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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

AS/Jur (2007) 35 rev 2*
26 July 2007
ajdoc35 2007rev2

Committee on Legal Affairs and Human Rights

The effectiveness of the European Convention on Human Rights at national level

Working document

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A. Introduction

1. On 11 May 2007, two years after the Summit of Heads of State and Government of the Council of Europe held in Warsaw in May 2005, the Committee of Ministers reviewed the implementation of decisions taken at the Summit. In so doing it emphasised, *inter alia,* the need to ensure the effectiveness of the European Convention on Human Rights (ECHR) at national level, the need for resolute action to ensure the full execution of the judgments of the European Court of Human Rights (ECtHR, Strasbourg Court or Court), as well as effective action at national level in order to reduce the need for individuals to apply to the Court in Strasbourg.[1]

2. Better implementation of the Convention at national level is central to the aim of guaranteeing the long-term effectiveness of the ECHR system, by reducing the number of applications that must be dealt with by the Strasbourg Court. The Explanatory Report on Protocol No. 14 states: "*Measures required to ensure the long-term effectiveness of the control system established by the ECHR in the broad sense are not restricted to Protocol No 14. Measures must also be taken to prevent violations at national level and to improve domestic remedies, and also to enhance and expedite execution of the ECtHR's judgments. Only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the ECtHR's present overload.*"[2]

3. On the intergovernmental side, much work has been carried out in this respect, especially by the Steering Committee on Human Rights (CDDH), which had been asked by the Committee of Ministers to review five of the latter's Recommendations on this subject.[3] When the Committee of Ministers asked the CDDH, in May 2004, to undertake this review, it requested that other bodies and institutions, including the Parliamentary Assembly, be involved in this exercise.

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* Declassified by the Committee at its meeting on 26.06.2007.
1 See Press Communiqué issued on 11.05.2007: 117th Session of the Committee of Ministers (Strasbourg, 10-11.05.2007).
2 Explanatory Report to Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, § 14.
3 See Committee of Ministers May 2004 Declaration on "Ensuring the effectiveness of the ECHR at national level" and document CDDH (2006) 008 and addenda I to III thereof, available on Website http://www.coe.int/T/E/Human%5Frights/ [hereafter, CDDH Activity Report]. See also "Guaranteeing the effectiveness of the ECHR: Collected texts" (Council of Europe, 2004).

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4. The Activity Report[4] prepared by the CDDH, in 2006, in response to the Committee of Ministers' request, consists of an overview – in effect a compilation of nearly 650 pages - of measures taken at national level in response to the various Committee of Ministers Recommendations. In addition, this data consists, almost exclusively, of information provided by member states themselves, and does not necessarily, in the view of the Rapporteur, provide a sufficiently objective assessment of the extent to which, if any, **in practice**, reforms and purported improvements have had a real impact at the domestic level. This is exacerbated by the fact that "…information is still completely lacking from a few member states and partly lacking from others".[5]

5. The present memorandum therefore attempts to critically evaluate the extent to which **real progress** has been made by states in implementing the Recommendations made by the Committee of Ministers to member states in May 2004. This memorandum concentrates on the extent to which States have implemented the following three Recommendations:

- Recommendation (2004)5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights,
- Recommendation (2004)6 on the improvement of domestic remedies; and
- Recommendation (2000)2 on the re-examination or reopening of certain cases at a domestic level following judgments of the European Court of Human Rights.

6. This memorandum is based, to an extent, on information compiled by Mr Marek Nowicki, a consultant expert (hereinafter referred to as 'the consultant'),[6] who in turn relied on information provided to him by a network of national human rights experts, practicing lawyers and NGO representatives in member states. That said, this overview is necessarily incomplete and must be seen as one, among a number of contributions, which will feed into the comprehensive report that the CDDH will present to the Committee of Ministers, probably in May 2008.

B. Assessing the compatibility of draft laws, existing laws and administrative practice with the ECHR

7. Member states of the Council of Europe (CoE) should give full effect to the Convention at national level by continuously adapting national standards in accordance with the ECHR as interpreted by the Strasbourg Court.[7] Member states' mechanisms for the systematic verification of ECHR compatibility should also ensure adequate follow-up in the form of prompt modification of laws and administrative practices in order to make them compatible with the ECHR.

8. Whilst EU member states generally have special procedures to verify compliance of draft legislative instruments with Community or Union law, only few CoE countries have a similar formal mechanism to evaluate the compliance of draft legislation with human rights standards, including the ECHR. In Switzerland, for example, Government bills submitted to parliament must contain a special clause confirming compliance with the Constitution and international law, including the ECHR. In Ukraine, the newly established National Bureau on compliance with the ECHR, which was set up pursuant to Article 19 of the 2006 Law "*On Executing the Judgments and Applying the Practice of the European Court of Human Rights*", which also acts as Ukraine's agent in cases before the ECtHR,[8] has the potential to play an important role in this field in the future. Its responsibilities include

[4] The Activity Report concerns other matters, including draft proposals for amendments to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (Appendix III), which the Ministers' deputies adopted on 10.05.2006 with some minor modifications to some articles, and practical suggestions to the Ministers' Deputies to address situations of slow or negligent execution of judgments of the Court (Appendix IV), which the Ministers' Deputies in turn made favourable reference to in their suggestions to the Ministers. The proposed amendments to the Rules of the Committee of Ministers are aimed, *inter alia*, at increasing transparency by compelling states in question to provide information on their actions, if any, they have taken. The practical suggestions focus on the full implementation of guidelines for working methods and a variety of measures to improve the initial execution phase, including rapid preparation of good action plans and ensuring maximum transparency by disseminating information on such action plans to the Committee of Ministers and the public at large, through a variety of ways (global database, press releases, etc.) The CDDH envisages sanctions in cases of non-implementation by member states.

