutional Court of 04/12/2001, which might open a way to making civil claims against state officials on the grounds of excessive length of judicial proceedings.

During consultations with the Polish delegation in September and October 2003, the Secretariat stressed the importance and the positive development of these reforms and presented certain observations concerning the two drafts. They principally concern the problem of non-application of the draft law with respect to an effective remedy against the excessive length of judicial proceedings to the length of the preliminary investigation, the limitation of compensation in cases of unjustified delay to 10 000 zlotys (about 2 200 euros) and the limited competence of a higher court to "recommend" to a lower court to take the appropriate measures to remedy the situation.

By letters of 01/04/2004 and 21/05/2004 the Polish delegation presented additional information regarding further progress of the draft law and the modifications made in the text of the draft on effective remedy. For instance, according to a new transitional provision introduced in March 2004, any person who had lodged an application with the European Court concerning a complaint relating to the excessive length of domestic proceedings may complain against the length of the impugned proceedings before the competent domestic court within 6 months following the entry into force of the law on effective remedy, unless the European Court has adopted a decision on the admissibility of the application.

On 17/06/2004 the Polish Parliament adopted the two draft laws. The law on complaints against excessive length of judicial proceedings entered into force on 17/09/2004 and the amendment to the Civil Code on 01/09/2004.

Information on other possible general measures adopted or envisaged is expected.

The Secretariat, in cooperation with the Polish delegation, is preparing for one of the following meetings a draft interim resolution assessing the progress and outstanding issues in the adoption of measures to remedy the structural problem of excessive length of judicial proceedings and to create effective domestic remedies in this respect.

## **2) Broniowski v. Poland, 31443/96, judgment of 22/06/04 (Grand Chamber)**

The case relates to the violation of the applicant's right to the peaceful enjoyment of his possessions (Article 1 of Protocol No. 1), in that his entitlement to compensation for property abandoned in the territories beyond the Bug River (the Eastern provinces of pre-war Poland) in the aftermath of the Second World War had not been satisfied.

By adopting both the 1985 and 1997 Land Administration Acts, the Polish State reaffirmed its obligation to compensate the "Bug River claimants" and to incorporate into domestic law obligations it had taken upon itself by virtue of international treaties concluded in 1944. However, the Polish authorities, by imposing successive limitations on the exercise of the applicant's right to compensation, and by resorting to practices which made it unenforceable in concrete terms, rendered that right illusory and destroyed its very essence.

Moreover, the right was extinguished by legislation of December 2003 under which claimants in the applicant's position who had been awarded partial compensation (2% of the value of the property, in the applicant's case) lost their entitlement to additional compensation, whereas those who had never received any compensation were awarded an amount representing 15% of their entitlement.

In the light of these considerations, the European Court concluded that the applicant had to bear a disproportionate and excessive burden which could not be justified in terms of the legitimate general community interest pursued by the authorities.

Individual measures: The question of Article 41 has been reserved concerning the compensation for pecuniary and non-pecuniary damage.

General measures: The Court concluded in the operative provisions of the judgment that:

- the violation found had originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the "right to credit" (according to the terminology used by the Polish Constitutional Court) of Bug River claimants;
- the respondent state must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1;

The Court recalled that the violation of Article 1 of Protocol No. 1 originated in a widespread problem which resulted from deficiencies in the domestic legal order which has affected a large number of persons (nearly 80 000 people) and which may give rise in future to numerous subsequent, well-founded applications.

Referring to the Committee of Ministers' Resolution of 12/05/04 on judgments revealing an underlying systemic problem (Res(2004)3) and to the Recommendation of the same date on the improvement of domestic remedies (Rec(2004)6), the Court decided to indicate the measures that the Polish State should take, under the supervision of the Committee of Ministers and in accordance with the subsidiary character of the Convention, so as to avoid being seised of a large number of similar cases.

It should further be emphasised that this is the first time that the Court has ruled in the operative provisions of a judgment on the general measures that a respondent state should take to remedy a systemic defect at the origin of the violation found.

On 06/07/2004 the Court decided that all similar applications (177 at present) - including future applications - should be adjourned pending the outcome of the leading case and the adoption of the measures to be taken at national level. It also decided that the Polish government and the Committee of Ministers should be informed of the adjournment and supplied with a list of the adjourned cases.

In a letter of 16/12/2004 addressed to the European Court the Polish authorities indicated that on 15/12/2004 the Constitutional Court had declared several provisions of the law of December 2003, challenged in the judgment of the Grand Chamber, contrary to the Polish Constitution. The decision concerns in particular Article 2§4 of this law, according to which claimants in the applicant's position who had been awarded partial compensation lost their entitlement to additional compensation. In accordance with domestic law, after the publication of the decision of the Constitutional Court in the Official Journal, the legal provisions declared contrary to the Constitution will no longer be in force. Consequently, the authorities consider that claimants in the applicant's situation will no longer meet any obstacles to fulfilling their entitlement to compensation - equal to that planned for claimants who did not receive any compensation before - i.e. 15% of their entitlement. Furthermore, the authorities informed the European Court that consultation had taken place concerning the preparation of new legislation aiming at ensuring that this right does not remain illusory but becomes enforceable.

Additional information on this proposal for a legislative reform is awaited, as well as on its implementation.

The European Court's judgment has been published, in Polish, on the Internet site of the Ministry of Justice [www.ms.gov.pl](http://www.ms.gov.pl) <<http://www.ms.gov.pl>>. The Secretariat is currently preparing a draft interim resolution on the measures already taken and under way.

## 1 case against Russia

### - Kalashnikov v. Russia, 47095/99, judgment of 15/07/02, final on 15/10/02, Interim Resolution ResDH(2003)123

The case concerns the poor conditions of the applicant's pre-trial detention between 1995 and 2000 which was found by the European Court to amount to degrading treatment, due in particular to severe prison overcrowding and an unsanitary environment; and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in these conditions (violation of Article 3).

The case also concerns the excessive length of this detention (1 year, 2 months falling within the Court's jurisdiction - violation of Article 5§3) and the excessive length of criminal proceedings brought against the applicant (1 year, 10 months falling within the Court's jurisdiction - violation of Article 6§1).

General measures: The Russian Federation has informed the Committee of a number of general measures adopted to prevent new, similar violations (see details in Interim Resolution ResDH(2003)123). As a result of these measures, the number of persons detained pending trial has significantly decreased and conditions of detention improved. Further improvements have been promised, not least in the context of the Federal Programme for reforming the Ministry of Justice's penitentiary system for 2002-2006. The new Code of Criminal Procedure, which entered into force on 01/07/2002, has been highly instrumental in reducing the length of pre-trial detention, as it transfers the power to order detention to the courts and imposes stricter criteria for allowing pre-trial detention and stricter time-limits on investigation and trial. In addition, the Vice-President of the Supreme Court sent, on 05/09/2002, a circular letter stressing the precedent value of Kalashnikov judgment and requesting that all courts ensure strict compliance with the time-limits set by the Code of Criminal Procedure for investigation and trial and prevent unjustified delays in proceedings.

In its Interim Resolution ResDH(2003)123 of 04/06/2003, the Committee took note, with satisfaction, of the progress achieved and called upon the Russian authorities *"to continue and enhance the ongoing reforms with a view to aligning the conditions of all pre-trial detention on the requirements of the Convention (...)"*.

The Committee also invited the authorities *"to continue to keep it informed of the concrete improvement of the situation, in particular by providing relevant statistics relating to the overcrowding and sanitary and health conditions in pre-trial detention facilities"*.

In response to the Interim Resolution, the Russian authorities provided a memorandum (on 28/09/2004) informing the Committee of further general measures taken to comply with the judgment. These are, in particular:

- new amendments to the Criminal Code and to the Codes of Criminal Procedure and of Execution of Sentences adopted in December 2003 to further improve, *inter alia*, the conditions of detention;
- continuous increase in budgetary means allocated to the Penitentiary Department of the Justice Ministry (approximately 20% increase is planned in the draft budget for 2005 (61 billion roubles - 1.7 billion euros) compared to the 2004 budget (48.3 billion roubles - 1.4 billion euros));
- construction of new and reconstruction of old pre-trial detention centres (SIZO) or equivalent facilities resulting in an increase in in-cell space (presently 4 m<sup>2</sup> per detainee; cf. less than 1m<sup>2</sup> per detainee in 2000);
- the improvement of medical treatment in pre-trial and other detention centres resulting among other things in a continuous decrease in the number of persons affected by serious diseases.

The memorandum also contains the latest detailed statistics of the prison population in the Russian federal entities (situation on 01/09/2004). These statistics show an average overcrowding in pre-trial detention in Russia of only 1% above the facilities' normal capacity. A detailed region-by-region analysis shows, however, that pre-trial detention centres remain overcrowded at different levels in 34 regional entities (compared to 57 entities in this situation at the beginning of 2003 - see Interim Resolution ResDH(2003)123). In 15 of them the overcrowding is less than 20%, in 16 between 20 and 50%. In 3 regions the pre-trial detention (SIZOs) or equivalent facilities remain more severely overcrowded (Tiva Republic, Chita and Kostroma regions). The present statistics thus show an improvement made since 2003 in response to the Committee's calls for "speedy action to remedy the overcrowding in those SIZOs where this problem still remain[ed]". Further efforts would nonetheless appear necessary in respect of the regions where significant overcrowding remains according to the latest statistics. Information on progressive improvements in this field is awaited. Clarifications would in particular be useful in respect of domestic remedies available to persons in the applicant's position to complain about the conditions of detention.

## 2 cases against Romania

### - Rotaru v. Romania, 28341/95, judgment of 04/05/00 (Grand Chamber)

The case concerns a breach of the applicant's right to respect for his private life in that the relevant national legislation does not contain sufficient safeguards against abuse as regards the way in which the Romanian Intelligence Service (RIS) gathers, keeps and uses information. The European Court has thus concluded that the holding and use by the RIS of information on the applicant's private life were not "in accordance with the law" within the meaning of the Convention (violation of Article 8).

The case also concerns an infringement of his right to an effective remedy before a national authority that could rule on his application to have the file amended or destroyed (violation of Article 13).

Lastly, the case concerns a breach of the applicant's right to a fair trial on account of the Court of Appeal's failure to consider the claim for damages and costs (violation of Article 6§1).

Individual measures: The Romanian delegation has indicated that there was no individual file on the applicant. Following the judgment of the European Court, the document that was in the possession of the RIS, based on which the applicant was erroneously designated as a member of an extreme-right organisation, was modified in order to avoid any confusion (another person bearing the same name as the applicant was listed there).

The Romanian authorities have indicated that the judgment of the European Court has been included in the file of the Romanian intelligence service, in order to avoid that any such confusion could occur again.

General measures: Information is awaited concerning the legislative reform to redress the shortcomings of Law No. 14/1992 on the organisation and operation of the Romanian intelligence service found by the European Court (especially concerning the way in which the RIS stores and uses the archives taken over from the former secret services) and on the progress of the reform of the law on national security which contains provisions (notably those related to the procedure allowing to collect information concerning the national security) relevant to the execution of this case.

The judgment of the European Court has been translated into Romanian and published in the Official Gazette.

The Secretariat, in cooperation with the Romanian delegation, is preparing a draft interim resolution on the general measures needed for the execution of this judgment.

**- Dalban v. Romania, 28114/95, judgment of 28/09/99 (Grand Chamber), Interim Resolution ResDH(2005)2**

The case concerns the applicant's conviction for criminal libel in 1994, under Article 206 of the Criminal Code, for having published articles in which he exposed a series of frauds allegedly committed by a senior official and a member of parliament. The European Court found a disproportionate interference with the applicant's freedom of expression on account of the fact that, although Article 207 of the Romanian Criminal Code admits the adduction of evidence supporting the truthfulness of the declaration at issue when it has been made in order to protect a legitimate interest, the Romanian courts had not allowed the applicant to prove the truth of his allegations but, *inter alia*, found it established that these were untrue since a non-indictment decision had been issued by the prosecutor's office against the public official at issue concerning the same allegations (violation of Article 10).

General measures: Since December 1999, the attention of the Romanian authorities has been drawn to the problems posed in particular by Section 206 of the Criminal Code regarding freedom of expression, and the question was raised of the state of advancement of the reforms envisaged in this field. In May 2002, certain provisions of the Criminal Code concerning defamation were modified by an emergency order. In a report of December 2002 of the Parliamentary Assembly of the Council of Europe, it was regretted that this draft reform did not fully respect the requirements of the Council of Europe and the opinion was expressed that it would rather have been advisable to cancel from the criminal code all provisions related to libel, insult and defamation.

A *new Criminal Code* was adopted on 29/06/2004 and will come into force a year after the date of its adoption. According to the new code, insult is no longer a criminal offence. As for defamation, imprisonment has been removed as a punishment and the possible use of the defence of truth has been widened, particularly by introducing the defence of good faith.

The Romanian delegation has also indicated that the Dalban judgment was translated and sent out to presidents of courts of appeal and that the case had been discussed in 1999 and 2000 at a seminar organised in by the Romanian Judges' Association, a meeting of the presidents of courts of appeal and a meeting of the Romanian Journalists' Association.

Moreover, the Romanian authorities have provided examples of recent court decisions concerning charges of criminal libel, in which the courts made reference to the Strasbourg case-law and acquitted the defendants not least in view of the fact that their intention had been to transmit to the public information and ideas on issues of public interest.

The legislative provisions concerning the defence of good faith will not come in force until 29/06/2005. The Committee therefore adopted, on 8 February 2005, an Interim Resolution.

## **111 cases against Turkey**

### **1) 74 cases concerning torture, ill-treatment, homicides and destruction of property by the Turkish security forces**

These cases concern violations of Articles 2, 3, 5, 6, 8 of the Convention and of Article 1 of Protocol No. 1, notably in respect of unjustified destruction of homes by the *gendarmérie*, disappearances, infliction of torture and ill-treatment during police custody and killings committed by members of the security forces. All the cases more specifically highlighted the general problem of the lack of effective domestic remedies capable of redressing violations of the Convention (violations of Article 13).

Since the very beginning of the Committee of Ministers' examination of these cases, it has been noted that the violations found are due to a number of structural problems: general attitudes and practices of the security forces, their education and training system, the legal framework of their activities and, most importantly, serious shortcomings in establishing at the domestic level administrative, civil and criminal liability for abuses. Thus, the Committee called upon the Turkish authorities to rapidly adopt comprehensive measures remedying these shortcomings in order to comply with the Court's judgments.

On 09/06/1999 and 10/07/2002 the Committee adopted two Interim Resolutions (DH(99)434 and DH(2002)98) which noted with satisfaction some progress achieved in the implementation of these judgments, while at the same time calling on Turkey rapidly to adopt further comprehensive measures to prevent new similar violations. In Interim Resolution DH(2002)98, the Committee notably stressed that efficient prevention of renewed abuses requires, in addition to the adoption of new texts, a change of attitude and working methods by members of the security forces and effective domestic remedies ensuring adequate compensation for victims and effective criminal prosecution of the officials responsible.

On 7/06/2005, the Committee adopted a **new Interim Resolution** (ResDH(2005)43) assessing further progress in the implementation of the present judgments.

The Committee welcomed the numerous recent measures adopted by the authorities in response to the Court's judgments and the Committee's two previous Interim Resolutions of 1999 and 2002. The Committee welcomed in particular the authorities' "zero tolerance" policy against torture and ill-treatment, as evidenced in particular by the introduction of additional procedural safeguards and of deterrent minimum prison sentences for torture. The Committee also welcomed the recent constitutional reform reinforcing the status of the Convention and of the Court's judgments in Turkish law. At the same time, the Committee stressed the need for strict implementation of the new legislation.

**In the conclusion of this Interim Resolution, the Committee:**

*Welcomes the adoption of a number of important reforms as well as the ongoing efforts to ensure full compliance with the Convention in these cases;*

*Expresses satisfaction with the results obtained so far, while encouraging the authorities:*

*- to consolidate their efforts to improve the procedural safeguards surrounding police custody through the effective implementation of the new Regulations based on the new Code of Criminal Procedure, in the light of the requirements of the Convention and bearing in mind the recommendations of the Committee for the Prevention of Torture (CPT);*

*- to consolidate their efforts to reorganise the basic, in-service and management training of the police and gendarmerie by making use of the results obtained in the Council of Europe/European Commission Joint Initiative, in particular as regards the mainstreaming of human rights into initial and in-service training;*

*- to take the necessary measures to ensure that the new status of the Convention and the case-law of the Court flowing from the change of Article 90 of the Constitution is translated into the daily practice of the security forces, in particular in the instructions given to them, and that prosecutors and judges are also encouraged to give effect to this new provision;*

*- to ensure the prompt and efficient implementation of the new "Law on Compensation of the Losses Resulting from Terrorism and from the Measures Taken against Terrorism", to reconsider its limited*

*time-frame so that all claims can be processed in an impartial manner, and to ensure that individuals do not have to bear a disproportionate burden as a result of lawful actions of the security forces;*

*- to take the necessary measures to remove any ambiguity regarding the fact that administrative authorisation is no longer required to prosecute any serious crimes allegedly committed by members of security forces;*

*- to pursue the training provided for judges and prosecutors in the Academy of Justice, in particular by mainstreaming the training on the Convention and the case-law of the Court into the initial and in-service training of judges and prosecutors within the framework of the Academy;*

*Urges the Turkish authorities regularly to keep the Committee of Ministers informed of the practical impact of the measures taken, including the provision of statistics regarding number of investigations, acquittals and convictions into alleged abuses;*

*Decides to pursue the supervision of the execution of the present judgments until all necessary measures have been adopted and their effectiveness in preventing new similar violations has been established;*

*Decides to resume consideration of the measures taken or envisaged in these cases within nine months to a year.*

## 2) 6 Cases concerning dissolution of political parties

### - United Communist Party of Turkey and others v. Turkey, 19392/92, judgment of 30/01/98, and 5 other cases

The cases concern the dissolution of the above-mentioned political parties by the Constitutional Court in 1991, 1992 and 1993. The United Communist Party and the ÖZDEP Party were dissolved shortly after their creation, on the mere basis of their programmes. The Socialist Party was dissolved on account of certain statements made by its chairman, Mr Perinçek. The reasons advanced by the Constitutional Court covered the undermining of the territorial integrity and the unity of the nation by references to the Kurdish people or to Kurdish self-determination (breaches of the Constitution and of various Articles in the Law on Political Parties (LPP). Among those cited by the prosecutor, mention may be made of Articles 78, 81 and 101 b) of the LPP. HEP was dissolved in similar circumstances. In the United Communist Party case an additional ground was the title "communist", banned in Article 96(3) of the LPP. In the ÖZDEP case an additional ground was a perceived aim to abolish the secular nature of the state in violation of Article 89 of the LPP.

The cases also concern the ensuing banning for life of the leaders of the parties from holding similar offices in any other political party.

In all the cases, the European Court found violations of the right to freedom of association (Article 11).

The Socialist Party case also concerns the criminal conviction of Mr Perinçek, subsequent to the Court's judgment, on account of the same statements as led to the Party's dissolution.

General measures: The judgments of the European Court have been published, in Turkish, in the Official Bulletin of the Ministry of Justice.