[5] CDDH Activity Report, § 35.

[6] Mr Nowicki is presently President of the Polish Helsinki Foundation. He is a former member of the European Commission of Human Rights.

[7] See Articles 1, 13, 19 and 46 of the ECHR.

[8] The text of this Law can be found in PACE Doc 11020, Appendix III, Part IV.

examining all draft legislative instruments for their compliance with the ECHR before their presentation to Parliament.

9. Some more recent member states to the CoE have a practice of presenting draft legislation to international experts for opinion. However, these opinions are not always taken into account by the authorities or the parliament, as appears to be the case of the Law on the Citizens' Defender (Ombudsman) in Serbia. As these opinions are usually not published, they rarely, if ever, are cited during the public debate on the legislation in question - if debate there is. Indeed, there is a danger that the authorities can even use selective quotes from the experts' opinions in order to add credence to their own viewpoint. Hasty adoption of laws, without a proper public debate (involving the civil society, where appropriate) may well contribute to the incompatibility of new laws in many countries with the ECHR "*under the irrational pretext that it is better to adopt a law as soon as possible and then, if need be, correct it*" – as the consultant put it.

10. By contrast, the Finnish system of an advance review of the ECHR compatibility of new legislation could be considered a "*best practice*." In this process, based on the 1995 Constitution, the Chancellor of Justice of the Government (under sections 108 and 112), the Ombudsman (section 112), the Constitutional Law Committee of the Parliament (section 74), the Speaker of Parliament (section 42) and, if necessary, the President of the Republic (under section 77, in specific instances), have important roles to play.

11. In the United Kingdom, pursuant to the 1998 Human Rights Act, in force since 2000, the minister in charge of new legislation must, before the second reading in Parliament, give his/her opinion on whether the provisions contained in the legislation are compatible with the ECHR. Alternatively, he/she must declare that they are unable to make that statement. As regards bills not promoted by the government the general practice is that ministers are expected to indicate in Parliament whether or not they consider the draft bill to be in conformity with the ECHR. The consultant noted that "*it is problematic that the basis on which a minister makes a declaration that draft legislation is compatible with the ECHR does not need to be disclosed*".

12. Particularly with reference to Sweden, Iain Cameron in fairly critical language argues that there is no group or person in the Foreign or Justice ministries given the job of checking whether a new case may cause problems for Swedish law and that there exists no formal "Strasbourg proofing" of new legislation.[9]

13. In this context, it is important to emphasise that parliamentary committees can play an important role in "Strasbourg-proofing", provided they allocate sufficient time for a thorough review of draft legislation. Some parliaments are not sufficiently aware of the impact of certain legislative measures on human rights. For that reason, bills are not submitted to relevant committees for scrutiny from a human rights perspective.[10] Even when they are, the quality of the scrutiny is often insufficient due to lack of resources.

14. Besides the preventive mechanisms existing in some countries, the compatibility of existing laws with the ECHR is assessed in many CoE member states by constitutional courts or courts of similar jurisdiction. A serious problem arises when governments and parliaments, fail to apply these courts' decisions.[11] A different problem exists when the Constitutional Court itself contravenes the case law of the ECtHR.[12]

[9] I. Cameron, "Damages for Violations of ECHR Rights: the Swedish Example", in Wahl and Cramer (eds) Swedish Studies in European Law (Oxford and Portland, Oregon), Vol. 1, 2006, p.100.
[10] The consultant gives the example of minority-related legislation in Latvia.
[11] The consultant cites as examples Poland and Slovenia.
[12] For example in Romania, concerning the status of the public prosecutor, according to information received by the consultant.

15. In many states (e.g. Portugal and France), any court is authorised and even under a legal obligation to refuse to apply a law that it deems to be in violation of the ECHR, although courts may be reluctant to do so.[13] Courts in the United Kingdom, according to Section 3 of the Human Rights Act, are obliged to construe legislation so far as possible in a way that is compatible with the ECHR as interpreted by the Court, which has, in fact, only occurred twelve times since 2000. The House of Lords[14] made it clear that the Human Rights Act reserved the amendment of primary legislation to Parliament and that any use of Section 3 to produce an interpretation departing substantially from the fundamental content of a statute was not acceptable. If a court cannot, within these limits, construe a statute in such a way as to render it compatible with the ECHR, it may make a declaration of incompatibility under Section 4 of the Human Rights Act – which the House of Lords considers as a remedy of last resort. Declarations of incompatibility have so far been made in fifteen cases, two of which are still under appeal.[15]

16. A related issue is that of existing legislation becoming "suspect" in view of an (important) Grand Chamber judgment or of several similar cases brought before the ECtHR. Here, it would be interesting to know the extent to which government agents before the ECtHR act as an "early warning" mechanism, or are (legally) obliged to alert or to trigger-off a review of legislation or an administrative practice. A (legislative?) procedure to ensure serious and regular preventive "Strasbourg-proofing" of all legislation - in light of the developing Strasbourg case-law - now appears essential.[16]

17. Ombudsman offices or national human rights institutions (NHRI), which by now exist in most CoE member states, could and probably should play a more important role in this sphere, a subject which was recently broached at a Roundtable organised in Athens on 11-12 April 2007 by the Council of Europe's Human Rights Commissioner. Currently, only a few of these bodies e.g. in Portugal, Sweden, Finland and Poland, are actively involved in the legislative process.

18. In order to assume the role of an effective 'observer', or, better still, 'controller' of administrative practices from the ECHR point of view, these institutions (ombuds- and NHRI's) must be vested with appropriate legal powers and operational instruments *vis-à-vis* the executive and/or legislative authorities, especially in countries which lack comprehensive judicial review of administrative decisions, in particular through a well-developed system of administrative courts. Whilst such courts adjudicate individual cases, Ombudsman offices are better placed to address systemic problems affecting a large number of persons.