The change of the Constitution in 1995 changed the permanent ban on political activities for members of dissolved parties to a 5-year ban and made it applicable only to party leaders.

The necessity of a further reform of the LPP has been pointed out since May 1998. Such a reform should remove the automatic ban of a party under Article 96§3 of the Constitution on the mere ground that its title contains the word "communist" and abrogate the possibility of dissolving parties solely on the basis of non-violent political speech or programmes which respect the rules of democracy. The possibility to ensure the compatibility of Turkish law with the Convention through a change of case-law has also been noted.

Further amendments to the Constitution entered into force on 17/10/2001. These amendments have, among other things, introduced a general principle of proportionality and the possibility to resort to less severe sanctions than dissolution of the party in case of violations of the authorised limits of political action, which however remain unchanged in Article 68 of the Constitution. Subsequently, a number of amendments to the LPP were adopted on 26/03/2002 in order to ensure that it is in conformity with the Constitution.

During the examination of these different amendments at the 792nd meeting (April 2002), the improvements brought about were noted, but certain hesitations were expressed in view of the absence of any change of several key provisions. Following this exchange of views, the Deputies agreed to resume consideration of these cases at their 810th meeting (October 2002) in order to examine any clarifications

which might have been made in the meantime through the case-law of Turkish courts, in particular by the Constitutional Court. At that meeting the Turkish Delegation informed the Committee of Ministers that the Communist Party had been allowed to participate in the general elections, a fact which may be accepted as a change of practice under Article 96/3 of the Constitution. Further information on the effect of the recent constitutional and legislative amendments was however requested.

Subsequently, the Turkish delegation furnished information concerning the additional legislative measures taken in respect of the LPP which entered into force 11/01/2003. According to new amendments, the conditions for being a member of a political party have been eased: being convicted under Article 312 of the Penal Code is no longer a basis for a restriction regarding membership of a political party. Some other restrictions were lifted. The provisions of the LPP (Articles 98,100,102 and 104) were amended so as to conform to the Constitutional amendments. Finally, political parties were granted the right to appeal against requests of the Chief Public Prosecutor before the Constitutional Court.

At the 834th meeting of the Ministers' Deputies it was agreed to wait for possible evolution of the case-law of the Constitutional Court as regards the effect given to the Convention and to the judgments of the European Court, or for other constitutional amendments, with a view to adopting, in the light of such evolution, either an interim or a final resolution at a subsequent meeting.

In May 2004 the Turkish Parliament approved an amendment to Article 90 of the Constitution, which now provides that international human rights treaties will have precedence over the national legislation in case of conflict with the latter. The Turkish Constitutional Court is expected to give direct effect to the Convention and the case-law of the European Court in the light of this newly amended provision.

Individual measures: The bans on political activities imposed on the applicants following the dissolution of the Parties have all been lifted. The Committee of Ministers found that under former Article 53 (today Article 46§1) of the Convention, Turkey was under an obligation to erase the consequences of Mr Perinçek's criminal conviction (see Interim Resolutions DH(99)245 and 529). Mr Perinçek was conditionally released after having served  $\frac{3}{4}$  of his 14-month prison sentence and, following the application of amnesty legislation, he once again enjoys the civil and political rights which he lost as a result of his conviction, although on the condition that he does not "commit a further crime". He has lodged a new complaint with the Court on account of this situation (Application No. 46669/99). This complaint was declared admissible by the Court on 26/02/2002. The Committee is awaiting the outcome of these proceedings.

### **3) Cases concerning freedom of expression (Interim Resolutions ResDH(2001)106 and ResDH(2004)38)**

#### **- Inçal v. Turkey, 22678/93, judgment of 09/06/98, and 26 other cases**

These cases all relate to unjustified interferences with the applicants' freedom of expression, in particular on account of their conviction by State Security Courts following the publication of articles and books or the preparation of messages addressed to a public audience (convictions under Articles 159 and 312 of the Criminal Code and Articles 6, 7 and former Article 8 of Anti-terrorism Law).

In the Özgür Gündem case, the Court also concluded that the search operation conducted in the applicant newspaper's premises had not been necessary in a democratic society and that the respondent government had failed to comply with its positive obligation to protect the applicant newspaper in the exercise of its freedom of expression. Furthermore, the cases Öztürk Ayşe and Çetin and others specifically concern the seizure of a publication and a newspaper (violations of Article 10).

Individual measures: Since June 1998, it has been repeatedly stressed in the Committee that any remaining consequences after the payment of just satisfaction, flowing from the applicants' convictions contrary to Article 10, must be erased not least by striking out their criminal records and restoring their civil and political rights, if restricted as a result of the convictions.

On 23/07/2001, the Committee of Ministers adopted Interim Resolution ResDH(2001)106, which, among other things, "*urges the Turkish authorities, without further delay, to take ad hoc measures allowing the consequences of the applicants' convictions contrary to the Convention in the above mentioned cases to be rapidly and fully erased*".

Updated information on the current situation of the applicants and on the concrete follow-up given to Interim Resolution ResDH(2001)106 have been regularly requested.

On 04/02/2003 a new law (No. 4793) entered into force allowing for the re-opening of domestic proceedings in all cases which have already been decided by the European Court and in all new cases which would henceforth be brought before the European Court. The provisions however exclude re-opening for all cases which were pending before the European Court at the date of entry into force of the law and had not yet been decided, as well as for cases resulting in friendly settlements.

On 10/02/2003, Law No. 4809 on suspension of proceedings and sentences concerning crimes committed through the press entered into force. Under certain conditions, this law provides that convictions related to freedom of expression might be erased, including all their consequences. On 07/09/2004 and 12/05/2005 the Turkish authorities informed the Secretariat of the erasure of the convictions of some of the applicants from their criminal records by virtue of Law No. 4809. These applicants were convicted under Article 312 of the Criminal Code, which was amended by Law No. 4744 of 06/02/2002 (for further information see Interim Resolution ResDH(2004)38).

<b>Name</b>	<b>Application number</b>	<b>Date of conviction</b>	<b>Date of erasure from criminal records</b>
Yaşar Kemal Gökçeli	27215/95	07/03/1996	18/02/2004
İbrahim İnçal	22678/93	09/03/1993	25/03/2003
Seher Karataş	33179/96	13/07/1995	04/09/2003
Ünsal Öztürk	22479/93	30/03/1989	19/03/2003
Ayşe Öztürk (article 312)	24914/94	24/07/1995	18/02/2003
Ayşe Öztürk (former article 8 of Anti-Terrorism Law)	24914/94	07/05/1996	29/01/2003
Münir Ceylan	23556/94	03/05/1993	December 2003 (the proceedings instituted upon the applicant's request for reopening ended on 27/04/2004 with his acquittal)
Abdullah Aydın	42435/98	21/10/1997	Unspecified date
Karkın Bayram	43928/98	22/10/1997	Unspecified date

Furthermore, on 19/07/2003, Law No. 4928 abrogated Article 8 of the Anti-terrorism Law No. 3713. At its 885th meeting (June 2004) the Committee welcomed this measure (see **Interim Resolution ResDH(2004)38**) and decided that “cases involving applicants convicted on the basis of former Article 8 of the Anti-terrorism Law will be closed upon confirmation that the necessary individual measures have been taken”.

Consequently, the applicants – in the cases listed below - no longer suffer any consequences of their convictions because Article 8 of the Law on Criminal Records (as amended by Law No. 4778 of 2/1/2003) provides that any information on criminal records shall be erased *ex officio* by the General Directorate of Judicial Records and Statistics of Ministry of Justice when an offence is de-criminalised. In letters of 09/07/04, 06/10/04, 22/11/04 and 12/05/2005 the Turkish authorities gave the following information concerning the situation of the applicant's criminal records:

Name	Application number	Date of conviction	Date of erasure from criminal records
Zeynel Abidin Kızılyaprak	27528/95	14/10/1993	02/12/2003
Sedat Yurttaş	25143/94+	12/04/1996	03/11/2003
Mehmet Selim Okçuoğlu	23536/94+	05/08/1993	31/07/2003
Fikret Başkaya	23536/94+	05/08/1993	31/07/2003
Mehdi Zana No.2	26982/95	12/05/1994	Unspecified date

The Turkish authorities further submitted that, as a result of the abrogation of Article 8 of Anti-terrorism Law and of the erasure of applicants' convictions from criminal records, the restrictions on applicants' civil and political rights have been automatically lifted.

The Committee will resume consideration of these cases (except the Mehdi Zana No.2 case) at its following meetings for supervision of payment of just satisfaction.

**Information awaited:** Information is awaited concerning the individual situation of the applicants in the following cases:

- Cases where the applicants had been convicted under Article 312 of the Criminal Code (35071/97 Gündüz Müslüm, judgment of 04/12/2003, final on 14/06/2004; 43928/98; 42920/98 Yıldırım Haydar and others, judgment of 15/07/2004, final on 15/10/2004)
- Case where the applicant had been convicted under Article 159 of the Criminal Code (43996/98 Kürkcü, judgment of 27/07/2004, final on 27/10/2004)
- Cases where the applicants had been convicted under former Article 8 of the Anti-terrorism Law (25723/94 Erdoğan, judgment of 15/06/00; 23927/94+Sürek and Özdemir, judgment of 08/07/99; 49283/99 Doğaner judgment of 21/10/2004, final on 21/01/2005; 38586/97 Varlı and others, judgment of 19/10/2004, final on 19/01/2005; 42713/98 Yazar Feridun and Others, judgment of 23/09/2004, final on 23/12/2004, rectified on 01/02/2005; 43995/98 Okutan, judgment of 29/07/2004, final on 29/10/2004; 57250/00 Ülger İbrahim, judgment of 29/07/2004, final on 29/10/2004)
- Case where the applicant had been convicted under Article 6 of the Anti-terrorism Law (24122/94 Sürek No. 2, judgment of 08/07/99)

**General measures:** The question has been raised, since 1998, of the need to adapt Turkish law to the requirements of the Convention so as to avoid further violations similar to those found. In particular, attention has been drawn to the need to assess the proportionality of restrictions on freedom of expression in the light of the presence of an “incitement to violence”. Furthermore, since 1999, the Turkish authorities have been invited to introduce a general criterion of truth and public interest into the Anti-Terrorism Law and to amend or abrogate Article 6 of this law; to review minimum penalties in crimes related to freedom of expression; to adopt specific measures aimed at ensuring the protection of freedom of expression. At the 834th meeting (April 2003), in connection with the examination of the case of Ayşe Öztürk, questions were raised concerning the reform of the press law under way.