19. The potential of NHRI's in such "Strasbourg-proofing" should also be better exploited. In many CoE member states, such institutions still do not exist. For example, discussions continue regarding their establishment in Belgium and the Netherlands.[17] Even in some states where they do exist, they do not fully meet public expectations. Note can be taken, in this context, of the role played by the Greek National Commission for Human Rights which has the constitutional competence to evaluate draft bills and whose views are taken into account by both the executive and Parliament prior to the adoption of legislation. Since 2000 the Commission has issued over 20 opinions on draft legislation - including proposals to amend the constitution - based on, *inter alia*, the relevant case-law of the Strasbourg Court.

[13] The consultant gives the example of Sweden, where such refusals occur only in extreme cases.
[14] In the case *Re S. (Minors) (Care Order: Implementation of Case Plan)* [2002] AC 291.
[15] Declarations have been made and have then been overturned following an appeal in a further five cases.
[16] See I. Cameron, "Damages for Violations of ECHR Rights: the Swedish Example", cited above, as well as my own observations with regard to Strasbourg Court "judgments of principle" in the memorandum on the Group of Wise Persons, document AS/Jur (2007) 25, esp. at pp 3 and 9.
[17] That said, in so far as the Netherlands is concerned, both the State Council when advising the government, as well as the Senate when debating such draft legislation, consider it their special duty to scrutinize the conformity of draft legislation with the ECHR.

20. A number of the above remarks likewise apply to the participation of independent experts, academics, human rights NGOs, etc. in the legislative process. That said, a note of caution, from the point of view of democratic representativity, is required with regard to the authority that should be attached to contributions of civil society actors who often represent special interests. On condition that proper consideration is given to substantial arguments raised by all sides, it would be unfair to criticise the majority for not, in the end, following all the – often conflicting – advice received.

21. To sum up the foregoing, in many member states of the CoE, special mechanisms to assess the compatibility of laws and administrative practice with the ECHR and the Strasbourg Court's case-law are either lacking or insufficient. While "Strasbourg proofing" is often formally a part of the legislative drafting process, it frequently does not include a legal obligation to, for example, seek opinions from specified bodies or institutions. Opinions requested by the governments or parliament are merely advisory. This even applies to such important bodies as the State Councils in the Netherlands and Belgium or the Legislative Council in Sweden.

C. Existence and effectiveness of domestic remedies

22. The Committee of Ministers' Recommendation (2004)6[18] on the improvement of domestic remedies for ECHR violations, addresses both preventative and curative approaches to the stemming of the flow of applications to the ECtHR. This Recommendation urges member states to ascertain, through constant review, in light of ECtHR case-law, that domestic remedies exist for anyone having an arguable complaint of a violation of the ECHR, and that these remedies are effective - meaning that they can result in a decision on the merits of the complaint providing adequate redress for any violation found.[19]

23. It is difficult to explain that in some countries, structural or general deficiencies in national law or practice persist even many years after relevant judgments of the ECtHR have been issued.[20] For example, Austria was found to have violated the freedom of expression in the end of 2006,[21] twenty years after the Court's judgment in the *Lingens* case,[22] finding a very similar violation.

24. In some states, legal remedies are deficient even in areas where the ECHR guarantees are of particular significance. For example, it would appear that Serbia's legal system provides no remedy for individuals who are subjected to substandard detention conditions, or who were victims of inappropriate use of force by state authorities, or for failure to conduct efficient and thorough investigations.[23]

25. In Sweden, the Supreme Court recently granted damages for violations of the ECHR. But it remains to be seen whether this will be applied to other cases than that of unduly lengthy court proceedings in criminal cases, as was the case at issue.

26. Even if legal remedies are theoretically available, violations are not always remedied in practice due to political reasons, for example in Transnistria.[24]

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[18] CM Rec (2004)6 to member states on the improvement of domestic remedies, (adopted by the Committee of Ministers on 12.05.2004, at its 114th Session).

[19] See, in this connection, the excellent "Report on effectiveness of national remedies in respect of excessive length of proceedings" recently issued by the Venice Commission, document CDL-AD (2006) 036 rev of 03.04.2007. Cf the work of the CoE's European Commission on the Efficiency of Justice (CEPEJ) whose work will, hopefully in the long run, have an effect on certain aspects of length of domestic procedures.

[20] See, in this connection, PACE Rec 1764 (2006), PACE Res 1516 (2006) and PACE Doc 11020.

[21] On 02.11.2006 (*Kobenter and Standard Verlags GmbH, Standard Verlags GmbH, Standard Verlags GmbH and Krawagna-Pfeifer*) and two other cases on 14.12.2006 (*Verlagsgruppe News GmbH and Verlagsgruppe News GmbH (No 2*).

[22] *Lingens v Austria*, No 9815/82, 08.07.1986.

[23] These types of problems exist in several other countires. See, e.g., *Becciev v Moldova*, No.9190/03, & *Sarban v Moldova,* No.3456/05, both judgments of 04.10.2005, & *Benediktov v Russian Federation,* No. 106/02, 10.05.2007, See also recent Annual Reports of the European Court of Human Rights for other cases in which domestic remedies have been found to be non-existent and/or ineffective.

[24] See Doc 11202, § 77-82.

27. In the United Kingdom, it appears that where remedial legislation is introduced following a Strasbourg judgment, it may not apply to the particular circumstances of the applicant's case unless it is given retrospective effect. In this respect, the Parliamentary Joint Committee on Human Rights stressed the need for remedial orders or legislation designed to remedy the violation to make specific provision for the individual circumstances of applicants as well as those in analogous situations. Moreover, some concern has been expressed that the implementation of judgments arising out of pre-Human Rights Act (1998) events is delayed. For example, the judgment in the *McKerr* case[25] about the duty to interpret the scope of Northern Ireland's inquests into pre-October 2000 deaths in a way that is compatible with the right to life under Article 2 of the ECHR, has not yet been implemented. The Committee on the Administration of Justice (CAJ) explained that there was a risk of developing a two-tier inquest system, with wider, Article 2 compliant inquests taking place into post-Human Rights Act deaths, and a narrower inquiry, falling short of Article 2 requirements, applying with respect to deaths that occurred before the 1998 Human Rights Act entered into force (October 2000).

28. The problem of the direct application of the ECHR by national courts constitutes a separate issue. In practice, in many countries national courts still rarely apply the ECHR directly[26]. That said, the Russian Constitutional Court often cites not only the provisions of the ECHR, but also the Court's case-law; the Constitutional Court has even set-up a special ECHR case-law research team within its registry. In Bulgaria, the direct application of the ECHR by courts is a rare phenomenon, due not only to inadequate knowledge of the ECHR but also due to the apparent presence of contradictions between the requirements of the ECHR and applicable national laws, with courts tending to apply the latter. In Serbia, both the executive authorities and the courts still seem to pay insufficient attention to internationally recognized human rights. A survey conducted in four district courts showed that the courts' "judicial practice departments" were unaware of any cases where judges had invoked the ECHR.

29. It would seem that the Strasbourg Court's case law is clear on the concept of a remedy pursuant to Article 13 of the ECHR. Nevertheless, in certain states, e.g. Sweden "*the case law has been interpreted very narrowly by national authorities and by governmental officials when discussing the term. In general, we see that what is considered a remedy is above all monetary compensation, and that Article 13 is sometimes confused with Article 41 of the ECHR. The understanding of other forms of remedies, restitution, reparation etc. is very low.*"[27]

30. In setting up domestic remedies, member states should make sure to satisfy the Court's standards for effectiveness of remedies. For example, the ECtHR in *Doğan and Others v Turkey*[28] in June 2004, had identified the presence of a structural problem with regard to internally displaced people (mainly Kurdish villagers) and indicated possible measures to be taken in order to put an end to the systemic problems in Turkey. Following that judgment, the Turkish authorities took several measures, including the enactment of a Compensation Law of 27 July 2004, to redress grievances of those denied access to their possessions in their villages. The effectiveness of this remedy was confirmed by the ECtHR in its decision in the case of *İçyer v Turkey*[29] (declared inadmissible). The ECtHR considered that the provisions of the Compensation Law provided adequate redress for the ECHR grievances of those who were denied access to their places of residence. Subsequently, approximately 1,500 similar cases from south-east Turkey (where applicants complain about their inability to return to their villages), currently pending before the ECtHR, were declared inadmissible on the grounds that the applicants had not exhausted the effective domestic remedy provided by the Compensation Law. By contrast, Human Rights Watch (HRW),[30] in December 2006, claimed that the Turkish government still failed to provide fair compensation for hundreds of thousands of displaced persons. According to HRW, the Compensation Law provides no viable opportunity to appeal assessments, leaving the displaced villagers no alternative but to accept whatever compensation is offered to them.

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[25] *McKerr v The United Kingdom*, No 28883/95, 04.05.2001.

[26] See, in this connection, R. Blackburn and J. Polakiewicz (eds), *Fundamental Rights in Europe* (OUP, 2001), *passim.* See also A. Drzemczewski, *European Human Rights Convention in Domestic Law. A Comparative Study* (OUP,1983), as well as the ongoing survey being carried out at the University of Zurich: Helen Keller and Alec Stone Sweet (ed.), *The Reception of the ECHR in Europe*, Oxford 2008; http://rwiweb.uzh.ch/keller/Reception/home.htm

[27] Information furnished to the consultant; see footnote 6 above.

[28] *Doğan and Others v Turkey,* Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29.06.2004.

[29] *İçyer v Turkey*, No 18888/02, 09.02.2006.

[30] Human Rights Watch, "Unjust, Restrictive, and Inconsistent - The Impact of Turkey's Compensation Law with Respect to Internally Displaced People", December 2006, Number 1, available at http://hrw.org/backgrounder/eca/turkey1206/

31. In this context, one cannot fail to appreciate the (potentially) important role played by certain legislative bodies. For example, the United Kingdom's Parliamentary Joint Committee on Human Rights (JCHR) closely follows developments in Strasbourg.[31] The Committee deals with structural and general deficiencies in the field of human rights protection and presents regular reports which (can) serve as the basis for follow-up action by Parliament and/or the executive.

32. Similarly, the Finnish Parliament's Constitutional Law Committee (CLC) reviews bills raising constitutional problems and recommends changes, where necessary. In the Finnish system, under the 1999 Constitution, in which the responsibility for maintaining the constitutionality of the laws rests completely with the Parliament, the CLC in practice fulfils duties similar to those of a constitutional court.

33. A particularly high number of applications lodged before the ECtHR allege that the length of the domestic criminal, civil or administrative court proceedings has exceeded the "reasonable time" stipulated in Article 6§1 of the ECHR. This seems to be a common phenomenon in many European legal systems.

34. Following the Strasbourg Court's judgment of 26 October 2000 in the *Kudla* case[32], in which the Court, departing from its previous case law, found a violation of Article 13 in that the applicant had had no domestic remedy whereby he could have enforced his right to a "*hearing within a reasonable time*" as guaranteed by Article 6§1 of the Convention, some states are in the process of introducing remedies that would meet the Article 13 requirements as interpreted by the Court. The Court, in the case of *Giuseppina and Orestina Procaccini v Italy,*[33] commended some States, namely Austria, Croatia, Spain, Poland and the Slovak Republic, for combining two types of remedies, one designed to expedite the proceedings and the other to afford compensation.