**Constitutional changes:** On 03/10/2001, a number of constitutional amendments, concerning *inter alia* the provisions on freedom of expression and information, were adopted and are directly applicable. In particular, the Constitution Preamble indicates now that only anti-constitutional “activities” (instead of “thoughts or opinions”) can be restricted and, according to the new Article 13, such restrictions should respect the principle of proportionality and be based on the specific grounds listed in the relevant articles of the Constitution. Accordingly, the new Article 26 on freedom of expression and information provides that “the formalities, conditions and procedures to be applied in the exercise of the right to freedom of expression and information shall be prescribed by law” and indicates as grounds for restrictions those prescribed by paragraph 2 of Article 10 of the Convention, with however one addition: the “protection of the fundamental characteristics of the Republic and the protection of the indivisible integrity of the State with its territory and nation”.

Furthermore, on 07/04/2004 the Turkish Parliament adopted an amendment to Article 90 of the Constitution, which now provides that international human rights conventions will prevail over incompatible domestic law.

It is expected that this amendment will facilitate the direct application of the Convention and case-law in the interpretation of Turkish law.

Legislative measures: In March 2001, the Turkish authorities presented the National Programme containing information on the reforms planned for the "short term" and the "medium term" (respectively 2002 and 2003-2004). Consequently, a series of packages of laws have been adopted and entered into force respectively on 19/02/2002 (Law 4744); on 09/04/2002 (Law 4748); on 09/08/2002 (Law 4771), on 11/01/2003 (Law 4778), on 04/02/2003 (Law 4793), on 19/07/2003 (Law 4928) and on 07/08/2003 (Law 4963).

These laws have in particular:

- modified Article 159 of the Criminal Code on insult and derision of public bodies by reducing maximum and minimum sanctions and by making them applicable only if the courts consider that there was an "intention" to insult or deride;
- modified Article 312 of the Criminal Code, on incitement to hatred, by limiting its scope to expression constituting an explicit threat to public order and by reducing its maximum penalties;
- modified Article 7 of the Anti-Terrorism Law No. 3713 by specifying that propaganda on behalf of terrorist organizations will incur sanctions if carried out in a manner that encourages resorting to violence or other terrorist means;
- abrogated Article 8 of the Anti-Terrorism Law No. 3713;
- erased prison penalties from the Press Law No. 5680 and introduced provisions prescribing the respect of the confidentiality of journalists' sources.

Although these amendments are aimed at generally improving the situation of freedom of expression, they do not seem to solve all the problems raised by the Court's judgments. Additional information has accordingly been requested on a number of points and the Turkish authorities were invited to clarify the expected impact of the reforms on freedom of expression in Turkey. By letters of 16/12/2002, 03/01/2003, 28/03/2003, 25/07/2003 and 15/09/2003, the Turkish authorities have provided examples of the case-law of the Court of Cassation and Security courts, concerning in particular the interpretation of the criterion of "threat to public order" in the application of Article 312 of the Criminal Code as revised in 2002 as well as the interpretation of the criterion of "intention" in the application of Article 159 of the Criminal Code as revised in 2002. These examples show that the Turkish courts' interpretation of Articles 312 and 159 of the Criminal Code in accordance with the amendments presents parallel with, to some extent, to that of used by the Strasbourg Court and may thus assist in preventing, notably as far as Article 312 is concerned, new violations of the Convention. The Turkish authorities expect that these changes and case-law developments will also affect the interpretation of other relevant articles, notably in the anti-terrorism law. Examples of such developments are expected.

The New Criminal Code: On 26/09/2004 the Turkish Parliament adopted the new Criminal Code, which came into force on 01/06/2005. The Turkish authorities submitted the relevant articles of the new Code. The Secretariat is currently studying the relevant provisions of this new code, which replaced the above-mentioned Articles 159 and 312 of the old Criminal Code.

Awareness raising and training measures: As a preliminary measure, the Ministry of Justice has published the most important judgments against Turkey in Turkish, sending them out in their regular bulletin to judges and prosecutors and making some of them accessible through the Ministry of Justice website (<<http://www.adalet.gov.tr/aihm/aihmk.htm>>). Furthermore, at the 741<sup>st</sup> meeting (February 2001), the Turkish Delegation indicated that an information note would be sent to judges and public prosecutors in order to raise their awareness of the requirements of the Convention. A copy of this note has been requested. In June 2002 a Council of Europe/European Commission Joint Initiative was launched in collaboration with the Turkish authorities, made up of three distinct projects: (i) the development and implementation of short and long-term strategies on the Convention and the case-law for judges, prosecutors and other public officials; (ii) the creation and launch of a comprehensive campaign to increase awareness and understanding of human rights among the public at large; (iii) a review of certain draft and existing legislation to ensure its conformity with European standards. The implementation of these projects is currently under way.

#### **4) Loizidou v. Turkey, 15318/89, judgments of 18/12/96 (merits) and 28/07/98 (just satisfaction), Interim Resolutions DH(99)680, DH(2000)105 and ResDH(2001)80, Interim Resolutions ResDH(2003)190 and ResDH(2003)191**

Until now, the Deputies have decided to concentrate on the question of payment of the just satisfaction awarded in the last-mentioned judgment on account of the violation of the applicant's right to the peaceful enjoyment of certain properties located in the northern part of Cyprus (violation of Article 1 of Protocol No. 1). The Court specified that payment was to take place within 3 months, i.e. before 28/10/1998.

As Turkey did not pay the just satisfaction awarded, the Chairman of the Committee of Ministers, the Icelandic Minister of Foreign Affairs, on 22/06/1999 wrote to his Turkish counterpart expressing the Committee's concern regarding the failure to execute the judgment.

Payment still not having taken place, the Committee adopted, on 06/10/1999, Interim Resolution DH(99)680, strongly urging Turkey to review its position and to pay the just satisfaction awarded. As payment still remained outstanding, the Chairman of the Committee, the Irish Minister of Foreign Affairs, wrote a new letter on 04/04/2000 to his Turkish counterpart reiterating the Committee's expectation that Turkey ensure payment in the near future.

The reply of the Turkish Ministers of Foreign Affairs indicated that Turkey did not consider itself to have either the competence or the jurisdiction to execute the Court's judgment.

On 12/07/2000, the Deputies, in response, adopted a new Interim Resolution DH(2000)105, declaring that the refusal of Turkey to execute the judgment of the Court demonstrates a manifest disregard for its international obligations, both as a High Contracting Party to the Convention and as a member State of the Council of Europe and insisted strongly, in view of the gravity of the matter, that Turkey comply fully and without any further delay with the European Court of Human Rights' judgment of 28/07/1998.

At the 749th meeting (April 2001) the Turkish Delegation presented a payment proposal subjected, however, to conditions deemed unacceptable by the other delegations.

In the continued absence of payment, the Committee adopted on 26/06/2001 a new Interim Resolution ResDH(2001)80 in which it recalled its previous Interim Resolutions and stated that:

*"Very deeply deploring the fact that, to date, Turkey has still not complied with its obligations under this judgment;*

*Stressing that every member State of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms;*

*Stressing that acceptance of the Convention, including the compulsory jurisdiction of the Court and the binding nature of its judgments, has become a requirement for membership of the organisation;*

*Stressing that the Convention is a system for the collective enforcement of the rights protected therein,*

*Declares the Committee's resolve to ensure, with all means available to the organization, Turkey's compliance with its obligations under this judgment,*

*Calls upon the authorities of the member States to take such action as they deem appropriate to this end."*

When the Deputies examined the matter at their 783rd meeting (February 2002), the Turkish Delegation reiterated the proposal made at the 749th meeting. Recalling that the conditions attaching to this proposal were unacceptable, several delegations presented proposals in order to make possible progress on the payment question.

At the 792nd meeting (April 2002), different proposals regarding payment of the sums awarded were discussed. The proposals examined were mainly based on the idea of a payment to the Council of Europe, which should forward the sums, including default interest, to the applicant. The Delegations of Greece and Cyprus objected to such a payment method as it would not correspond to the Court's judgment, which ordered payment to the applicant. Several delegations asked Turkey to provide further clarifications as to the exact content of its own payment proposal.

The Chairman also presented to the Deputies a letter from the applicant in which she expressed her frustration and anguish about Turkey's unwillingness to comply with the judgment and asked to be authorised to address the Committee in person at a forthcoming meeting. A short discussion followed indicating that the Deputies were not inclined to grant the request. A negative reply has subsequently been sent by the Chair to the applicant.

For procedural reasons, the case could not be examined at the 796th meeting (May 2002) and the examination was postponed to the 798th DH meeting (June 2002). The Chairman indicated that he would in the meantime continue his consultations with interested delegations. At the 798th (June 2002) and 803rd (July 2002), 810th (October 2002), 819th (December 2002) and 827th meeting (February 2003) meetings no information regarding the payment was available. At the last-mentioned 827th meeting, considerable concern was expressed regarding this situation and it was decided to resume consideration of the case at the 832nd meeting (19 March 2003), also bearing in mind the fact that the Committee of Ministers intended adopting its reply to Parliamentary Assembly Recommendation 1576 (2002) on the execution of Court judgments by Turkey in time for the Assembly's next part-Session (31 March - 4 April 2003).