35. In connection with the situation in Germany, the Strasbourg Court recently found that the right of individual application (constitutional complaint) to the Federal Constitutional Court and other existing remedies invoked by the authorities had been ineffective (*Sürmeli* judgment[34]). In large part due to this case, a new law has been announced by the Federal Ministry of Justice indicating the authorities' intention to introduce a specific remedy against excessive length of proceedings in all branches of the judiciary.[35]

36. In Portugal, the Decree-Law (Decreto-Lei) of 8 June 2006, created a new procedure that aims to resolve the problems of excessive length of proceedings, but the procedure contained in this law is currently only implemented as an experiment, and is only being applied in certain selected courts.

37. On 6 October 2005, the first length-of-proceedings judgment was rendered against Slovenia in the *Lukenda*[36] case. The Strasbourg Court concluded that existing remedies (action before the administrative courts, tort claim, supervisory appeal, and appeal before the constitutional court) could not be regarded as effective. Following this decision, and in view of the persistent backlog in the Slovenian courts and of the 500 similar cases pending in Strasbourg against Slovenia, the Slovenian legislator - in 2006 - adopted the Act on Protection of the Right to a Trial without Undue Delay.

[31] See Rec 1764 (2006), Res 1516 (2006) and Doc 11020.
[32] *Kudla v Poland*, No 30210/96, 26.10.2000.
[33] *Giuseppina and Orestina Procaccini v Italy,* No 65075/01, 29.03.2006.
[34] *Sürmeli v Germany,* No 75529/01, 08.06.2006.
[35] See Bundestag website http://www.bundestag.de/cgibin/druck.pl
[36] *Lukenda v Slovenia*, No 23032/02, 06.10.2005.

38. Such remedies still do not exist in other countries, such as Greece, even though the Court has found a violation of Article 13 of the ECHR - for exactly this reason - in dozens of cases against this country. Greece's problem of excessive length of proceedings is clearly of a structural nature. A similar situation exists in Bulgaria, against which the Strasbourg Court has issued over 60 judgments finding that there had been violations of the right to reasonable length of both civil and criminal proceedings, and that remedies relied on by the Bulgarian Government had been insufficient and ineffective for the purposes of Article 13.

39. According to information obtained by the consultant in Russia,[37] no effective remedies exist in many instances either, despite the Court's numerous judgments finding Article 13 violations for that reason in criminal and civil matters. It should be mentioned, in this respect, that on 25 January 2001 the Constitutional Court invited Parliament to adopt special legislation to provide Russian courts with the competence to deal with claims concerning excessive length of proceedings and a compensation procedure. The lack of such remedies is also common in countries like Moldavia, Georgia, Bosnia and Herzegovina, Azerbaijan, Romania, Latvia and Serbia. In the Netherlands, the lack of such remedies concerns only administrative matters, in that both the codes of civil and criminal procedure allow for the re-examination of cases in the context of, *inter alia,* adverse findings of the Strasbourg Court.[38].

40. In countries whose remedies for length of procedure have a compensatory character, compensation provided on the national level is sometimes significantly lower than that awarded by the Strasbourg Court in similar cases (e.g. Slovakia), or that all too frequently, no compensation is awarded at all (e.g. in Poland). This is particularly significant in view of the fact that in general, awards of damages awarded by the Court are relatively low compared with damages awarded by the domestic courts of many other Council of Europe states.

41. In Italy, apart from the fact that the level of compensation is too low, the time taken to implement decisions awarding such compensation based on the Pinto law is, again, unduly lengthy.[39] The effectiveness of the new Polish *Law on Complaints about a Breach of the Right to a Trial within a Reasonable Time* will, so it is understood, be examined by the Strasbourg Court following an application lodged in May 2006.

42. Legal instruments must exist to allow individuals to seek appropriate compensation from the state for different types of damage caused, such as that due to the poor functioning of the judiciary (as, for example, in France pursuant to Article L 781-1 of the judicial organisation code). But it would appear that state responsibility in France is only recognised where the State commits a grave mistake or the facts amount to a denial of justice. In view of the wide interpretation of the notions of “grave mistake” and “denial of justice” by the Court of Cassation, the Strasbourg Court, in its decision of 12 of June 2001 in the case of *Giummara and others*, considered this remedy as effective and declared the application inadmissible for non-exhaustion of domestic remedies.

43. In Sweden, following a Supreme Court judgment of 1998, an individual may be entitled to compensation for loss, injury or damage caused by the excessive length of proceedings pursuant to the 1972 Tort Liability Act.

44. In criminal cases, the violation of the right to a trial within a reasonable time may result in a lighter penalty for the defendant, or in a decision not to impose any penalty (for example, in Sweden, according to Chapter 29§5 and Chapter 30§4 of the Criminal Code, in Cyprus, as well as in Belgium, after a reform of the Belgian Code of Criminal Procedure in June 2000 settled a long-standing disagreement between different courts).

[37] See footnote 6 above.
[38] The government has also announced its intention to impose such a remedy in the administrative law sphere.
[39] *Scordino v Italy*, No 36813/97, 29.03.2006.

45. In Portugal, a specific mechanism to tackle excessive length of procedure in criminal cases is foreseen in Articles 108 and 109 of the Code of Criminal Procedure, and the country is presently putting into effect extensive general measures in this respect.[40] The parties to the procedure and the prosecutor's office have the possibility to request such acceleration whenever the deadlines for any stage of the proceedings have been exceeded. This request can be made by the Attorney General of Portugal or by the Higher Judicial Council (Conselho Superior da Magistratura).

46. Belgium has a special procedure for removing a case from a judge whose attitude contributes to protracted proceedings. The Law of 6 December 2005 has streamlined this procedure, which can now be initiated by any party to the relevant proceedings.

47. Proper guidelines aimed at changing overly time-consuming practices can also play a vital role in the efficient administration of justice so as to avoid excessive delays. In the United Kingdom, the *King* case[41] is a good example for the fairly successful use of such guidelines. The case concerned an Inland Revenue investigation and appeals, which were subject to considerable delays. HM Revenue and Customs subsequently ensured compliance of Article 6 rights through a number of specific procedures.

48. The *Massey* case[42] concerned delays in criminal proceedings. Guidance on these matters had been issued to prosecutors by the Crown Prosecution Service following the Court of Appeal's judgment in *R v J (Attorney General's Reference No 2 of 2001*). The Home Secretary accepted that, because the judgment in *Massey* suggested that the investigative period might be relevant to the reasonable time requirement (Article 6), it might be necessary to provide guidance on this point to the police.

49. Delays in the execution of judicial decisions also concern the issue of lengthy procedures. Russia has a persistent and serious problem with regard to the execution of domestic court judgments against government authorities. Such judgments are not executed for years, apparently due to bailiffs' lack of authority to do so. The Russian Constitutional Court was close to resolving this situation in the case of *Ponyatovskiy et al v. the Government* in July 2005, when it validated the existence of a special procedure of voluntary execution of financial obligations for the state (see Federal Government Order on the Execution of Judgments of 2002), but indicated that such a procedure must be established by a federal law and not by a Governmental Decree.(for more details, see Committee of Ministers Memorandum CM/Inf/DH(2006)19 revised 3). The Constitutional Court instructed the State Duma to regulate the payment process. But the law adopted in December 2005 apparently does not solve the problems pinpointed by the Constitutional Court.

50. The obligation to take appropriate steps to counter undue delays in the administration of justice falls on the state as a whole, including the legislator. This is recognised by the Belgian Court of Cassation in its judgment of 28 September 2006 confirming the legislator's liability for failing to take appropriate legal steps to prevent lengthy judicial procedures, especially if this dilatoriness (negligence) deprived courts of having at their disposal appropriate tools to review cases within a reasonable time.

51. And last but not least, on this point, it is important to stress that legal instruments alone will not resolve the problem of lengthy procedures. The necessary political will to improve the functioning of the judiciary must also be reflected in the allocation of adequate resources. Here again, our role as parliamentarians may be crucial in this respect.

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[40] The European Court of Human Rights has already noted improvements in this respect in its admissibility decisions in the cases of *Tomé Mota* (of 2 December 1999) and *Gouveida da Silva Torrado* (of 22 May 2003).

[41] *King v The United Kingdom*, No 13881/02, 16.11.2004. The Court noted that the proceedings in question did not comply with the "reasonable time" requirement in Article 6 § 1 of the Convention and accordingly held unanimously that there had been a violation. It considered that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant, awarding him EUR 17,500 for costs and expenses. ECtHR Press release, issued by Registrar, 16.11.2004.

[42] *Massey v The United Kingdom*, No 14399/02, 16.11.2004.

D. Possibilities to re-open or re-examine cases

52. The remedies of re-opening or re-examination of cases are available in the majority of states parties, more frequently in criminal rather than in civil or administrative cases. In recent years, a number of states have introduced these remedies into their legal systems through legislative changes or a broader interpretation of previously applicable law, despite some opposition.[43]

53. Recently, the Italian parliament debated the possibility of allowing re-opening of cases by amending Article 630 of the Code of Criminal Procedure. The Government opposed this idea and feared that it could give rise to an avalanche of requests for re-opening. Consequently, the bill was withdrawn even though the issue is a pressing one, as exemplified in the *Dorigo* case.[44] Maybe the Azzolini law, adopted in 2006, instituting a special procedure for the supervision of the implementation of ECtHR judgments by the government and parliament, will improve the situation in future.

54. In the Netherlands, both Codes of Criminal and Civil Procedure provide for the re-examination of cases, and the government has announced its intention to envisage the possibility of re-reopening administrative cases. In Sweden, fears were voiced that re-opening court cases in order to execute judgments of the Strasbourg Court may turn this Court into a court of fourth instance. In the United Kingdom, successful applicants can apply to the Criminal Cases Review Commission (CCRC) to have their conviction reviewed. The CCRC, which is not a judicial body and whose members are chosen by the Prime Minister, was set up by the Criminal Appeal Act 1985. The parliamentary Joint Committee on Human Rights (JCHR) recommended that the Government consider reforming the law to allow for the re-opening of proceedings in appropriate cases, since there are currently no specific legal provisions in this respect with regard to Strasbourg judgments.

55. The Belgian bill of 22 June 2006 provides that in the event that the Cassation Court declares null and void a criminal conviction or in the case of acquittal as a result of re-opening or re-examination of the case the state shall be liable for compensation.

56. Even in countries where possibilities for re-opening are broadly defined, certain conditions must be met. For example, in Slovakia, pursuant to the provisions of the new Code of Criminal Procedure,[45] a re-opening is warranted if there is no other way to remedy negative consequences of the violation. In civil proceedings, this may occur if an award of financial compensation did not constitute a sufficient remedy for serious consequences of the violation. This also applies to administrative judicial proceedings. In Bulgaria, Article 422§1 (4) of the Code of Criminal Procedure provides for re-opening of criminal cases where "*by virtue of a judgment of the Court a violation of the ECHR has been established that has a considerable importance for the case*".