At the 832nd meeting (19 March 2003), a declaration made by the European Union concerning this case received broad support from delegations. At the same meeting, the Turkish Delegation made a statement.

Following a comprehensive debate, the Deputies agreed to reply to Parliamentary Assembly Recommendation 1576 that the Turkish authorities had indicated at recent Committee of Ministers' meetings their determination to comply with the Court's judgment of 28 July 1998 and that it expected to receive shortly information on concrete steps to this effect. At the 834th meeting (9-10 April 2003) Delegations insisted on the importance of the Turkish authorities providing for the 841st meeting (3-4 June 2003) a clear, concrete and positive proposal, in line with the judgment, concerning the payment of the just satisfaction.

The Secretariat was invited to begin work, if appropriate depending on the content of the information to be supplied by the Turkish Delegation and in time for the 841st meeting, on drafting a possible fourth interim resolution which would renew the Committee's insistence on payment and indicate the measures contemplated in case of non-payment.

The Chairman also noted the proposal made by certain delegations to accept, if necessary, a method of payment along the lines of that proposed earlier by Turkey. These delegations invited the Turkish authorities to restate this proposal, but without the elements which had been found unacceptable by the Committee.

He reminded Turkey that in all objectivity this case had remained on the Committee of Ministers' agenda much too long and insisted on the importance and urgency of taking effective action.

At the 841st meeting the Representative of Turkey confirmed his authorities' commitment to close the Loizidou case but asked for more time for his authorities to give effect to their proposals concerning the payment of the just satisfaction in this case.

At the 844th meeting (19 June 2003), the representative of Turkey stated that his authorities had "initiated the measures necessary to enable the Committee to take note of payment of the just satisfaction award and approve a draft final resolution at the DH meeting on 7 and 8 October."

The consideration of the case was postponed following the payment of the just satisfaction on 2 December 2003.

### **5) Cyprus v. Turkey, 25781/94, judgment of 10/05/01 (Grand Chamber)**

The case relates to the situation that has existed in northern Cyprus since the conduct of military operations there by Turkey in July and August 1974 and the continuing division of the territory of Cyprus. The European Court held that the matters complained of by Cyprus in its application entailed Turkey's responsibility under the European Convention on Human Rights. In its judgment, it held that there had been 14 violations of the Convention:

#### Greek-Cypriot missing persons and their relatives

- Lack of an effective investigation into the whereabouts and fate of Greek-Cypriot missing persons (continuing violation of Articles 2 and 5);
- Silence of the Turkish authorities in the face of the real concerns of the relatives attaining a level of severity which could only be categorised as inhuman treatment (continuing violation of Article 3);

#### Home and property of displaced persons

- Refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus (continuing violation of Article 8);
- Refusal to allow them access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights (continuing violation of Article 1 of Protocol No. 1);
- Failure to provide them with any remedies to contest interferences with their rights under Article 8 and Article 1 of Protocol No. 1 (violation of Article 13).

#### Living conditions of Greek Cypriots in Karpas region of northern Cyprus

- Restrictions on freedom of movement of Greek Cypriots living in northern Cyprus which limited access to places of worship and participation in other aspects of religious life (violation of Article 9);
- Excessive measures of censorship of school-books destined for use in the primary school for Greek Cypriots living in northern Cyprus (violation of Article 10);
- Lack of guarantees concerning the right of Greek Cypriots living in northern Cyprus to the peaceful enjoyment of their possessions in case of permanent departure from that territory - in case of death, lack of recognition of the inheritance rights of relatives living in southern Cyprus (continuing violation of Article 1 of Protocol No. 1);
- Infringement of the right to education of Greek Cypriots living in northern Cyprus in the absence of appropriate secondary-school facilities (violation of Article 2 of Protocol No. 1);
- Discrimination against Greek Cypriots living in the Karpas area of northern Cyprus amounting to degrading treatment (violation of Article 3);
- Infringement of the right of Greek Cypriots living in northern Cyprus to respect for their private and family life and to respect for their home (violation of Article 8);
- Absence of remedies in respect of interferences by the authorities, as a matter of practice, with the rights of Greek Cypriots living in northern Cyprus under Articles 3, 8, 9 and 10 of the Convention and Articles 1 and 2 of Protocol No. 1 (violation of Article 13).

#### Rights of Turkish Cypriots living in northern Cyprus

- Unfair legislative practice of authorising the trial of civilians by military courts (violation of Article 6).

The Deputies examined this case for the first time at their 760th meeting (July 2001). At the 764th meeting (October 2001), it was decided to group the violations found by the Court into four categories, to focus debates on part of them, without preventing the Deputies from pursuing in parallel an examination of the other issues raised in the Court's judgment:

- the question of missing persons,
- the living conditions of Greek Cypriots in northern Cyprus,
- the rights of Turkish Cypriots living in northern Cyprus,
- the question of the homes and property of displaced persons.

A Turkish translation of the judgment was published in the legal journal *Yargı Mevzuatı Bülteni* of 01/07/2003.

#### Question of missing persons

Concerning the **violation of Articles 2 and 5**, the delegation of Turkey has always underlined the importance of the Committee on Missing Persons in Cyprus (CMP), stressing the efforts of Turkey to contribute to the work of this committee and the need to reactivate it.

For this purpose, Mr. Denktaş, "President of the TRNC", wrote to the Secretary General of the United Nations, on 17/06/2004, to ask for a meeting of the CMP to be called with a view to its reactivation and to a reinforcement of its powers, to comply with the Convention's requirements. Following this initiative, the CMP has met several times, as from 30/08/2004, since when the Turkish delegation has presented to the Deputies, at each examination of the case, the main work carried out in this context : study of the possible amendments to the rules of procedure of the CMP with a view to increasing its efficiency, identification of burial sites, appointment of the INFORCE Foundation to carry out the exhumation work, etc. Information is awaited on how these issues developed recently, and in particular on the action taken following the recent identification of new sites, following the failure of the first excavations carried out in the northern Cyprus in January 2005.

In any case, the Secretariat notes that the reactivation of the CMP will only be able to cope in part with the requirements of the Convention (see § 135 of the judgment), as it should only make it possible to draw up a comprehensive list of missing persons, find out if they are alive or dead and in the second case determine the approximate date of death. Now, effective investigations should also deal with the causes of the disappearances and the circumstances in which they occurred, expressly excluded from the CMP's present mandate. Information is thus awaited on the alternative measures foreseen. In addition, the activities of the CMP would not appear to be relevant for the purposes of the Convention - within the aforementioned limits - unless it were to achieve concrete results quickly.

As far as the **violation of Article 3** is concerned, the Turkish authorities announced the establishment, within the Office of the Turkish Cypriot Member of the CMP, of a special information unit for the families, which started to function on 12/11/04. Since that time, this unit has been receiving requests, directly or by telephone, and provides all information available and already submitted to the CMP within a period of 48 hours, collects information from the families and, according to the Turkish authorities, a dialogue favourable to reconciliation is gradually established. The Cypriot authorities contest this description of the information unit and question the nature of the information provided by the "TRNC authorities" to the families.

#### Specific questions concerning the living conditions of the Greek Cypriots in the northern part of Cyprus

In connection with the issue of **secondary education**, the Turkish authorities indicate that the secondary school of Rizokarpaso, which reopened on 13/09/2004 is working satisfactorily and concrete information has been provided in this respect. The Cypriot authorities emphasise in this context that at present the school only covers the first three years (secondary school) whereas there are already now potential pupils for the three following years (high school). Information is thus necessary on that issue.

The Turkish authorities furthermore indicate that legislative work is under way to regulate Greek Cypriot and Maronite schools in the North of Cyprus. Information is required on the adoption of the law envisaged by the "TRNC authorities", a copy of which has recently been submitted, or on any other measure to provide a stable and lasting basis for the functioning of these schools.

Concerning the **censorship of schoolbooks** for Greek-Cypriot primary schools in the northern part of the island, considered as excessive by the Court in respect of Article 10 of the Convention, the Turkish authorities assert that the only criterion applied nowadays aims at material likely to promote hatred or animosity and that the examination procedure takes no more than approximately two or three weeks. The Turkish authorities point out that there is no longer any real censorship, as after the procedure the books are returned to the Greek Cypriot authorities, together with a report containing recommendations, the

implementation of which is left to their discretion. The Cypriot authorities contest this information. Clarification is thus needed in this respect.

Concerning the issue of **freedom of religion**, the Turkish authorities assert that, following the lifting of the restrictions on freedom of movement, there is no interference anymore of the "TRNC authorities" into the freedom to exercise one's religious faith and opinions and that a number of religious services in various places of the Karpas region have been facilitated. Prior authorisation is only requested in exceptional circumstances, for security and public order reasons. The submission of the provisions setting up all situations covered by the scheme of prior authorisation is awaited.

Furthermore, in March 2005, the "TRNC authorities" approved the appointment of a second priest, following a proposal made by the Cypriot authorities a few months before, for the Karpas region. However, the person proposed was finally unable to take up his duties for personal reasons. A new request introduced by the Cypriot authorities was rejected in April 2004 for security reasons which are contested by the Cypriot authorities. Details are thus awaited in this respect. Information is also required on the measures taken to allow the appointment of a second priest without new delay.