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[43] See, in this connection document CDDH (2006) 008 Addendum III, pp. 3 to 110 for a detailed compilation. The difference in "reopening" and "re-examination" of cases has been explained as follows in Explanatory Memorandum to Rec(2000)2 on the re-examination or reopening of certain cases at a domestic level following judgments of the European Court of Human Rights: "5. As regards the terms, the recommendation uses "re-examination" as the generic term. The term "reopening of proceedings" denotes the reopening of court proceedings, as a specific means of re-examination. Violations of the Convention may be remedied by different measures ranging from administrative re-examination of a case (e.g. granting a residence permit previously refused) to the full reopening of judicial proceedings (e.g. in cases of criminal convictions)". However, as has been noted in the CDDH Progress Report of 2005, § 21, there has been some confusion in the two concepts on the part of member states. A further explanation is provided in Doc CDDH(2006)008 Addendum I, 07.04.2006, p. 3, entitled *Follow-up on the implementation of the five recommendations*: "For the purposes of the follow-up of the recommendation, re-examination is understood as a re-assessment, normally by the same decision-making body, of the situation which gave rise to a violation of the Convention, which may also lead to the granting of what was at issue in the original proceedings. Other situations involving *restitutio in integrum* are therefore not included in the present exercise. The same holds true for situations where re-examination is not the main object of the proceedings or where what was originally at stake can no longer be granted but must be replaced with monetary damages. Reopening is reserved for judicial proceedings challenging the validity of an earlier decision qualifying as *res iudicata*."

[44] *Dorigo v Italy*, No 46520/99, 16.11.2000.

[45] The new Code of Criminal Procedure entered into force 01.01.2006

57. In civil cases, Romanian law provides for the possibility of re-opening if the material facts of the violation continue and cannot be remedied in any other way. The new Article 442 *bis* of the Belgian Code of Criminal Procedure provides for the possibility of a re-opening if, following a review of the request for re-opening, a court finds that the substance of a judicial decision violated the ECHR or finds that such a violation results from defects or procedural deficiencies so material as to engender significant reservations regarding the ensuing decision. However, a convicted person or one whose rights were violated must demonstrate the existence of ongoing very severe negative consequences of the ECHR violation that may be remedied solely by re-opening. In France, pursuant to Article 626§1 of the Code of Criminal Procedure, it is possible to request re-examination only if the Strasbourg Court finds a violation of the ECHR and the just satisfaction under Article 41 of the ECHR insufficiently redresses the harm. In Switzerland, a re-examination is possible if reparation can only be obtained by way of a rehearing (by a Federal Court or a lower court). In practice, the narrow or broad interpretation by domestic courts of these and similar conditions determines the practical relevance of this remedy.

58. It should be noted that in Bulgaria, the decision on retrial lies solely within the discretion of the public prosecutor.[46] As concerns Russia, the prosecutor's monopoly in this respect has been abolished. Article 413 of the Code of Criminal Procedure expressly provides for the re-opening of cases after the finding of a violation by the Strasbourg Court; Article 304, § 1, of the Code of Commercial Procedure also provides for such a possibility. Interestingly enough, the Russian Supreme Court is using "newly discovered circumstances" to re-open a case after an adverse finding by the European Court of Human Rights in the *Shofman case* (No. 74826/01, judgment of 24 November 2005).

59. The Latvian Code of Administrative Procedure (Article 87) also provides for the possibility of reopening a case. Following the ECtHR's judgment in the *Slivenko*[47] case concerning the applicants' expulsion from Latvia, the Supreme Court's Administrative Chamber quashed the decision in question pursuant to Article 87 of this code and sent the case back to the Riga Regional Administrative Court for second review, despite the expiration of the three-year period for filing a re-opening request. The Latvian Supreme Court argued that the legislator had failed to anticipate that Strasbourg proceedings frequently take longer than three years.

60. Even if re-opening or re-examination is theoretically possible in many states, the number of actual cases is often too small to assess whether this mechanism functions effectively. In Bulgaria, for example, only one such case has occurred so far (*Al-Nashif*[48] concerning deportation).

61. In France, re-opening or re-examination of civil matters is possible if the verdict resulting in the successful complaint to the Strasbourg Court was issued in one of four circumstances enumerated in Article 595 of the new Code of Civil Procedure. But in the opinion of a French expert, there is very little chance for civil cases to be opened in actual fact even if the Strasbourg Court has found a violation of the ECHR. The case of Mr Hakkar[49] shows that the aggrieved party does not necessarily derive much benefit from a retrial.

62. In Romania, criminal law provides for re-opening, but this has never occurred in practice to date. In Greece, re-opening was not granted in certain cases that seem to require it (e.g. in the cases of *Arvelakis*[50]), although an encouraging development can, in this respect, be noted in the case of *Papageorgiou*[51] in which the applicant's case was recently re-opened (see Appendix to Committee of Ministers Resolution CM/ResDH (2007) 104, of 20.06.2007).

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[46] See E.Lambert Abdelgawad "Les procédures de réouverture devant le juge national en cas de 'condamnation' par la Cour européenne", in Cohen-Jonathan, Flauss and Lambert Abdelgawad (eds) *De l'effectivité des recours internes dans l'application de la Convention européenne des Droits de l'Homme* (Bruylant, 2006, pp.197 – 258, et p. 211.

[47] *Slivenko v Latvia*, No 48321/99, 09.10.2003.

[48] *Al-Nashif v Bulgaria*, No 50963/99, 20.06.2002.

[49] Written question No 481 (Doc 10788 rev) to the Committee of Ministers presented by Mr Jurgens, Case of Abdelhamid Hakkar, Doc. 10788 rev. 23 January 2006; See in this context also: Written question No 481 (Doc 11042) to the Committee of Ministers, Doc. 11042, 2 October 2006, Reply from the Committee of Ministers adopted at the 974th meeting of the Ministers' Deputies (27.09.2006).

[50] *Arvelakis v Greece*, No 41354/98, 12.04.2001.

[51] *Georgios Papageorgiou v Greece*, No 59506/00, 09.05.2003.

63. Serbia provides for re-opening following a Strasbourg Court judgment in the new Law on Civil Procedure of 2004. Since no judgment has so far been issued in Strasbourg against this state, the effectiveness of this instrument cannot yet be evaluated. The same is true for example for Armenia, where Article 241§1 of the Code of Criminal Procedure provides that a Strasbourg Court judgment should be considered as a new fact, on the basis of which a case can be re-opened or re-examined.

64. In Turkey, following the judgment of the Strasbourg Court in the case of *Sadak, Zana, Dicle and Dogan*,[52] a new law entered into force on 4 February 2003 allowing the re-opening of domestic proceedings in all cases that had already been decided by the Court (and had become final before the law entered into force) and in all new cases which would henceforth be brought before the Court. The provisions of this law, however, exclude the possibility of re-opening cases which were at the time pending before the Court and that have not yet been decided, as well as for friendly settlements. As a result, there will be no right to a retrial in Turkey for those cases pending before the Strasbourg Court as of 4 February 2003. According to Amnesty International[53] *"the motivation for this was to find a way to avoid the retrial of Abdullah Öcalan. The measure thus has a discriminatory effect on all the other cases which, along with that of Abdullah Öcalan, were pending at the Court on 4 February 2003."* In the *Öcalan* case,[54] even if the Strasbourg Court did not directly call for a retrial, it found that retrying Mr. Öcalan would be "*an appropriate way of redressing the violation*."[55] Another example of problems existing in Turkey is the protracted refusal to retry the case of *Hulki Güneş*[56] who is still serving a severe prison sentence. In this case the Court had held that his right to a fair trial was violated by the national security court.

65. In Moldova, the public prosecutor requests more and more often that criminal and civil cases are re-opened, which are related to applications that are still pending before the Strasbourg Court, sometimes immediately after the communication of the application by the Court to the Government in cases, in which the prosecutor finds that a violation of the ECHR may have actually occurred. Such a practice may sometimes undermine redress for the ECHR violations, especially if the court does not grant any compensation due to the re-opening. This was the finding of the Strasbourg Court in the case of *Rosca,*[57] although it admitted that "*the State has made efforts to remedy the applicant's situation by reviving the final judgment of the Court of Appeal in the applicant's favour."*

66. A similar practice has been found in first cases pending before the Strasbourg Court concerning Azerbaijan. Immediately after applications had been communicated to the Government, cases were re-opened and the Government asked the Court to strike them off the list. Later, however, re-opening resulted in verdicts similar to those giving rise to the ECHR complaints. It would appear that these are attempts by the Government to avoid findings by the Strasbourg Court in cases of clear violations of the ECHR, or at least to delay such findings.

67. A notable example of good practices in this area in administrative matters is a provision from a new Swedish Law on Aliens of March 2006. It requires authorities to issue residency permits to an alien in Sweden if the Strasbourg Court has found a violation of the ECHR in the alien's case, except in exceptional circumstances.

68. Interestingly enough, the impossibility of re-opening or re-examining of a case may be considered as a matter requiring a determination as to the "constitutionality" of such measures, or rather the inability to have recourse to such measures. In March 2006, the Bologna Court of Appeals submitted a question related to this issue to the Italian Constitutional Court. A somewhat similar issue is also awaiting adjudication by the Polish Constitutional Court.

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[52] *Sadak, Zana, Dicle and Dogan* v *Turkey*, Nos 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 17.07.2001.
[53] Amnesty International, special report of 06.09.2006, "*Justice delayed justice denied*"
[54] *Öcalan v Turkey,* No 46221/99, 12.05.2005.
[55] See in this connection the way in which the Committee of Ministers dealt with the matter: Resolution ResDH(2007)1.
[56] *Hulki Güneş v Turkey*, No 28490/95, 19.06.2003.
[57] *Rosca v Moldova*, No 6267/02, 22.03.2005.

69. In this context, the Estonian Supreme Court set a positive example, by holding on 6 January 2004 that the case of *Veeber*[58] had to be re-opened irrespective of the absence of explicit provisions in Estonian law on re-opening. The Estonian Supreme Court found that the ECHR constitutes an integral part of the Estonian legal order and that under Article 14 of the constitution, it was up to the judiciary to ensure respect for the rights and freedoms of the ECHR. The Supreme Court went on to define the conditions for re-opening: "*the re-opening of the proceedings would be justified only in a case of a continuing and serious violation and where it is a remedy affecting the legal status of the person. The need to re-open judicial proceedings must be weighed against legal certainty and possible infringement of other persons' rights in a new hearing of the matter.*"

70. In Sweden, by contrast, there is considerable doubt as to whether the Swedish Supreme Court would mandate re-opening without an express legislative provision. The Polish Supreme Court refused to re-open a case after a Strasbourg Court judgment in the case of *Podbielski and others,*[59] arguing that Strasbourg Court decisions are not listed in Article 405 of the Code of Civil Procedure as one of the grounds for re-opening. As a result, the Strasbourg Court judgment in this case remains unexecuted.

E. Conclusion

71. On the basis of the Committee of Ministers' 2004 Declaration on "Ensuring the effectiveness of the ECHR at national level" and its request for participation of other CoE bodies and institutions in the review to be undertaken by the CDDH, the Rapporteur proposes that this memorandum be declassified and submitted as background information to the CDDH and the Committee of Experts for the improvement of procedures for the protection of Human Rights (DH-PR), as the Assembly's contribution to their on-going work on this subject.

[58] *Veeber v Estonia*, No 45771/99, 21.01.2003
[59] *Podbielski and PPU Polpure v Poland,* No 39199/98, 26.07.2005