### **Military courts**

It is recalled that by judgment of 12/04/2001, the "Supreme Constitutional Court of the TRNC", referring in particular to the European Court's case-law, found the composition of the "Security Forces Court" to be unconstitutional because of the presence of military judges in cases concerning civilians. Following this judgment, amendments were introduced into the "Law No. 34/1983 on the Establishment and Judicial Procedure of the Security Forces Court and Security Forces Court of Appeal", particularly concerning the composition of these courts and the procedural guarantees applied. At the Ministers' Deputies' 897th meeting (September 2004), the Turkish authorities announced that in September 2004, the "Parliament" adopted new amendments to the above-mentioned Law No. 34/1983.

According to the information provided by the Turkish authorities, the situation is now the following:

#### **Composition of the courts**

- all the judges currently sitting in these courts are civilian judges;
- the "Law 34/1983" as amended provides that the judges sitting in the military courts be civilian judges appointed by the "Supreme Council of Judiciary";
- the "Law 34/1983" as amended means by "military judge" the exclusively civilian judges appointed by the "Supreme Council of Judicature" to sit in military courts;
- the wording "civilian judge" remaining in the provision concerning the composition of the "Court of Appeal" refers to a civilian judge appointed under the previous legislation; at his retirement, he will be replaced by a "military judge" within the meaning of the "Law 34/1983" as amended.

#### **Competence of the courts with respect to civilians**

The competence has been limited and now only covers the following situations:

- persons accused of offences under sections 26 and 29 of the "Military Offences and Penalties Law" who were acting in their capacity of military personnel,
- civilians accused of offences committed under sections 18 and 19 of Law 29/1983 (military espionage or the assistance thereto);
- civilians accused of offences committed under section 18(1) (B), (C) and (Ç) of Law 34/1983 (offences against military personnel at military sites, offences causing damage to military equipment - excluding traffic offences - and offences which are stated to be within the jurisdiction of the "Security Forces Court" under any other law).

All the cases falling under the field of competences which have been withdrawn from military courts have been transferred to civil courts. In addition, the rules of procedure in force before civil courts apply with no exception before military courts.

On 7 June 2005, the Committee of Ministers adopted an Interim Resolution ResDH(2005)44 concerning the execution of the present judgment by Turkey in the areas on which the Committee's examination has focused at this stage. This Resolution takes stock of the measures adopted so far and points out the outstanding issues in these areas, that the Committee calls upon to resolve.

### **6) Hulki Güneş v. Turkey, 28490/95, judgment of 19/06/03, final on 19/09/03**

The case concerns the lack of independence and impartiality of the Diyarbakır State Security Court on account of the presence of a military judge (violation of Article 6§1) and the unfairness of the proceedings before that court: the applicant was sentenced to death (subsequently commuted to life imprisonment) mainly on the basis of statements made by gendarmes who had never appeared before the court. Furthermore, the applicant's confessions, upon which the trial court had relied, had been obtained when he was being questioned in the absence of a lawyer and in the circumstances which led the European Court to find a violation under Article 3 (violation of Article 6§1 and 3d). The case also concerns the ill-treatment inflicted on the applicant while in police custody in 1992 which the European Court found to be inhuman and degrading (violation of Article 3).

**Individual measures:** In view of the seriousness of the violation of the applicant's right to a fair trial, the adoption of specific individual measures aimed at erasing it as well as its consequences for the applicant is

urgent. In this respect the case is similar to Sadak, Zana, Dicle and Doğan (Final Resolution ResDH(2004)86) where the proceedings had been reopened following the coming into force of Law 4793 of 23/01/2003. However, the applicant, in the present case, cannot obtain reopening of the impugned proceedings under Law 4793 as this law does not apply to proceedings which were pending before the European Court at the date of its entry into force (same situation as many other cases against Turkey concerning state security courts).

The applicant's petition challenging the constitutionality of this law on account of the discriminatory character of its scope of application was rejected twice on 30/10/2003 and on 19/11/2003 by the Diyarbakır State Security Court. The applicant thus continues serving his life-time sentence.

The Chairman of the Committee wrote to the Minister of Foreign Affairs of Turkey on 21/02/2005, indicating that the Court's judgment required the Turkish authorities to grant the applicant adequate redress through either reopening of the proceedings or *ad hoc* measures to erase the consequences of the violations for the applicant. The Minister's reply is awaited.

General measures:

1. Concerning the independence and impartiality of state security courts, the general measures were adopted by the Turkish authorities in the Çıraklar against Turkey case (DH99(555)). Furthermore, state security courts were abolished following the constitutional amendments of May 2004. Information is awaited concerning the practical aspects of the implementation of this constitutional reform.
2. Concerning the ill-treatment inflicted on the applicant, the general measures are under way in cases concerning action of the Turkish security forces pending before the Committee.
3. Information is still awaited concerning publication and wide dissemination of the judgment to the competent authorities.

**7) Doğan and others v. Turkey, 8803/02, judgment of 29/06/04, final on 10/11/04, rectified on 18/11/04**

The case concerns the denial to the applicants of access to their property in South-East of Turkey since 1994 on the basis of security concerns. The applicants allege that security forces forcibly evicted them from their village in October 1994 and destroyed their property. Many of the applicants moved with their families to Istanbul, where they currently live in difficult conditions.

Between 1999 and 2001, the applicants filed petitions with the Turkish administrative authorities requesting permission to return to their village and to use their property. In response to petitions by 5 of the applicants, submitted in 1999 and 2000, the authorities informed them that their petitions would be considered in the context of the "Return to Village and Rehabilitation Project", a scheme to re-settle villagers evicted in the context of clashes between the security forces and the members of the terrorist organisation. In response to their petition of 2001, 3 of the applicants received letters from the authorities informing them that any eventual return to their village was prohibited for security reasons. The other applicants received no response.

The European Court observed that it was unable to determine the exact cause of the applicants' displacement because of insufficient evidence and the absence of an independent investigation into the alleged events. However, the fact that they were denied access to their village deprived them of all their resources from which they derived their living and thus constituted an interference with their right to the peaceful enjoyment of their possessions. The Court further observed that applicants live in conditions of extreme poverty, with inadequate heating, sanitation and infrastructure in other areas of Turkey and that the authorities had not provided them with alternative housing, employment or financial help. While the Court acknowledged the government's efforts to remedy the situation of the internally displaced generally, for the purposes of the present case it considered them inadequate and ineffective in that the return to village and rehabilitation project has not been converted into practical steps to facilitate the return of the applicants to their village (violation of Article 1 Protocol No1).

In the light of the above findings, the Court concluded that the refusal of access to the applicants' home and livelihood constituted a serious and unjustified interference with the right to respect for family life and home (violation of Article 8).

Lastly, the Court found that the applicants did not have available an effective remedy in respect of their complaints (violation of Article 13).

There are approximately 1,500 similar cases from South-East of Turkey (in which the applicants complain about their inability to return to their villages) registered before the European Court. This figure constitutes 25% of the total applications filed in respect of Turkey.

General and/or individual measures: The Court reserved the question of the application of Article 41. Following the first consideration of the case at the Ministers' Deputies 922<sup>nd</sup> meeting (February 2005), the Secretariat remains in contact with the Turkish delegation with a view to drawing up a plan of action for the execution of this judgment.

## 15 cases against United Kingdom

### 1) 6 cases concerning the lack of effective investigation into alleged killings by the UK security forces in Northern Ireland (Interim Resolution ResDH(2005)20)

- **McKerr v. United Kingdom, 28883/95, judgment of 04/05/01, final on 04/08/01**

- **Finucane v. United Kingdom, 29178/95, judgment of 01/07/03, final on 01/10/03, and 4 other cases**

These cases concern the death of applicants' next-of-kin during police detention or security forces operations or in circumstances giving rise to suspicions of collusion of such forces.

In this respect, the Court found various combinations of the following shortcomings in the proceedings for investigating deaths giving rise to possible violations of Convention rights (violations of Article 2): lack of independence of the investigating police officers from security forces/police officers involved in the events; lack of public scrutiny and information to the victims' families concerning the reasons for decisions not to prosecute; the inquest procedure did not allow for any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which might have been disclosed; the soldiers / police officers who shot the deceased could not be required to attend the inquest as witnesses; the non-disclosure of witness statements prior to the witnesses' appearance at the inquest prejudiced the ability of the applicants to participate in the inquest and contributed to long adjournments in the proceedings; the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

The McShane case also concerns the finding by the Court of a failure by the respondent state to comply with its obligations under Article 34, in that the police had - albeit unsuccessfully - brought disciplinary proceedings against the solicitor who represented the applicant in national proceedings for having disclosed certain witness statements to the applicant's legal representatives before the European Court.

Individual measures: At its 914th (DH) meeting (February 2005), the Committee adopted Interim Resolution ResDH(2005)20 with respect to these cases. In this resolution the Committee recalled the respondent state's obligation under the Convention to conduct an investigation that is effective "in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible", and the Committee's consistent position that there is a continuing obligation to conduct such investigations inasmuch as procedural violations of Article 2 were found in these cases. It further called on the government to take all outstanding individual measures in these cases rapidly and to keep the Committee regularly informed thereof.

For a summary of the current situation with regard to individual measures in each case, see Appendix II to Interim Resolution ResDH(2005)20.

In this regard, the United Kingdom authorities have indicated that the Inquiries Act 2005, enacted in April, is intended to form the basis of the individual measures to be adopted in the Finucane case. They have further stated that the provisions of the Act are based to a large extent on existing legislation and practice. While most of the inquiries that will be held under it are not likely to engage Article 2, the United Kingdom government has indicated that it is satisfied that, in those cases in which Article 2 of the Convention is engaged, the Act is capable of being used to hold an inquiry that will discharge or contribute to the discharge of the state's obligations under that article to provide an effective official investigation.

The applicant's representatives have, however, forwarded a number of submissions, including statements by judges having sat on previous inquiries and by NGOs, casting doubt on the capacity of an inquiry set up under the 2005 Act to fulfil the procedural requirements of Article 2.

General measures: Information submitted to date by the United Kingdom authorities and other interested parties appears in Interim Resolution ResDH (2005)20.

### 2) 5 cases concerning violations of the right to a fair trial

- **Murray John v. United Kingdom, 18731/91, judgment of 08/02/96, and 4 other cases (Interim Resolution DH(2000)26, Interim Resolution ResDH(2002)85)**

These cases concern the right to silence, the right not to incriminate oneself and the denial of access to legal advice during the first 48 hours of detention (24 hours in the Averill case), in combination with the provisions in national law whereby the choice of the accused to remain silent could result in a court's or a jury's drawing unfavourable conclusions (violations of Article 6§3c alone or combined with Article 6§1).

General measures: A number of interim measures have been taken since the adoption of the judgments by the European Court and of decisions by the Committee of Ministers in these cases to avoid putting suspects in the situations impugned by the European Court and the Committee of Ministers. Legislative reforms are also under way.

Interim Resolution DH(2000)26 was adopted in the Murray John case at the 695th meeting (February 2000) summarising all the measures taken and envisaged by the United Kingdom authorities in order to implement the Court's judgment.

At the 798th meeting (June 2002) the Deputies adopted a second Interim Resolution, ResDH(2002)85, concerning all the above cases, in which, among other things, they strongly encouraged the United Kingdom authorities to take all necessary measures to ensure the rapid entry into force of the amendments to the Youth Justice and Criminal Evidence Act 1999 and the Criminal Evidence (Northern Ireland) Order 1999.

The United Kingdom authorities informed the Committee that the Code of Practice covering the detention, treatment and questioning of persons by police officers (revised Code C), which enables the implementation of the relevant provision (Section 58, on non-permissible inferences from silence of suspects prior to access to legal advice) of the Youth Justice and Criminal Evidence Act 1999, came into force on 01/04/03. Most of the Criminal Evidence (Northern Ireland) Order 1999 has entered into force between 2000 and 2003. However, a relevant provision (Section 36, again on non-permissible inferences from silence of suspects prior to access to legal advice) will only enter into force (along with other amendments to the Criminal Evidence (Northern Ireland) Order 1988) after completion of the review of police and criminal evidence legislation and Codes of Practice in Northern Ireland, expected by summer 2006. Information on the progress of the legislative reform is awaited.

### **3) A. v. United Kingdom, 25599/94, judgment of 23/09/98, Interim Resolution ResDH(2004)39**

The case concerns the failure of the state to protect the applicant, at the time a child of nine years old, from ill-treatment by his step-father, who was acquitted of criminal charges brought against him after he raised the defence of reasonable chastisement (violation of Article 3).

General measures: The Deputies have resumed their examination of the measures taken by the United Kingdom to protect children against treatment contrary to Article 3, in the light of the new legislative measures applicable in England and Wales and of the Interim Resolution adopted on 02/06/2004.

The United Kingdom authorities stated in a letter of 03/02/2004 and at the Ministers' Deputies 871<sup>st</sup> meeting (February 2004) that the findings in this case did not require states to criminalise any form of physical rebuke, however mild, by a parent of their child; that the abolition of the defence of reasonable chastisement would mean that all corporal punishment by parents would be an unlawful assault; and that the commitment entered into by the Government before the Court was not a commitment to outlaw all forms of corporal punishment but to amend the law so as to ensure that the corporal punishment of children would be unlawful under domestic law if it breached the standards required by Article 3 of the Convention. They argued that the incorporation of the provisions of the Convention into domestic law, through the commencement of the Human Rights Act 1998 in October 2000, combined with the judgment of the Court of Appeal of 25/04/2001 in the case of *R. v. H.*, meant that trial courts were now bound by the standards applicable under Article 3 just as if the law had been changed by Act of Parliament. In addition, judges, prosecutors and other professionals were well aware of this change in the law, and guidance on relevant Convention issues was readily accessible to all Crown Prosecution Service lawyers wherever the defence of reasonable chastisement was likely to be raised. The application of the law was kept under review by the Attorney General's Department, which considered that the change in the law had been effective, as parents could be (and had been) prosecuted for excessive corporal punishment. Finally, the relevant law was also publicised widely through the consultation paper "Protecting Children, Supporting Parents", published in January 2000, and in the Government's response to that consultation in November 2001, which also referred to the present judgment and to the above-mentioned judgment in *R. v. H.*

Several delegations expressed some support for these views and requested clarification from the Secretariat as to whether it considered the measures taken to be sufficient.

Other delegations contested the position taken by the United Kingdom and considered that it was too soon for the Committee of Ministers to conclude its examination of this case.

Reference was made in this context to the Government's undertaking before the Court to change the relevant law. It was in particular pointed out that the Human Rights Act on its own could not be considered to be a sufficient legislative measure to execute the present judgment, since this would imply that once states had incorporated the European Convention into their domestic law, they would never need to legislate to execute a judgment, a logic that was clearly untenable. More importantly, the case-law developments did not demonstrate that United Kingdom law had changed as required by the Court's judgment. The judgment in the case of *R. v. H.*, relied upon by the United Kingdom authorities, had led to the acquittal of a father who had used a leather belt to beat his four-year-old son, causing bruising, after his son had refused to write his name. Furthermore, the problem also appeared to remain in Scotland as the Scottish law on justifiable assault did not demonstrate satisfactorily that Convention requirements had been taken into account. The ineffectiveness of the case law changes so far appeared accepted by the Joint Committee on Human Rights (a select committee of both houses of the United Kingdom Parliament) as it had found, in its Tenth Report of Session 2002-03, that the retention of the defence of reasonable chastisement constituted a breach of the

United Kingdom's obligations under Article 19 of the United Nations Convention on the Rights of the Child. A number of delegations recalled that all judgments had to be executed, even if this was sometimes difficult notably because of domestic public opinion.

The Secretariat noted in particular that, in the domain of the criminal law, legislative action remained the best means of achieving the changes required. If this path was not chosen, then the Committee of Ministers must be satisfied that change had effectively occurred through a change of case-law. It emphasised that doubts subsisted both as to the standards now applied by the United Kingdom courts and as to whether the current state of the UK law, including the information provided the public thereon, provided effective deterrence against treatment in breach of Article 3, as required by the judgment in this case.

At the 879th meeting (April 2004), the Secretariat was requested to draw up a draft interim resolution for discussion at the next meeting. In this resolution (ResDH(2004)39), adopted at the 885th meeting (June 2004), the Committee took note of the developments outlined above and considered that it was not able at that stage to conclude whether United Kingdom law complied with the present judgment.

*Developments since the adoption of the Interim Resolution:* On 15/11/2004, the Children Act 2004 was enacted. Under section 58 of this Act, which applies to England and Wales, the battery of a child can no longer be justified on the grounds that it constituted reasonable punishment where the accused is charged with wounding, causing grievous bodily harm, assault occasioning actual bodily harm or cruelty to persons under 16. Nor can the battery of a child causing actual bodily harm to the child be justified in any civil proceedings on the ground that it constituted reasonable punishment. The effect of this provision is that the defence of reasonable punishment remains available in England and Wales, but is restricted to cases where the charge is one of common assault.

The Committee has not been informed of any changes to the law in Northern Ireland and it is understood that the present situation is therefore the same as that which prevailed in England and Wales prior to the enactment of the Children Act 2004.

At the 914th meeting (February 2005), the United Kingdom delegation stated that the new legislative provisions brought the law in England and Wales into line with Convention requirements; in addition, public awareness of the issue had been raised through widespread debate during Parliament's examination of the legislation. With regard to Scotland, the Human Rights Act applied and the existence of case-law would depend on any cases brought. With regard to Northern Ireland, the matter was under examination. The United Kingdom authorities considered, however, that the situation in Scotland and Northern Ireland fell outside the scope of the execution of the present judgment, which concerned events that had occurred only in England.

Several delegations emphasised that the legislation in Scotland, enacted after the judgment was delivered in the present case, ran counter to the judgment. This was contrary to the purpose of general measures, namely of preventing similar violations in future. The situation in Northern Ireland also remained problematic, in their view. One delegation also queried whether the measures taken with respect to England and Wales were sufficient to constitute effective deterrence as required by the judgment.

#### **4) Hashman and Harrup v. United Kingdom, 25594/94, judgment of 25/11/99 (Grand Chamber)**

The case concerns a "binding-over" order imposed on the applicants for having disrupted a fox hunt, not to breach peace or behave *contra bonos mores* in the future, although their behaviour did not constitute any breach of peace. The European Court considered that the "binding-over" order, based on the notion of "behaviour *contra bonos mores*", was too vague and therefore did not comply with the Convention requirement that it be "prescribed by law" (violation of Article 10).

General measures: The United Kingdom authorities have undertaken to carry out a full review of the law related to "binding-over" and, as the entry into force of this reform is not expected in the short term, they have adopted or are adopting certain interim measures.

- As regards the *measures already adopted*, the question has been raised of whether any example of change in case-law was visible as a result of the publication of *Crown Prosecution Service Casework Bulletin No. 6 of 2000*, giving guidance to prosecutors that they should not ask courts to consider binding-over orders unless there is evidence of past conduct which, if repeated, is likely to cause a breach of the peace. The guidance also suggested that courts could be encouraged to ensure that the behaviour to be avoided was made quite clear in the order.

In addition, the judgment of the European Court had been published in several law reports (inter alia: (2000) 30 EHRR 241; [2000] Crim LR 185; [1999] EHRLR 342; Times LR, 1/10/98).

- As regards *measures under way*, information is awaited on the follow-up given to the consultation paper issued in March 2003 on the law of “binding-over”, in particular as regards the issuing of a Practice Direction, which was expected for autumn 2003. The relevant proposal contained in the consultation paper is that courts should not specify “to keep the peace” or “to be of good behaviour”, but rather that the individual should be bound over to do or refrain from doing some specific activity or activities.

At the 906th meeting (December 2004), clarifications were requested on the time-frame expected for the entry into force of the reform. The United Kingdom authorities indicated that the details of the relevant practice orders were still being prepared.

#### **5) Faulkner Ian v. United Kingdom, 30308/96, judgment of 30/11/99 - Friendly settlement**

The applicant complained of the fact that he could not pursue a civil action in Guernsey, as legal aid could not be granted for that purpose (complaint under Article 6§1).

General measures: The Government of the United Kingdom has informed the Committee of Ministers that following the introduction of an interim Criminal Legal Aid Scheme, an interim Civil Legal Aid Scheme was introduced with effect from 01/01/2002. With regard to the Criminal Aid Scheme, in 119 cases during the year 2001, legal aid was provided for persons who had been detained in police or customs custody.

In a letter of 16/12/2003, the United Kingdom authorities indicated that legal aid has continued to be provided to litigants who need and deserve it under the interim schemes, which have now been in operation for around two years.

In addition, a *Projet de Loi*, the Legal Aid (Bailiwick of Guernsey) Law 2003, was approved by Guernsey's States of Deliberation (legislative body of the island) in July 2003. This does not formally establish any particular statutory scheme for legal aid but creates the powers to enable an appropriate scheme to be developed through subordinate legislation. That subordinate legislation will be developed when the States of Deliberation and the authorities in Alderney and Sark have debated the merits of various schemes and decided on the best way to proceed. The work under way to review the various options for a statutory scheme is in progress.

In a further letter forwarded on 24/05/2004, the United Kingdom authorities indicated that Royal Sanction for the *Projet de Loi* had yet to be received, meaning that the Law remained unregistered on the Island. This had slowed down the progress of the relevant subordinate legislation; however, the Legal Aid Working Party had continued to meet to investigate how to achieve a viable legal aid service that would not be so bureaucratic as to be disproportionate to the need to ensure feasible access to justice for all. In the meantime, the existing non-statutory scheme appeared to be working adequately.

On 14/09/2004 the authorities indicated that progress towards the introduction of a statutory scheme on the basis of the above-mentioned *Projet de Loi* had, for a number of practical reasons, been slower than expected. It was therefore unlikely that the report of the Working Party would be debated until the early part of 2005. The legislation giving effect to the outcome of the debate would then follow a few months later. In addition, they again stated that there had been no complaints in the last few years about the availability of legal aid for civil cases.

Information concerning further progress in the adoption of the statutory scheme is awaited.

#### **6) Johnson Stanley v. United Kingdom, 22520/93, judgment of 24/10/97**

The case concerns the applicant's continued detention in a hospital, although he was no longer suffering from mental illness, pending his placement in a hostel (violation of Article 5§1).

General measures: the Representative of the United Kingdom informed the Committee of Ministers that a circular issued by the Department of Health (number HSC 2000/03) had been sent to all authorities concerned drawing attention to the Johnson judgment. A revised Statutory Code of Practice of the Mental Health Act of 1983 came into force on 01/04/1999. Furthermore, both the report of a group of independent experts appointed to review all the changes needed to the Mental Health Act and the Consultation Paper on the reform of the Mental Health Act (Green Paper) were published on 16/11/1999.

On 15/06/2002, a first draft bill was published. A new draft of the Mental Health Bill was published by the Department of Health on 8/09/2004 and underwent pre-legislative scrutiny by a Joint Committee of the House of Commons and the House of Lords, which issued its conclusions a few months ago, leaving sixty days for the Government to respond. The Secretariat is currently studying the explanatory report of this draft bill. A timetable for its possible enactment is awaited.

Finally, the judgment has been published in the European Human Rights Reports at (1999) 27 EHRR 296.

## 1 case against Ukraine

### **Sovtransavto Holding v. Ukraine, 48553/99, judgment of 25/07/02, final on 06/11/02 and judgment of 02/10/03, final on 24/03/04 (Article 41), Interim Resolution ResDH(2004)14**

The case concerns the failure to respect the applicant company's right to a fair trial before an impartial and independent tribunal in respect of certain proceedings conducted between 1997 and 2002 before the Ukrainian courts with a view to establishing the unlawfulness of domestic decisions which resulted in the depreciation of its shares in - and the ensuing loss of control over - a Ukrainian transport company (violation of Article 6§1).

The main deficiencies found by the Court consist of:

- repeated attempts by the President of Ukraine to influence domestic court decisions;
- application of "*protest*" procedure ("application for supervision") making it possible to quash final judicial decisions without any limitations;
- the refusal by courts to examine the arguments on the merits in a public hearing and the absence of adequate motivation of judicial decisions.

The Court concluded in addition that the manner in which the impugned proceedings were conducted and concluded had violated the applicant company's right to peaceful enjoyment of its possessions (violation of Article 1 of Protocol No. 1).

Individual measures: Following the judgment of the European Court of 25/07/2002 the private limited company "Sovtransavto" made a request for reopening of the domestic proceedings as legal successor of the applicant company. On 19/08/2003 the Supreme Court granted this request. The decisions of the domestic courts challenged in the judgment of the European Court were quashed and the case was referred to the first-instance court for new examination. By decisions of 07/05/2004 and 12/07/2004 the first-instance court and the court of appeal rejected the request of the applicant company's legal successor. On 23/12/2004 the Supreme Commercial Court quashed these decisions and remitted the case to the first-instance court. Information is awaited on the progress in these proceedings.

The question of the individual measures will also be examined in the light of the judgment of the European Court in the proceedings under Article 41. As regards just satisfaction for the alleged pecuniary damage, the Court noted that it was not possible to speculate on the outcome of the proceedings before the Ukrainian courts, and consequently the amount of the compensation to be awarded would not be based directly on the value of the shares held by the applicant. On the other hand, considering the gravity of the violations which occurred in the contested proceedings, the Court found that the applicant had suffered a loss of real opportunities and awarded the company compensation taking into account this value as reference.

General measures: On 11/02/2004 the Committee of Ministers adopted an Interim Resolution ResDH(2004)14, taking stock of the measures adopted so far and pointing out the outstanding questions.

#### **In conclusion of this Resolution the Committee:**

*Encourages* the Ukrainian authorities rapidly to ensure that the necessary measures are taken to guarantee that each and every state authority fully respects the independence of the judiciary, in particular by ensuring:

- that all necessary measures are taken to implement the President's order of 12 July 2003 (aiming at ensuring the unconditional implementation of all legal norms, including the Convention, protecting the independence of the judiciary),
- that it is no longer possible for public prosecutors to question the final character of court judgments in civil cases.

*Calls on* the competent authorities to continue the training on the Convention, including the case-law of the European Court, during the initial and in-service training of judges and prosecutors and to ensure that the latter have ready access to such case-law.

*Urges* the Ukrainian authorities to ensure the wide dissemination of the interim resolution in Ukrainian translation to the Government ministries, General prosecutor's office, local authorities and courts.

#### **Developments:**

- *As regards the problem of the executive's repeated interferences with judicial proceedings*, the Ukrainian authorities have indicated that the reflection carried out in response to the Presidential order of 12/07/2003 arrived at the conclusion that the independence of the judicial power is guaranteed by the current legislation (new Code of Civil Procedure). It will be enhanced by certain draft laws (draft Codes of criminal, commercial and administrative procedures; amendments to the Law on the judiciary). Additional information is needed regarding how, in concrete terms, these legislative measures will prevent future events similar to those challenged by the European Court in this case, as well as concerning possible adoption of other effective measures apart from the legislative reform.

- *Concerning supervisory review (protest)*, this procedure had been abolished in Ukrainian law in June 2001. However, according to the provisions of the Code of Civil Procedure and the Code of Commercial Procedure, public prosecutors had still the power to ask for the annulment of final judgments in civil proceedings in order to protect individuals' or state interests, without having had been party to the proceedings. The new Code of Civil Procedure adopted on 18/03/2004 (in force since 01/01/2005) abolished

prosecutors' power to request revision of final judgments in civil cases (Articles 353 and 362 of the new Code). On the other hand, the relevant provisions of the Code of Commercial Procedure of 1991 still envisage this possibility (Articles 107, 111-14 and 113). The Ukrainian delegation indicated in this respect that the draft Code of Commercial Procedure (examined at first reading by Parliament on 29/06/2004) provides the abolition of this power. Information would be necessary on the progress in the adoption of this draft law. Copies of the relevant provisions would be useful.

- *As regards the training activities on the Convention*, the authorities have provided comprehensive information on the aims of the Judges' Academy (established in October 2002) and also a list of the seminars and conferences organised since the beginning of its functioning in April 2003. Additional information is awaited concerning training for judges on the Convention and the case-law of the European Court, including the training programmes and the duration of the available courses.

Moreover, it should be noted that a group of 53 trainers of future prosecutors is at present undergoing in-depth training on the Convention organised in the framework of the Council of Europe/European Commission Joint Programme (four four-day training sessions took place between January and April 2005). Further training activities for judges and prosecutors are planned within this programme for 2005 and 2006.

- *Publication and dissemination*: the European Court's judgment of 25/07/2002 has been translated into Ukrainian and published in the Official Journal, issue No. 44/2003, in the Bulletin of the Ministry of Justice, No. 9/2003 and in the journal *Case-law of the ECHR*. The Interim Resolution has been published in Ukrainian translation in the Bulletin of the Supreme Court (No. 3(43), 2004) which is accessible to the institutions mentioned above, as well as to the public.

The Secretariat drew the attention of the Ukrainian authorities to the outstanding questions, referred to above, in a letter of 31/03/2005.